

**INTERPRETING AND APPLYING THE *QISAS* AND *DIYAT*
LAW IN MODERN WORLD: CRITICAL EVALUATION OF
JUDGMENTS OF SUPERIOR COURTS OF PAKISTAN**

A thesis submitted for the partial fulfilment of the requirements for
the degree of Ph.D in law



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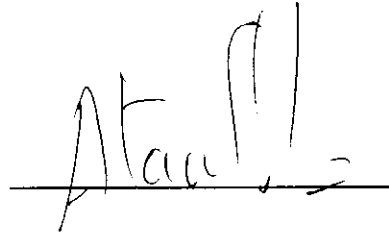
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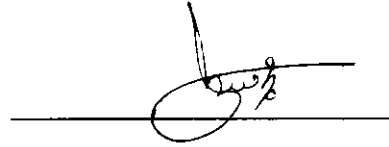
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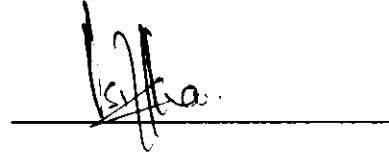
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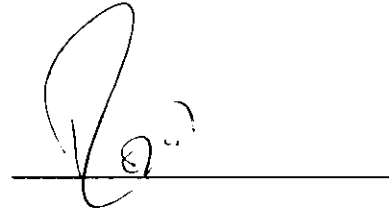
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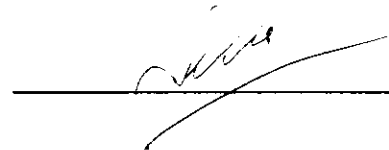
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In the name of Allah, most Gracious, most Merciful

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To my (late) Father

DECLARATION

I, Ishfaq Ahmad s/o Muhammad Afsar do hereby affirm and declare that the research titled 'Interpreting and Applying the *Qisas* and *Diyat* Law in Modern World: Critical Evaluation of Judgments of Superior Courts of Pakistan' being submitted for the award of the Degree of Doctor of Philosophy in Law, to International Islamic University, Islamabad is genuinely an original research of my own. It is also declared and affirmed by me that the thesis or any part thereof has never been submitted to this or any other university, law school or institution for the award of any degree, diploma or fellowship. Furthermore, I affirm and declare that any secondary information, given or mentioned in the text of the research, has been duly acknowledged by me.

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ABSTRACT

The law of Pakistan relating to the offences of homicide and bodily hurts had been under severe objection, by all and sundry, for lacking Islamic features like *afw*, *aqilah*, *badl-i-sulh*, *diyat*, *qasamah*, *qisas* and *sulh*. The demand of Islamizing the law, however, could not seek attention of the Parliament until it was declared to be un-Islamic and void by Pakistan judiciary and a direction in this regard was given by the Supreme Court for Islamizing the law. Hence, through the Criminal Law (Second Amendment) Ordinance, 1990 a new law, based on Islamic *qisas* and *diyat* law, was promulgated by amending various provisions of the erstwhile law of homicide. The law was amended subsequently many times. Under new law, compoundable nature of offence made murder an easy-going offence. On the other hand, exercise of unbridled power by judiciary of seeking guidance from the injunctions of Islam in the interpretation and application of *qisas* and *diyat* law of Pakistan resulted into contradictory and inconsistent decisions. Even, the judiciary and the government are blamed for paving the way for acquittal of influential murderers like Raymond Davis and Shahrukh Jatoi. Hue and cry on the dispensation of justice in these cases again brought the law of *qisas* and *diyat* of Pakistan in the limelight.

This research considers few very crucial questions concerning the Islamized law on the offence of murder and analyses critically the interpretation of the law by Pakistan judiciary. It also explores that why application of the law invites public rage and protests in Pakistan. Finally, it suggests that the *qisas* and *diyat* law of Islam is viable, even today and is compatible with modern social trends and legal standards. Moreover, Islamic concepts of *aqilah* and *qasamah* involve society, as a party to the offence of murder, in the process of administration of justice.

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LIST OF ABBREVIATIONS

| | |
|--------|-------------------------------|
| AIR | All India Reporter |
| ATA | Anti-Terrorism Act |
| ATC | Anti-Terrorism Court |
| Bal. | Balochistan |
| Cr.PC | Code of Criminal Procedure |
| FIR | First Information Report |
| FSC | Federal Shariat Court |
| IHC | Islamabad High Court |
| ILR | Indian Law Review |
| IPC | Indian Penal Code |
| Isb. | Islamabad |
| Kar. | Karachi |
| Lah. | Lahore |
| MLD | Monthly Law Digest |
| NLR | National Law Reporter |
| PCr.LJ | Pakistan Criminal Law Journal |
| Pesh. | Peshawar |
| PLD | [All] Pakistan Legal Decision |
| PO | President's Order |
| PPC | Pakistan Penal Code |
| QSO | <i>Qanun-e Shahadat</i> Order |
| SAC | Supreme Appellate Court |
| SC | Supreme Court |
| SCC | Supreme Court Cases |
| SCMR | Supreme Court Monthly Review |
| UK | United Kingdom |
| USA | United States of America |
| YLR | Yearly Law Reports |
| WP | Writ Petition |

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CHAPTER 1

INTRODUCTION TO THE RESEARCH

1.1 INTRODUCTION

Islamic law of *qisas* and *diyat* has its bases in the *Qur'an* and the *Sunnah* of Prophet Muhammad (pbuh). There are few verses of the Holy *Qur'an* wherein law of *qisas* and *diyat* has been ordained.¹ Besides *Qur'anic* injunctions, narrations of the Prophet Muhammad (pbuh) add into and explain the *Qur'anic* law relating to murder and bodily hurts. Simple concept of *qisas* under Islamic law is that an individual who causes or facilitates the doer in causing hurt on the body of any human is liable to be punished in same manner and to the same extent.² The Constitution of Islamic Republic of Pakistan, 1973 requires that all laws shall be brought in conformity with the injunctions of Islam.³ Moreover, in early era of General Muhammad Zia-ul Haq's rule Islamization of laws was one of the main obsessions of the government but the

¹ See *Al-Quran*, Chapter II (*Al-Baqara*) Verses 178, 179 and 194; Chapter IV (*Al-Nisa*) Verses 29, 92 and 93; Chapter V (*Al-Ma'idah*) Verses 32, 33 and 45; Chapter VI (*Al-An'aam*) Verse 151; Chapter XVII (*Al-Bani Israel / Al-Asraa*) Verses 31&33 and Chapter XXV (*Al-Furqan*) Verse 28.

² Words '*qisas*' and '*diyat*' are terms of Islamic law of punishments of offences relating to human body. Literally, word *qisas* (origin *qasas*) means story, narration or tale. Under Islamic law, *qisas* indicates to a law of retaliation wherein the offender is punished with similar hurt or death he inflicted on the victim or deceased. Through enacting the Criminal Law (Second Amendment) Ordinance, 1990 few provisions of the erstwhile chapter XVI of the Pakistan Penal Code, 1860 from sections 299 to 338 were either replaced or amended with new law based on Islamic concept of punishment in matters of murder or bodily hurts.

³ See Article 227 (1) of the Constitution of Islamic Republic of Pakistan, 1973 which reads as "All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions".

then Parliament failed to amend the law of homicide until it was forced to do so by Pakistan judiciary through three successive verdicts.⁴

In the year 1989 the general substantive criminal law, under chapter XVI of the Pakistan Penal Code, 1860 relating to the offences affecting the human body, was challenged before the *Shariat* bench of the Peshawar High Court in *Gul Hassan Khan's* case.⁵ In its decision the *Shariat* bench gave few recommendations and declared few provisions relating to the law of murder to be inconsistent with Islamic injunctions.⁶ Almost similar questions again arose before the Federal Shariat Court during the hearing of *Muhammad Riaz* case and the Federal Shariat Court decided the case in the line of the judgment of the Peshawar High Court.⁷ Subsequently, decisions of both courts were challenged before the *Shariat* Appellate Bench of the apex court of Pakistan.⁸ A five member bench of the apex court finally declared various provisions of laws relating to the offences of murder and hurts un-Islamic for want of rights of *qisas*, *diyat*, waiver and compounding offences.⁹ The appellate bench also held that Islamic *qisas* and *diyat* law would automatically be considered promulgated on 23rd March 1990 if the Federal Legislature failed to enact new law. However, on a

⁴ See the cases of *Gul Hassan Khan vs. Government of Pakistan*, PLD 1980 Pesh. 1; *Muhammad Riaz etc. vs. Federal Government etc.*, PLD 1980 FSC 1 and *Federation of Pakistan through Secretary, Ministry of Law and another vs. Gul Hasan Khan*, PLD 1989 SC 633.

⁵ *Gul Hassan Khan vs. Government of Pakistan and another*, PLD 1980 Pesh. 1.

⁶ The *Shariat* Bench of the Peshawar High Court declared sections 54 & 55 of the Pakistan Penal Code, 1860 and sections 345 (7), 401, 402, 402-A and 402-B and relevant parts of Schedule-II of the Code of Criminal Procedure, 1898 to be contrary to Islamic injunctions.

⁷ *Muhammad Riaz etc. vs. Federal Government etc.*, PLD 1980 FSC 1.

⁸ Federation of Pakistan challenged the decision of *Shariat* Bench of the Peshawar High Court as well as the decision of *Muhammad Riaz* case of the Federal *Shariat* Court before the *Shariat* Appellate Bench of the Supreme Court of Pakistan through *Shariat* Appeal No. 1 / 1980 and *Shariat* Appeal No. 13/ 1981, respectively. Both these petitions along with other nine like petitions were clubbed together and decided under the same judgment.

⁹ *Federation of Pakistan through Secretary, Ministry of Law and another vs. Gul Hasan Khan*, PLD 1989 SC 633.

review petition filed by the Federal Government the apex court was pleased to extend time for enacting and enforcing amended law till the month of September 1990.¹⁰

It is not out of place to mention here that, *hudood* laws and *qisas & diyat* laws were contemporaries as per their original drafts, time and scheme but the latter could not be promulgated in the year 1979 for some political reasons. Prior to introducing amendments through the Criminal Law (Second Amendment) Ordinance, 1990, the law of offences relating to human body under the Penal Code was based on common law and it was severely criticised by legal and religious circles. The Ordinance either replaced or amended some provisions relating to offences against human body under the Penal Code, 1860 and the Criminal Procedure Code, 1898 in order to bring existing laws in compliant with the injunctions laid down in the *Qur'an* and by the *Sunnah*.¹¹ The legislature, under the new scheme of penal law, kept two regimes of punishment, i.e. *qisas* and *ta'zir*, under different sub-sections of section 302 PPC. Formal defects of new legislation and subsequent conflicting judgments of courts made the law more confusing and contradictory. Few main difficulties in the draft, application and interpretation of law include introducing two parallel systems of punishments under same chapter of same statute but sans any difference of mode of execution; strict criterion of witness qualifying the test of *Tazkiyah-al-Shahood*; a law favouring the rich rather the poor; denying benefits of provisions of sections 306, 307 and 308 PPC in *ta'zir* cases; scope of provisions of section 302 (c) PPC; generality of injunctions of the *Qur'an* and the *Sunnah* according to which courts were to administer justice and interpret law; frequent acquittals of murderers on the basis of

¹⁰ *Federation of Pakistan and another vs. NWFP Government and others*, PLD 1990 SC 1172.

¹¹ Provisions of laws wherein amendments were suggested include sections 4, 57, 299 to 338 of the PPC and sections 337 to 339-A, 345, 381, 401, 402, 402-A & 402-B of the Cr.PC.

unqualified compromise and lastly reposing power of interpreting law under section 338-F PPC to judges without specifying their qualifications, competence and experience.

There are numerous inconsistent decisions of superior judiciary of Pakistan on *qisas* and *diyat* law. A few of such inconsistencies were finally tried to settle by a larger bench of the Supreme Court of Pakistan in *Zahid Rehman* case wherein accused was booked in a case FIR No. 166/2001, dated 29-06-2001, under section 302 PPC at Police Station Golra Sharif, Islamabad for committing murders of his wife and son. Accused himself informed police about the occurrence. On his pointation dead bodies were recovered by the local police but during trial accused denied charges. He refused to be examined under section 340 (2) Cr.PC and also did not produce his defence. On conclusion of trial, Sessions Court Islamabad vide its judgment dated 10-01-2004 convicted Zahid Rehman under clause (b) of section 302 of the Penal Code and he was punished with death on both counts as *ta'zir* besides compensation. Trial court submitted murder reference under section 374 Cr.PC before the Lahore High Court. Meanwhile, mother of one of the deceased persons namely Mst. Sheerin Zafar preferred a revision petition for maintaining conviction and punishment of accused but enhancing amount of compensation up to Rs. 10,00,000/- on each murder. On the other hand, accused challenged his conviction and sentenced by filing an appeal through his counsel Mr. Ijaz Hussain Batalvi and prayed for his acquittal.¹² Before the High Court on behalf of appellant it was argued

¹² A Criminal Appeal No. 30/2004, a Murder Reference No. 54/2005 and a Criminal Revision No. 19/2004 were initially filed before the Lahore High Court as appellate jurisdiction at that time lied with the Lahore High Court. However, after establishment of the Islamabad High Court, in the year 2010, all three matters were transferred to the new established court which decided the matters vide a single judgment dated 23-11-2011.

that sentence could have been possible under section 308 PPC for accused committed murders of his wife and son. The High Court was not convinced with the contention of accused so dismissed appeal and confirmed murder reference. Regarding application of the provisions of section 308 PPC, relying on the precedent cases of the apex court, Justice Riaz Ahmad Khan at page number 16 of the judgment observed:

Keeping in view the above judgments, we are firmly of the view that Section 308 PPC has no application in the case of present convict / appellant. He was convicted and sentenced under Section 302(b) PPC and there is no exception attached to the sentence provided in this Section. Therefore, the same cannot be altered on the ground available under Section 308 PPC.

The decision of the Islamabad High Court was assailed by accused to the apex court. A larger bench of five members of the apex court tried to raise and settle few of hard questions involved under the law of murder. But on many points of law the bench had split.¹³ Even majority view was given on different reasoning. Finally, after discussing numerous precedent cases, the apex court approved one of the conflicting views of superior judiciary regarding the application of exceptions to punishment of death as laid down under sections 306 and 307 PPC. The Court endorsed the correct approach that these sections attract when death is awarded by way of *qisas* under section 302 (a) PPC. The larger bench of the court in this case did not consider it expedient to answer many other questions relating to the *qisas* and *diyat* law of Pakistan. The court, no doubt, avoided answering questions touching the very Islamicity of the law. The court, ostensibly, preferred to follow the verdict of apex court in *Faqir Ullah* case wherein a bench of five judges of apex court assumed that

¹³ *Zahid Rehman vs. The State*, PLD 2015 SC 77.

provisions of law introduced in 1990 in the Pakistan Penal Code, 1860 were not violative of the *Qur'anic* text or the *Sunnah* of Prophet Muhammad (pbuh).¹⁴

The *Qisas* and *Diyat* Law Ordinance was promulgated on 12th of September 1990 and later on it was amended for more than twenty times in order to bring it in accordance with Islam law.¹⁵ Nonetheless, the law is being criticised for not being purely Islamic. The law is considered defective for being a bi-product and un-natural amalgamation of two laws from two different criminal justice systems, i.e. Islamic law and common law. The *qisas* and *diyat* law remained under discussion since its promulgation but debate once again gained hype after accepting compromise in the cases of *Raymond Davis*¹⁶ and *Shahrukh Jatoi*¹⁷. These murder cases once again invited multifarious views of people from different walks of life including theologians, feminists, human rights activists, lawyers, educationists and journalists.

A religious scholar Javed Ahmed Ghamadi while commenting on public protest after affecting compromise between parties and accepting compromise by the court without any objection in *Shahrukh Jatoi's* case also criticised the *qisas* and *diyat* of law of Pakistan.¹⁸ According to him injunctions of the holy *Qur'an* were revealed on three stages under chapter IV, chapter XVI and Chapter II. However, it is under verse 178 of Chapter II (*sura al-baqarh*) of the holy *Qur'an* ordained by Almighty *Allah* that the State on behalf of community shall enforce *qisas* in cases of

¹⁴ *Faqir Ullah vs. Khalil-ul-Zaman*, 1999 SCMR 2203.

¹⁵ See *Riaz Ahmed vs. The State*, 1998 SCMR 1729.

¹⁶ The accused, an American national, murdered two innocent Pakistani citizens in Lahore in the year 2011 but he was acquitted by the court due to a compromise by invoking the provisions of amended murder law of Pakistan.

¹⁷ A twenty years' old student was killed in Karachi in December 2012 by the accused and his friends. Father of main accused, namely Shahrukh Jatoi, was a filthy rich and influential man. However, in September 2013 the matter was patched up and father of the deceased submitted compromise deed in the court and recorded statement on behalf of the whole family of the deceased that they had waived of their right of *qisas*.

¹⁸ A talk with Javed Ahmad Ghamdi aired on 17-01-2014 on Sama TV Channel. Retrieve from ghamdi.tv on 17-04-17.

qatl. So under Islamic law the State, on behalf of society, becomes a party in cases of *qatl* and it has a duty rather than discretion to enforce *qisas*. When legal heirs compound an offence of *qatl* the obligation of *qisas* is discharged but not the right of *qisas* until the State compounds the offence. He also added that under Pakistani law of *qisas* and *diyat* the State as a party has no role in compounding and enforcing the right of *qisas* on behalf of the community and this important aspect of Islamic law has been ignored by the *ulema*, i.e. religious scholars, who took part in drafting the law. From these discussions and protest by civilian society one could conceive an impression that substitution of substantive penal law of murder with Islamic *qisas* and *diyat* law in fact privatised the justice. Due to privatising criminal justice courts let wealthy and powerful convicts, especially in murder cases, go scot-free. Resultantly, the State lost its authority to intervene where legal heirs of a deceased are made, by any hook or crook, to agree to waive the right of *qisas*, compound the right of *qisas* or compound an offence of *qatl-i-amd*.

Substitution of criminal law of murder based on common law with that of Islamic law in fact privatised the criminal justice wherein the right of *qisas* could be waived or compounded. The right of *qisas* of the community in cases of *qatl-i-amd* was ignored by the law makers and much was left up to the courts to accomplish by vesting them with vast discretionary powers sans any parameters which resulted in injustice and ambiguities in the two parallel regimes of punishment as well as inconsistencies in decisions of the judiciary. Therefore, the law, substantially being an outcome of analogical deduction, needs to be amended in accordance with the principles of Islamic criminal law and contemporary modern standards so that it could be made uniform, effective and unequivocal.

1.2 LITERATURE REVIEW

On the *qisas* and *diyat* law of Pakistan its application and interpretation by courts there are many good writings. In such scholarly contributions the Islamised law of murder has been analysed, criticised and occasionally appreciated as well. One of such important works is a book authored by Doctor Tahir Wasti based on his Ph.D dissertation.¹⁹ In his book Dr. Wasti discusses the background in which *qisas* and *diyat* was drafted and enforced in Pakistan. He also discusses the basic draft and the way it went under the process of legislation. The book of Dr. Wasti consists of an introduction and seven chapters. Main question which is answered by Dr. Wasti is whether or not the change in the law of murder had achieved the purpose of controlling the crime of murder? In chapter one of his research Dr. Wasti gives an over view of his study. According to him, he took this topic for research in order to prove three drawbacks of the law. The first that by introduction of amendments, offence of murder was made a civil wrong or a private matter which was the very of reason of increase in murder offence. Secondly, murderer must be punished regardless of the fact that relatives of victim show un-willingness to fight case against the culprit. Thirdly, the Islamized law of *qatl* of Pakistan was not compatible with the criminal justice system of Pakistan. The author briefly discusses the concept of Islamic law, i.e. *Shariah*, its sources, legal concept relating to murder offence in Islam, Pakistani law of *qisas* and *diyat* and theories under Islamic law. In chapter two of the book, Dr. Wasti analyses three leading decisions of constitutional courts which provided a foundation of the present statutory law of murder. In his book Dr. Wasti

¹⁹ Wasti Tahir, '*The Application of Islamic Criminal Law in Pakistan: Shariah in Practice*': BRILL (London. Boston) 2009.

blames judiciary for becoming over-zealous in declaring the Islamic *qisas* and *diyat* law relating to the offence of murder. He further alleges that, by doing so, courts exceeded their legal and constitutional jurisdiction. According to him, judges failed to take notice of many *Qur'anic* verses and the narrations of the Prophet Muhammad (pbuh) which either could go against their own traditional beliefs or their personal understanding of Islam. He further adds that judges did not consider the opinions of contemporary jurists who criticised the old structure of criminal law of Islam. In chapter three of the book, Dr. Wasti discusses that how Islamized law of Pakistan was evolved. He discusses the role of two important figures, i.e. Mr. Afzal Cheema and Mr. Tanzeel-ur Rehman, who prepared two separate versions of Islamised law as per their personal perceptions. The author also analyses different provisions of the Draft Bills. In chapter four of his research Dr. Wasti discusses as to how the law went under debate in the Parliament? According to him only sixty eight members participated in the debate and about half of them did not utter a single word. He further says that the Parliamentarians who were in favour of the law were more zealous to Islam rather had special knowledge or expertise in the matter. The Parliament, however, finally passed the law but rejected the very bases of the law including principles of *aqilah*, *qasamah* and women's half *diyat* which were part of the draft of the Ordinance, 1990.²⁰ Under chapter five of his book, the author

²⁰ About *aqilah* as reported in *Al-Sunan Ibne Ma'jah*, Volume II, Chapter 'Blood-money, it was narrated by a Companion of the Prophet (pbuh), namely *Mughirah bin Shau'bah* (Allah be pleased with him) that the Prophet of Allah (pbuh) ruled that *diyat* must be paid by the *aqilah* of the murderer. At another occasion as reported in *Al-Sunan an-Nasai*, Chapter 'Oaths, Retaliation and Blood-money', narrated by *Mughirah bin Shau'bah* (Allah be pleased with him) as well as by *Abu Hurairah* (Allah be pleased with him) when an inadvertent act of a woman, wife of *Hudhail*, caused miscarriage to her husband's another wife, the Prophet of Allah (pbuh) gave verdict that *aqilah* of the woman would give a slave as *diyat*. A similar *Hadith* is also narrated by *Ibn-e Abbas* (Allah be pleased with him) and reported in *Al-Sunan an-Nasai*, Chapter 'Oaths, Retaliation and Blood-money'. Similarly, regarding *qasama* it is reported in *Al-Sunan an-Nasai*, Chapter 'Oaths, Retaliation and Blood-money' and narrated by *Ibn-e Al-Musayyab* (Allah be pleased with him) that *qasamah* existed

discusses judicial response on new law. Dr. Wasti criticises the provisions of section 338-F PPC whereby unlimited power in the interpretation and application of the law was given to all judges of criminal courts. Subsequently, misuse of the power by judges resulted into miscarriage of justice. Secondly, rights of society were not considered by law makers while drafting section 338-F of the Code. Dr. Wasti also emphasises that under new law two different yardsticks for proving offence of *qatl-i-amd* was provided, i.e. one for punishing as *qisas* and other for punishment of *ta'zir*. Double standard of evidence, according to Mr. Wasti, was discriminatory and could not be allowed under the law of any State. After discussing many areas of the Islamised law relating to the offence of *qatl-i-amd*, Dr. Wasti answers the core question in affirmative that the new law is defective, full of flaws and legislature failed to control frequent occurrence of the offence of murder after introducing Islamic concepts therein. However, by going through the book of Dr. Wasti, it seems that he deliberately did not suggest any mechanism and solution following which the law could be improved, made flawless and effective for it might be out of the scope of his research.

Recently, a celebrated work is accomplished by Mr. Muhammad Mushtaq Ahmad, in the shape of his Ph.D dissertation.²¹ Mr. Mushtaq discussed *qisas* and *diyat* law under two chapters of his research - chapters eleven and twelve. Under chapter eleven of the thesis he elaborates as to how the law of murder was Islamized

during *jahaliah* and the Prophet of *Allah* (pbuh) approved it in the case of an *Ansari* who was found dead in a well of the Jews. Same narration is reported in *Al-Sunan Abi Daud*, Vol. 4 that in an untraced murder of a Muslim committed in Khaiber, the vicinity of Jewish people, the Prophet of *Allah* (pbuh) preferred *qasamah* from fifty persons of that vicinity, nominated by the complainant.

²¹ The Doctrine of *Siyasah* in the *Hanafi* Criminal Law and Its Implication for Islamization of Laws in Pakistan.

in Pakistan?²² Besides analyzing few case laws decided by the higher and superior judiciary of Pakistan Mr. Mushtaq discusses various stages and steps taken by Pakistan government and judiciary during drafting of Islamic version of law relating to offence of murder. He also criticizes the law for not being based upon principles expounded by *Hanafi* jurists. According to him, the law makers ignored the doctrine of *aqilah*. He criticizes the law for not including *qatl-i-shibh al-khata* one of the main kinds of *qatl* under *Hanafi* school of thought. To him, the law is also defective for primary punishment for *qatl-i-amd* is *qisas* and *qisas* cannot be enforced in two situations - when there is any doubt or when there is compromise between legal heirs and the culprit. Mr. Mushtaq, referring a narration of the Holy Prophet (pbuh), concludes that execution of killer in *qatl-i-shibh-i-amd*, according to Imam *Sarakhsi*, was not *qisas* but *siyasa*.²³ He severely objected the law of *qatl-i-amd* of Pakistan as it was an unnatural amalgamation of two separate regimes of punishment. The researcher in chapter twelve of the dissertation discusses the application of doctrine of

²² Islamizing Pakistani Law on Homicide and *Siyasa*.

²³ In Islamic State a political decision, an administrative measure or a policy oriented step taken by a ruler or the government in order to meet any urgent need or situation in the interest of justice, is called *siyasa* or *siyasa shariah*. Today, in Islamic States that believe in constitutionalism such powers are being exercised vertically by federal and provincial governments and horizontally through three organs including legislature, executive and judiciary. In his books, 'Theories of Islamic Law' and 'General Principles of Criminal Law', Professor Imran Ahsan Khan Nyazee has, in relation to five *maqasid-e shariah*, described '*siyasa shariah*' as the policy of the *Shariah*. He further explains that the policy is just as long as the government upholds the *shariah* but if it does not uphold it, the policy becomes unjust or *zalimah*. According to him the policy of the *shariah* is of two types: the first deals with the 'preservation' aspect of the five principles or *maqasid-e shariah*, while the second deals with the 'protection' aspect of these five principles. Muhammad Mushtaq Ahmad has further expounded the work of professor Nyazee on the doctrine of *siyasa* in his writings including (i) his PhD dissertation (ii) a research paper 'The Crime of Rape and the *Hanafi* Doctrine of *Siyasa*', Pakistan Journal of Criminology, Volume 6, No.1, Jan-June (2014), pp.171 – 202 and (iii) a research paper 'Post-Colonial Discourse on *Siyasa* in Islamic Criminal Law'; Kardan Journal of Law, Kardan University, Kabul, Afghanistan 1(1) pp. 1-15 (2019). Similarly, professor Mohammad Hashim Kamali in his book 'Principles of Islamic Jurisprudence' quoted *Ibn Al-Qayyim* who about *siyasa* observed as "*siyasa shar'iyah* comprises all measures that bring the people close to well-being (*salah*) and move them further away from corruption (*fasad*), even if no authority is found for them in divine revelation and the *Sunnah* of the Prophet."

siyasah on the offence of *qatl-i-amd* under penal law of Pakistan.²⁴ He claims that the *Hanafi* doctrine of *siyasah* is the best anecdote to address the crises of Islamic law of *qisas* and the doctrine can resolve all issues relating to the law of murder of Pakistan. He discusses in this chapter the nature and scope of *qatl-i-amd* and required standards of evidence for both regimes of punishments, i.e. *qisas* and *diyat*. Mr. Mushtaq also analyzed the latest decisions of Pakistani higher and superior judiciary and fixed responsibility on judiciary for its failure to address all issues relating to the law properly. He further contended that the apex court in *Zahid Rehman's* case expressed its inability to interpret the law in accordance with the principles dictated by Islam. Another important issue discussed under this chapter is compounding and composition of offence of *qatl*. According to the researcher both terms are for different situations. Right of *qisas* may be compounded even by a single person amongst the heirs of the deceased but composition is possible only when all legal heirs agree on it subject to the permission of court. Regarding *Hanafi* doctrine of *siyasah*, Mr. Mushtaq Ahmad says that the doctrine is for two purposes; one to justify the use of governmental power in order to ensure peace in community; secondly to keep a check so that the power could not be misused.²⁵ Mr. Mushtaq Ahmad also suggests that standards determining *fasad-fil-arz* as provided under the provisions of section 311 PPC should be applied carefully and strictly so that only offenders of most heinous offences could be convicted for capital punishment. The researcher,

²⁴ Chapter 12 titled as "The Doctrine of *Siyasah* in the *Hanafi* Criminal Law and Its Implications for Islamization of Laws in Pakistan".

²⁵ Under his unpublished Ph.D thesis Muhammad Mushtaq Ahmad has tried to refute the conception of orientalist that Islamic law is bifurcated in theory & practice and theory is different from practice. According to the orientalist as a theory Islamic law, i.e. *fiqh*, is developed by Muslim jurists while the law in practice, i.e. *siyasah*, was developed by rulers and judges in the process of administration of justice. Mushtaq Ahmad strengthened his argument with the view point of professor Imran Ahsan Khan Nyazee who in his book 'Theories of Islamic Law' has highlighted the misconception of the orientalist by arguing that in Islamic law theory and practice are not separate but it was just a division of labour between jurists and rulers.

however, did not discuss the law relating to murder comprehensively in its holistic framework for most probably it was out of the scope of his research.

Another research oriented contribution is made by the National Commission on the Status of Women (NCSW) through its publications.²⁶ In its report of the year 2003 about the Islamized Pakistani law of murder Islamicity of the law was adjudged by the Commission.²⁷ Issues discussed in its report include legitimacy of honour killing, compounding of offence and mode of disbursement of *diyat* according to Islamic law of inheritance. The commission, however, in its findings of the research observed that the *qisas* and *diyat* law of Pakistan was against the order of other laws of Pakistan and society. Secondly, the Commission found that the offence of honour killing was against entire humanity. Thirdly, no exemptions from *qisas* punishment are there under Islamic law. Fourthly, law of inheritance does not attract in cases of distribution of *diyat* among *walis*. Similarly, in a brochure published by the Commission, a suggestion was extended that the law should be changed for incorporating some provisions therein in order to discourage compounding offences in case of '*fisad-fil-arz*'; habitual offenders should be severely punished; shares of *diyat* should be paid to the victim after proper medical check-up of victim and above all presiding officers of courts must be trained in Islamic law so that they could be able to interpret and apply the injunctions of Islam in their true spirit.²⁸ But the study conducted by the commission did not evaluate judicial role and development of law

²⁶ The Commission is a statutory body created under The National Commission of the Status of Women Bill, 2012. Functions and powers of the Commission are given under section 11 of the Bill. The Commission had mandate to give recommendations by reviewing all laws, rules, regulations and policies relating to and affecting the status of women and their rights.

²⁷ The Commission issued a comprehensive report on the Islamized law on the offence of murder. The report is retrieved online from <http://www.ncsw.gov.pk> on 28-09-2015.

²⁸ A brochure issued by the commission comprising of some suggestions for the legislature for amending the law. The broacher is retrieved online from www.ncsw.gov.pk on 16-02-2016.

through precedents. Moreover, no plausible solution is suggested by the commission for reforming the law in conformity with Islamic injunctions and modern standards.

There are numerous judgments of higher and superior judiciary of Pakistan relating to the *qisas* and *diyat* law but only milestone decided cases can be discussed at this stage for the purpose of conciseness and brevity. *Gul Hassan Khan's* case is the first case of this category wherein *Gul Hassan Khan's* conviction and capital punishment for committing murder was challenged on the ground of law being against the injunctions of Islam through filing a Shariat petition before the Peshawar High Court.²⁹ A three member bench heard the petition which was moved for examining few provisions of law of murder on the basis of Islamic injunctions. The court by its decision declared various provisions of the Penal Code, 1860 and the Criminal Procedure Code, 1898 to be un-Islamic. After its constitution, the Federal Shariat Court took up and answered the same question in a murder case of *Muhammad Riaz* and declared few provisions of the statutory law relating to the offence of murder to be un-Islamic.³⁰

The Federal Government of Pakistan challenged both decisions before the Supreme Court of Pakistan.³¹ A five member bench, called Shariat Appellate Bench, of the apex court decided Shariat appeals unanimously under a single judgment. Main judgment was written by Justice Pir Muhammad Karam Shah while two members of the bench namely Muhammad Taqi Usmani and Shafi-ur-Rahman gave their separate observations in agreement with the main judgment. Effect of the decision was that impugned decisions, more or less, were upheld by the apex court declaring various

²⁹ *Gul Hassan Khan vs. Government of Pakistan and another*, PLD 1980 Pesh. 1. The petition, i.e. Shariat Petition No. 7 of 1975, was filed in 1975 and it was decided on 01-10-1979.

³⁰ *Muhammad Riaz etc. vs. Federal Government etc.*, PLD 1980 FSC 1.

³¹ *Federation of Pakistan versus Gul Hasan Khan*, PLD 1989 SC 633. The petition, i.e. Shariat Appeal No. 1 was heard and decided together with other ten like appeals having same question of law.

provisions of the Penal Code and the Criminal Procedure Code to be against the injunctions of Islam as laid down in the Holy *Qur'an* and the *Sunnah* of Prophet Muhammad (pbuh). However, the bench disagreed with the decision of the Peshawar High Court on the point of rights available to legal heirs of the deceased. In this regard, the court observed that legal heirs of deceased, besides rights of *qisas* and *diyat*, had a third right as well which is right of compromise. Under the right of compromise legal heirs may agree on accepting any other form of compensation instead *diyat*. On the point of stringency and severity of punishment of *qisas* than that of *diyat*, in his judgment, Justice Pir Muhammad Karam quoted Imam Malik who had opined that in case of *ta'zir*, punishment should be more stringent than the punishment of death awarded by way of *qisas*.³² On the other hand, Justice Taqi Usmani extended his personal opinion that punishment awarded as *ta'zir* should not be more severe than that of *qisas*.³³ The Shariat Appellate Bench not only declared laws relating to the offence of murder and hurts to be against the injunctions of Islam but held that such laws would cease effect on 23-03-1990. Moreover, in case of failure on the part of the federal legislature to promulgate amended law, it was observed by the bench that its decision would be effective and enforceable as law.³⁴

Another milestone case on the *qisas* and *diyat* law of Pakistan is *Faqir Ullah* case wherein a larger bench of five judges of the apex court reviewed the decision of

³² *Federation of Pakistan through Secretary, Ministry of Law and another vs. Gul Hasan Khan*, PLD 1989 SC 633 at p. 660.

³³ See *ibid* at p. 671. Same question was taken up again by the apex court in *Zahid Rehman vs. The State*, PLD 2015 SC 77 but strangely the issue could not be resolved by the larger bench of the apex court. In this case Justice Ejaz Afzal Khan raised same question and unequivocally adopted, without making any reference of source, the opinion of Justice Taqi Usmani by holding, at page 119 of the judgment, that no second opinion was possible on the view that punishment by way of *ta'zir* could not be more stern and stringent than the punishment awarded as *qisas*.

³⁴ *Federation of Pakistan through Secretary, Ministry of Law and another vs. Gul Hasan Khan*, PLD 1989 SC 633, at pp. 642 & 643.

case given by a two member bench of the Supreme Court.³⁵ The larger bench, however, indirectly declined to discuss the Islamicity of the law of *qisas* and *diyat* of Pakistan.³⁶ After elapsing more than sixteen years, the *ratio* of a larger bench of the apex court in *Faqir Ullah's* case was approved by another bench of equal strength in *Zahid Rehman* case regarding the application of sections 306, 307 and 308 PPC and held that the provisions could attract only in cases of *qisas* but not in cases of *ta'zir*. Effect of this decision is that in future cases of *qatl-i-amd*, courts would be bound to deny the relaxation given under sections 306, 307 and 308 PPC to the accused / convict under *ta'zir*. The decision of *Zahid Rehman's* case was analysed later on in a research paper authored by Mr. Kamran Adil.³⁷ Mr. Kamran no doubt pinpointed what the bench in judgment actually missed to decide but he could not suggest any cogent solutions to the identified problems. He also did not provide in his paper what, in fact, Islamic law was on the issue?

Another debateable issue under the Islamized law of murder is the ground of provocation. The Supreme Court of Pakistan in *Gul Hasan Khan's* case neither expressly ordained that the clause relating to sudden and grave provocation be struck down from statutory law, i.e. PPC, for being un-Islamic nor objected the view adopted by Justice Aftab Hussain under the impugned judgment.³⁸ However, in

³⁵ *Faqir Ullah vs. Khalil-uz-Zaman and others*, 1999 SCMR 2203.

³⁶ The larger bench of the apex court observed that due to paucity of time they had not been able to make further research in the matter themselves. However, regarding amendments introduced through the Criminal Law (Second Amendment) Ordinance, 1990 in the Pakistan Penal Code, 1860 the apex court assumed that the provisions of law were not violative of any of the *Qur'anic* text or the *Sunnah* of the Prophet Muhammad (pbuh).

³⁷ Research paper titled '*The Jurisprudence of the Codified Islamic Law: Determining the Nature of the Legal System in Pakistan*', published in LUMS Journal. It was retrieved online on 15-12-2015.

³⁸ In *Gul Hasan Khan's* case under main judgment authored by his lordship Pir Muhammad Karam Shah majority members raised no objection on the view of the Federal Shariat Court under the impugned judgment that no matter, how sudden and grave it was, could lessen the intensity of crime of murder. However, according to the minority view of the Shariat Appellate Bench, at page 674 of the judgment written by a member Muhammad Taqi Usmani, in Islamic law if deceased was doing an act

subsequent decisions of Supreme Court ground of provocation, contrary to the majority view of the Shariat Appellate Bench in *Gul Hasan's* case, was revived by judges which was deliberately ignored by law makers at the time drafting and enacting new law, i.e. the Criminal Law (Second Amendment) Ordinance, 1990.³⁹ In few of their decisions courts also discussed the importance of grave and sudden provocation as a mitigating or extenuating circumstance in cases of murder.⁴⁰ The Supreme Court of Pakistan tried to some extent to reverse the impact of such reviving judgments by holding that such defence must be proved by the accused.⁴¹ Again recently, on the ground of un-Islamicity provisions of clause (b) of section 302 PPC were challenged before the Federal Shariat Court through preferring a Shariat Petition but it was dismissed by a five member bench of the Federal Shariat Court on 15-05-2016 being devoid of any merits.⁴²

In research works and case laws, as discussed above, no heed was paid to the requirements of modern trends, contemporary standards and concerns of advanced society while drafting, amending, applying or interpreting the *qisas* and *diyat* law. It is also not suggested in these writings that how lacunae of *qisas* and *diyat* of Pakistan

itself punishable with death then his killer would be exempted from punishment of *qisas* if he proves the act of deceased but for breaking law of State he would be punished accordingly.

³⁹ For instance, *Ali Muhammad vs. Ali Muhammad and another vs. The State*, PLD 1996 SC 274 and *Abdul Zahir and another vs. The State*, 2000 SCMR 406.

⁴⁰ See *Ghulam Yaseen vs. The State*, PLD 1994 Lahore 392 wherein punishment of accused, convicted by trial court u/s 302 (c) PPC and sentenced to rigorous imprisonment of 25 years, was converted to five years' simple imprisonment by giving accused a concession due to family honour. The court also created distinction between *qatl-i-amd* committed due to *ghairat* and *qatl-i-amd* committed intentionally. Similarly, in *Abdul Haque vs. The State*, 1996 SCMR 1566 the apex court held regarding the principle of diminished responsibility that the principle under grave and sudden provocation had been in practice in Indian Subcontinent for more than a century for the reasons that an offender of culpable homicide under some compulsion could never be treated at par with one who commits intentional murder or gets one killed through some hired assassins.

⁴¹ For example, in *Abdul Zaheer vs. The State*, 2000 SCMR 406, it was held that on the ground of provocation, sudden and grave, a case of *qatl-i-amd* itself does not fall under clause (c) of section 302 PPC especially murders of female relatives committed at the hands of male family members on the ground of *siya kaari*.

⁴² *Dr. Muhammad Aslam Khaki vs. Federation of Pakistan and another*, PLD 2017 FSC 1.

could be overcome. Islamic law of *qisas* and *diyat* is neither ridiculous nor anachronistic. At the advent of Islam in cases of *qatl-i-amd* for awarding punishment of death as *qisas*, testimony of witnesses qualifying the test of *Tazkiyah-al-Shahood* was required in order to protect and safeguard right of life of accused. Through Islamic principles of *aqilah* and *qasamah* society was involved in the criminal justice system. Today, though the world is different in social structure and modern standards but importance and just application of *qisas* and *diyat* law of Islam cannot be ruled out. Even today heinous offences like *qatl* can be controlled by adopting these salient features of Islamic law of murder compliant with the latest legal standards of modern societies and sentiments of people.

1.3 THESIS STATEMENT

The superior judiciary of Pakistan, by exercising authority of interpretation, has been trying to contextualise the *qisas* and *diyat* law but the law still has many lacunas which need to be overcome in the light of injunctions of Islam and modern standards.

1.4 STATEMENT OF THE RESEARCH PROBLEM

In the light of above literature review and thesis statement, the research problem definitely requires analysis and evaluation of the subject dwelling upon the following questions:

- 1- In what backdrop and on what bases the *qisas* and *diyat* law of Pakistan was drafted and promulgated?

- 2- When there is no difference between the modes of execution of punishment of death for *qatl-i-amd* awarded by way of *qisas* under section 302 (a) PPC and that of awarded under section 302 (b) PPC as *ta'zir* then what is the advantage of introducing two distinct clauses under section 302 PPC for punishment of death?
- 3- Is it possible today to observe practically the test of *Tazkiyah-al-Shuhood* for a witness as required under section 304 of the Penal Code, 1860 and under article 17 of the *Qanoon-e Shahadat Order*, 1984?
- 4- What is the scope of extenuating and mitigating circumstances, carved by the superior judiciary of Pakistan, under the criminal law relating to offence of *qatl-i-amd*?
- 5- Whether *qisas* and *diyat* law of Pakistan provides impunity to perpetrators of their murderers being relatives or infants? And whether or not concessions given under sections 306 & 307 (c) PPC extendable to death punishment for offence of *qatl-i-amd* awarded by way of *ta'zir*?
- 6- Is it possible for the State to convict accused when he successfully manages to patch up the offence of *qatl-i-amd* with the legal heirs of the deceased? Whether courts have power to reject a compromise affected between parties in cases of *qatl-i-amd*?
- 7- In what cases of offence of *qatl-i-amd* principle of *fisad-fil-arz* attracts? And whether accepting compromise by court when legal heirs compound *qisas* or granting permission by courts for composition of offence of *qatl-i-amd* in heinous murders like cases of *Raymond Davis* and *Shahrukh Jatoi* leaves an impression that *qisas* and *diyat* law of Pakistan favours the rich who can buy

justice by paying compensation to legal heirs while the poor convicts have to face death or incarceration for life?

- 8- How defectiveness and ineffectiveness of the *qisas* and *diyat* law of Pakistan have made the modern society more vulnerable and acute prone to the offence of premeditated murder?
- 9- How injustice and discrimination, caused by the substitution of offence of homicide with Islamic law of *qisas* and *diyat*, can be eliminated and how the law can be modernized so that it could be made uniform, effective and flawless to make it practicable according to the requirements of modern society?

The above stated issues shall be proved and disproved with the help of available data, literature and judicial pronouncements.

1.5 HYPOTHESIS

The proposed research can be hypothesised as follows:

- 1- Law of *qisas* and *diyat* of Pakistan is not objectives oriented so failed to control crime of murder. The law can be re-legislated in accordance with the principles of Islamic criminal law. If reforms are not introduced in order to bring the law relating to the offence of *qatl-i-amd* in accordance with the standards of modern world, the whole legal system which is meant for the betterment and comfort of the society would prove to be prevaricated and perverted.

2- There are a few lacunas and shortcomings in *qisas* and *diyat* law of Pakistan which can, adequately, be removed through amendments by the legislature or broader interpretation of the law by the judiciary. Nonetheless, the legislation holistically is comprehensive and satisfactory as per Islamic law and modern standards.

1.6 METHODOLOGY OF RESEARCH

The research like other social sciences is socio-legal, analytical, descriptive, conceptual and doctrinal in nature. Prime focus throughout the research had been upon formal defects of the Islamized law of premeditated murder of Pakistan. By using pure legal methods, besides relevant statutory laws, numerous judgments of the higher and superior judiciary are analysed to pinpoint that how Islamic *qisas* and *diyat* law of Pakistan is based partly on analogical deductions and partly on the Injunctions of Islam as laid down in the Holy *Quran* and the *Sunnah* of Prophet (pbuh). Case law analysis helps exploring inconsistencies and contradictions in courts' decisions. Moreover, case law study highlights actual loopholes and ambiguities in the legislation. In order to complete the research contemporary legal thoughts, latest conceptions of law and sentiments of modern society are studied so that plausible conclusion could be drawn as well as viable recommendations could be made. Nonetheless, limitations of the research include details of Islamic injunctions, drafting process, legislative process and un-reported case law precedents.

1.7 SCOPE AND OBJECTIVES OF THE RESEARCH

The criminal justice system of Pakistan, as given under the substantive as well as procedural laws, was amended in order to bring it in conformity with the injunctions of Islam. The instant research involves numerous questions regarding the Islamized law relating to the offence of *qatl-i-amd* and inconsistent decisions of courts. The law remained under discussion since its promulgation in the year 1990. For refining it, the law was further amended for more than twenty times. Under amended law, offences relating to human body were made compoundable without adhering to social rights and public sentiments. In other words, under *qisas* and *diyat* law of Pakistan offence of murder was made purely a civil matter and decision of parties thereof in shape of compromise was enough for the acquittal of killer. Unrest regarding the application of *qisas* and *diyat* law was there in public since its enforcement. However, the recent civil society's outrage, noticed in streets of Lahore and Karachi on murders committed by Raymond Davis and Sharukh Jatoi and their acquittal on the ground of compromise, once again brought weaknesses of the *qisas* and *diyat* law of Pakistan in the limelight. Deep concerns shown and protest recorded by public not only questioned the legislation but also interpretation of law by judiciary. Therefore, it became expedient to analyse the legislation and its evolution through interpretation of law by judges in the light of principles of Islamic law of *qisas* and *diyat*, present jurisprudential trends and modern standards of vibrant society.

The research topic has much significance for the people connected with crime control system or involved in teaching or research. They will be able to get first-hand knowledge regarding the current position of law relating to murder, injuries to body

and the relevant issues. Secondly, the work will be equally useful to lawyers and judges in assisting and deciding cases. Thirdly, the work not only contains exact legal hitches in the way of justice but will provide appropriate solutions to eradicate such impediments from the justice system. Fourthly, it will help raising public opinion which may cause pressure on legislature to introduce amendments into the law or enact a new law. Fifthly, people will have more trust in legal system and the reliefs provided for. Sixthly, by taking into account modern trends and developments, the law will meet international standards as well. Consequently, victims will approach local judicial forums for redresses and reliefs they expect as they see in today world.

1.8 OUTLINE OF THE RESEARCH

The research is comprised of twelve chapters including introduction and conclusion. Chapter 1 is about introduction to the research, the statement of the problem and the literature relevant to the topic. Chapter 2 of the dissertation gives a brief count of the history of Indian law relating to the offence of murder. Chapter 3 of the thesis concentrates on few leading cases of Pakistan judiciary whereby many provisions of the erstwhile law of pre-meditated murder were declared to be repugnant to the injunction of Islam as laid down in the holy *Qur'an* and the *Sunnah* of the Prophet (pbuh). Chapter 4 of the research examines the process of legislation in Pakistan on the *qisas* and *diyat* law and highlights differences amongst the Draft Ordinance, 1980, the Criminal Law (Second Amendment) Ordinance, 1990 and the Criminal Law (Amendment) Act (II of 1997). Chapter 5 of the thesis gives insights about the criterion of evidence required for conviction and sentence of death under clause (a) of

section 302 PPC by way of *qisas*. This chapter also explores the cases of *qatl-i-amd* wherein sentence of death as *qisas* was awarded by criminal courts which was subsequently sustained, set aside or altered by the higher courts. Chapter 6 describes the provisions of clause (b) of section 302 PPC wherein two alternate punishments of the offence of *qatl-i-amd* and required standard of evidence for proving the same are provided. This chapter also analyses many cases decided by the higher and superior judiciary of Pakistan wherein death punishment was not awarded for *qatl-i-amd* but due the involvement of any of extenuating circumstances lesser punishment of imprisonment for life was preferred by way of *ta'zir*. Chapter 7 of the research relates to clause (c) of section 302 PPC. This chapter discusses the scope of the provisions of 302 (c) PPC; explores mitigating circumstances and that how courts have placed such circumstances under 302 (c) PPC through interpretations. Chapter 8 of the research discusses the interpreting power of criminal courts under section 338-F PPC and analyses various case laws wherein contradictory decisions were given and inconsistent interpretations were made. Chapter 9 of the dissertation encompasses many issues relating to waiving of right of *qisas*, compounding right of *qisas* and composition of offence of *qatl-i-amd*. The principle of *fasaz-fil-arz* and public protest on accepting compromise in brutal murder cases of Shahruxh Jatoi and Raymond Davis are covered under chapter 10 of the research. Chapter 11 highlights modern standards of law and law reforms in few jurisdictions with comparison of application of *qisas* and *diyat* law of Pakistan. Last chapter concludes the research with recommendations for reforming the law relating to the offence of *qatl-i-amd*.

CHAPTER 2

LAW OF HOMICIDE OF PAKISTAN BEFORE ISLAMIZATION

2.1 INTRODUCTION

Before discussing the law of murder in Pakistan, it is necessary to take a bird's eye view of the law of homicide of Indian Subcontinent under this chapter. So evolution of criminal justice system in Indian Subcontinent in the era of different rulers is discussed under this chapter concisely. The chapter also highlights that how India specific law of homicide was prepared by English rulers. The chapter includes discussion on the constitution of the first Law Commission for India and its role in the development of law relating to the offence of murder. Lastly, this chapter covers salient features of the provisions, relating to offence of murder, of the draft of the first Penal Code as approved by the Law Commission.

2.2 HISTORY OF CRIMINAL LAW OF INDIAN SUB- CONTINENT

Justice is not a new concept and evolution of a justice system is coincidence of social life of human being. Under a criminal justice system prime consideration is given to the task of eliminating crime or at least controlling crime rate in a society. Word 'crime' is a wide term having different connotations and it includes 'offence'.

Generally speaking, an act in violation of any right is called crime. On the other hand an offence, whether commission or omission of something, is violation of any law. According to Rob White and Fiona Haines a crime is an offence of the time.⁴³ So when a crime is committed or omitted it might infringe any right whether private or public or it might violate any legal rule. A private right is a right of an individual and a public right is a right of public. Often, occurrence of an offence instils a sense of fear and insecurity in the minds of public and disturbs peace and tranquillity of a society. So the state, on behalf of public, brings criminal system in operation for ensuring justice. We can hardly find a society in history free from offence so history of offence is as old as human being is. Moreover, in every society offence of murder had been considered one of the most heinous offences and that is why it always fascinated human mind. In history, heinous offences not only affected victims but indirectly they put whole community under pains of unhappiness, threat and grief so punishment of such offences had always been severe in order to control the rate of such offences through deterrence.

In Indian Subcontinent, law of murder evolved centuries before the arrival of the holy Christ. We can, for the sake of convenience, divide era of evolution and development of criminal justice system in India into three phases. First phase of evolution of criminal justice system in ancient India remained till the establishment of Muslim dynasties. Second phase covers evolution of criminal justice system during the reign of Muslim emperors. In third phase English rulers attempted to transplant common law of murder into the indigenous law of India and this phase lasted till partition of the sub-continent in the year 1947.

⁴³ White Rob and Haines Fiona, '*Crime and Criminology*', Second Edition (2004), published by Oxford University Press, at p. 7.

2.2.1 Evolution of Criminal Justice System in Ancient India till the Rule of Muslim Dynasties

Indian civilisation is one of the oldest civilisations of history. Like legal system of any civilised society, Indian legal system evolved due to changes in social, political and economic conditions of the society. It was interdependence of social life which bridged gaps amongst various groups of people for their common benefits and resultantly they developed consensus on some rules for their life and survival. These rules in ancient India were known as *dharma* or law.⁴⁴ There were three main sources of ancient *Hindu* law viz. literary works, customs and usages. Historically, Indian Sub-continent had been governed by many rulers. These rulers of ancient India established a system of their own choice and according to their own needs for discouraging miscreants. There is no much literature relating to the evolution of criminal law in ancient India, however, traditional legal system in ancient India, is found in various religious scripts and treatises on politics. A regular judicial system of ancient India can be traced back to Mauryan period (326-185 BC).⁴⁵ Moreover, the oldest writing regarding code of conduct for people is *Veda* (plural *Vedas*). *Veda* is considered the first divine source of law i.e. *dharma* in ancient India. There are four *Vedas* in toto, one *Rig Veda*, second *Yajur Veda*, third *Sam Veda* and fourth *Atharva Veda*. Besides these *Vedas*, other sources of law / *dharma* were *Sutras*, *Smritis* and *Puranas*. *Dharma-shastras* consists of rules relating to conduct of entire human

⁴⁴ Bharti Balbir, '*The Constitution and Criminal Justice Administration*', published by A.P.H. Publishing Corporation, 5, Ansari Road, Darya Ganj, New Delhi (India) at p. 12.

⁴⁵ See *ibid* at p. 14.

activities.⁴⁶ Criminal justice system in fact evolved in ancient Hindu society through these sources.

In ancient India, traditionally followers of Brahman religion believed in four dimensions of human life including *dharma* (law or ethics of society), *artha* (profit), *kama* (pleasure) and *moksa* (liberty). Authors of ancient India had also discussed these four traditions in their writings, for instance, Manu's *Manava-dharma-sastram* Kautilya's *Artha-sastra* and Vatsyayana's *Kama-sutra*.⁴⁷ Subjects of these writings were human, society and social issues including religion, customs, traditions, law and justice. However, a detailed discussion about law can be found in *Dharma-sustras* and *Dharma-sastras* (also known as *smritis*). *Dharma-sastras* covers a verity of subjects like cosmogony, politics, duties of Brahmins, rules of conduct for judges, rules for witnesses, rules relating to contracts, punishments, damages and succession.⁴⁸

When society evolved and settled in India during 200 BC to 100 AD, few other *dharma-sastras* (treatises on law) were also written including Manava's *dharma-sastra* or Manu's *smriti* known as the Law Code of Manu. Besides these writings, there was no legislation given from Hindu rulers of that time. A well-known code of Manu was never enforced as law and its contents were not binding for judges.⁴⁹ The *smritis* was the codified form of law. In other words, all legal rules scattered under *Vedas* or *Sutras* were arranged under *smritis* and *smritis* discuss

⁴⁶ See *ibid* at p. 15.

⁴⁷ Sinha Kanad, 'Be it Manu, be it Macaulay: Indian Law and the 'Problem of the Female Body'; Journal of Indian Law and society', Volume V; winter at p. 65. Retrieved online on 18-7-2016.

⁴⁸ Jean-Louis Halperin, Jindal, 'Western Legal Transplant and India'; Global Law Review, 2010, volume 2 (Issue 1) pp. 14-40 at p. 20. Retrieved online on 21-07-2018.

⁴⁹ See *ibid* at p. 19.

courts, judges, substantive and procedural laws.⁵⁰ Later all books like *Yajñawalkya* (of 2nd / 3rd Century AD), *Visnu* (of 3rd century AD), *Narada* (of 4th / 5th Century AD), *Brhaspati* (5th / 6th Century AD) and *Katyayane* (of 7th Century AD) were commentaries on the basic sources of *dharma*. One of the allegations on all these historical books is that those writers had biases in favour of highest classes of society and male gender because male gender was pictured as dominating in society and the society was patriarchal where men were proprietors of women.⁵¹

In the second century AD, writers believed that *Manu Smriti* was the most authentic compilation of *dharmas*.⁵² Another important source of law in ancient India was the *Artha-shastra* of Kautilya. In his book Kautilya discussed social order and legal system of India including substantive law, procedural law, civil law, criminal law, law of evidence, offences, punishments and jails. There are four types of punishment mentioned in Manu's *Smriti* which were enforced in his times in India namely admonition, censure, fine and corporal punishment. Corporal punishment was of two types; death and cutting of limb.⁵³ The quantum of punishment for same offence was different for various classes and a man of higher caste was awarded half punishment than that of a lower class.⁵⁴

Downfall of Hindu Kingdom started with the advent of eleventh century due to external invasions and conquest of Mahmud Ghazni (1000 AD to 1026 AD) and Muhammad Ghori (1192 AD to 1206 AD). After gaining control of various parts of

⁵⁰ Bharti Dalbir, '*The Constitution and Criminal Justice Administration*'; A.P.H. Publishing Corporation, 5, Ansari Road, Darya Ganj, New Delhi (India) at p. 16.

⁵¹ Sinha Kanad, '*Be it Manu. be it Macaulay: Indian Law and the 'Problem of the Female Body'*'; *Journal of Indian Law and society*', Volume V; winter at p. 64. Retrieved online on 18-7-2016.

⁵² Bharti Dalbir, '*The Constitution and Criminal Justice Administration*'; A.P.H. Publishing Corporation, 5, Ansari Road, Darya Ganj, New Delhi (India) at p. 16.

⁵³ See *ibid* at p. 20.

⁵⁴ See *ibid*.

India Ghori left for his homeland and appointed his slave namely Qutub-ud-Din Aibak as administrator on his occupied parts of India on his behalf.⁵⁵ Hence, before arrival of Muslim invaders Hindu law, based on various religious scripts, had been in application on Indian subjects till 12th century AD. In 12th Century AD Hindu legal system was replaced with Islamic law, called *Shariah*.

2.2.2 Muslim Rulers and Criminal Justice System in Indian Sub-Continent

Muslims arrived in Indian from Arabia in the life time of the Prophet Muhammad (pbuh) and in subsequent centuries for the purpose of trade and preach and some of them permanently settled in India.⁵⁶ The first Muslim invasion on Indian Territory took place when army of Hajaj bin Yousef under the command of Muhammad Bin Qasim conquered various parts of Sindh in the year 712 AD. A great number of people arrived in India after that invasion. Indians inhabitants started embracing Islam. Teachings of Islam spread in India by Muslim traders, preachers and saints. Eleventh and twelfth centuries saw defeat of Hindu kingdom due to the invasions of Mahmood Ghazni and Muhammad Ghori, respectively. On the death of Ghori in the year 1206 Qutub-ud-Din Aibak established first Muslim Dynasty known as Slave Dynasty and became the first Muslim ruler of India. Title of Muslim rulers was *Sultan* or emperor. Sultan was a symbolic representative of *Khilafa* i.e. the Caliph of Ottoman Empire called *Khilafat-e Usmania*. After first slave dynasty four further Muslim dynasties were established in India including the Khiljis (1290 AD to 1320

⁵⁵ See *ibid* at p. 22.

⁵⁶ Khan Hamid, '*Constitutional and Political History of Pakistan*,' Oxford University Press (2005), at p. 1.

AD), the Tughlaqs (1320 AD to 1414 AD), the *Syeds* (1414 AD to 1450 AD) and the Lodhis (1451 AD to 1526 AD). Babur defeated Ibrahim Lodhi in 1526 and established his own Mughal Empire. Muslim rulers improved judicial system by various reforms. The first slave caliph Qutub-ud-Din Aibak first time appointed a chief judge for India. During his reign, Sher Shah Suri appointed *qazis* at provincial level and at village level a headman was given authority to control and prevent offences of theft and robberies. Period of Sultans and Mughals is known as 'Muslim period' and in this period Muslim rulers enforced Islamic law / *Shariah* in India. Islamic law enforced by Muslim rulers of India was based upon the holy *Quran* and the *Sunnah* of Prophet (pbuh). However, criminal law introduced by Muslim rulers was known as private law because under Islamic law due to compromise and forgiveness an offender could be acquitted of charge.⁵⁷ Mughal emperor Akbar introduced many reforms in criminal justice system of India. He established uniform judicial system for all and sundry and had banned the tradition of *Satti*. Like Brahmanical law, as discussed above, Islamic law was also prescriptive in nature but not a single local compendium of Islamic law was there until emperor Aurangzeb got published *Fatawa-e Alamgiri*. Aurangzeb Alamgir, the last effective Mughal ruler, followed cannons of Islam strictly.⁵⁸ The great Mughals effectively ruled over India till the year 1707 when emperor Aurangzeb passed away. After his death the Mughal Empire became weak and lost its effectiveness in governance. But symbolically, the Mughals ruled Indian up till 1858. Unfortunately, the end of war of Independence resulted into direct control of British government over India and English East India

⁵⁷ Bharti Dalbir, '*The Constitution and Criminal Justice Administration*'; A.P.H. Publishing Corporation, 5, Ansari Road, Darya Ganj, New Delhi (India) at p. 24.

⁵⁸ Khan Hamid, '*Constitutional and Political History of Pakistan*'; Oxford University Press' (2005) at p. 4.

Company ceased its control. During the period of Muslim rulers, Islamic law was the law of India. In this era many contributions had been made by Muslim scholars and jurists for the development of justice system. Law of murder was also based on the principles of Islamic law. Punishment for the offence of murder was death as *qisas* as well as *ta'zir* for all offenders of murder irrespective of their religion and caste. Offence of murder was compoundable and legal heir / heirs of deceased could enter into a compromise with accused against any amount but not less than the amount of *diyat*.

2.2.3 British Rule and Promulgation of the First Penal Code for British India

Britain arrived in India in the Era of the emperor Jahangir with his permission. First English factory was established in Surat in the year 1612. At that time, there was no courts system at Surat. However, in all three presidencies of Madras judges in courts were appointed in the year 1639 and they all were English. Similar appointments of presiding officers were made at Bombay in the year 1668 and at Calcutta in the year 1690.⁵⁹ The first jury trial of a murder case was conducted by English judge without the help of lawyer and accused lady namely Mrs. Dawes was acquitted, in the year 1665, of charge of murder of a slave.⁶⁰ In 1726 a charter was issued by King George-I for India whereby many English legal institutions were launched in India like Mayor's courts system, justices of peace, system of petty jury and of grand jury.⁶¹

⁵⁹ Halperin Jean-Louis, 'Western Legal Transplant and India'; Jindal Global Law Review, 2010, Volume 2 (Issue 1) pp. 14-40 (retrieved on 21-07-2018), at p. 21.

⁶⁰ See *ibid*, at p. 22.

⁶¹ See *ibid*.

Almost for a century, till the year 1857, British East India Company ruled on India. During this period criminal law given by Mughal emperors was main source in practice.⁶² Initially, British judges and magistrates applied Islamic criminal law but they felt difficulties because under Islamic law relating to violence against human body, punishment was almost impossible due to the concepts of pardon and blood money.⁶³ So, Britain tried to transplant English legal rules into Islamic law in India. Thus a hybrid law developed in India, known as Anglo-Muhammadan law.⁶⁴ Subsequently, under judicial reforms plan of Governor General Warren Hastings of 1772 a new system of civil and criminal courts was introduced with a task to apply indigenous legal norms comprised of 'Shariah rules' for Muslims and 'Brahmanic Shasters' for Hindus. Moreover, Muslim scholars called *Maulvis* and Hindu scholars called *Pandits* were to assist judges and magistrates in the matters of respective personal laws.⁶⁵ The Regulation Act of 1773 eliminated Islamic concept of pardon and compensation, i.e. *diyat*, and in a murder case victim's family members were not allowed to pardon offender. Britain rulers were adamant to replace gradually *Shariah* and *Hindu* laws with a uniform law, based on principles of common law. Therefore, colonial masters, after successful administrative and legal control of British East India Company, tried to give a comprehensive criminal law to a heterogeneous population of Indian Subcontinent. Subsequently, few changes into the existing murder law were introduced. For instance, through the Cornwallis Code of 1793, *mens rea* was introduced as a prerequisite for offence of murder. Moreover, through

⁶² Subramanian Lakshmi, 'Criminalising the Subject: Law, Social Reform in Colonial India; Centre for Studies in Social Sciences, Calcutta'. (retrieved online on 12-05-2017)

⁶³ See *ibid.*

⁶⁴ Mehdi Rubya, 'The Islamisation of the Law in Pakistan; Routledge Library Editions, Politics of Islam, Taylor and Francis Group, London & New York, 2015.

⁶⁵ Anderson Michael R., 'Islamic Law and the Colonial Encounter in British India; Arnold, David and Peter Robb (Eds.), Institutions and Ideologies; A SOAS South Asia Reader, London: Curzon Press Ltd. 1993, pp. 165 to 185, at p. 171.

the Regulations of 1797 convicts who were behind the bars for non-payment of blood money were set free and punishment of blood money was replaced with punishment of fine. So government could collect money from offenders instead of legal heirs of victims of offence of murder. Similarly, the Regulations (VIII) of 1799 declared all types of murder punishable with death while the Regulations (LIII) of 1803 provided that no one would be condemned unheard and only after producing evidence against murderer offender could be convicted and punished. Another reform was introduced in 1829 through the Regulations (XVII) whereby Indian *Sati* System⁶⁶ was eliminated and the offence was made punishable as a murder. Again, a major development in respect of legal reforms took place in the year 1833 when the Charter Act was passed and the Governor General for Bengal was given wide powers and he was named as the Governor General of British India. This Act, in fact, transferred all administrative and financial powers to the Governor General in Council, a body of four members. The council was given direction by the British Parliament to set up an Indian Law Commission. In compliance with such direction, the first Law Commission for India was constituted in the year 1834 under the chairmanship of Lord Macaulay.

Main goal given to the first Law Commission was to investigate about powers of courts, functions of courts, rules of courts' procedure, establishing agency of police and preparing a report about a viable legal and judicial system for India. Report of the Commission was to be placed before the British Parliament through the Governor General in Council. The commission first of all had to examine ancient Indian texts for proper understanding of indigenous traditional law. The Commission was

⁶⁶ *Sati* is a word of local Hindi Language. It is used for an old tradition when a wife had to die with the death of her husband.

significantly influenced by the Indian traditional law.⁶⁷ Lord Macaulay intended to transplant English criminal law in India with the destruction of diverse indigenous law i.e. *Shariah* and Hindu law. This was the basic method which Lord Macaulay had already formulated when he left England for India in 1834. For him, basic principle for codification of a uniform criminal law for India was “uniformity when you can have it; diversity when you must have it; but, in all cases certainty”⁶⁸. Though, Lord Macaulay was under the belief that a uniform law might not be acceptable to a heterogeneous society of Indian but different laws for different sections of society were not possible. Simply, the principle coined by Macaulay had three main points that the penal law would be preferably uniform. If uniformity becomes impossible then diversity in law would be acceptable. But in both scenarios law would be certain and impeccable.

First draft of a Penal Code for India was completed in the year 1837 by Thomas Babington Macaulay with the help and assistance of members of the Indian Law Commission. First report was submitted to the Council on 14-10-1837 and final report on 31-12-1837 but the draft was not accepted by the British Government. One of the objections on the draft was that it was borrowed from various other systems relying upon abstract theories of jurisprudence. As a protest Lord Macaulay resigned from the chairmanship of the commission in 1838. British Government constituted a second Indian Law Commission in 1845. The new Commission re-examined the first draft of the Indian Penal Code and presented its report in 1847. The draft was again presented to the Governor General in Council by John Elliot Drinkwater Bethune and

⁶⁷ Sinha Kanad, '*Be it Manu, be it Macaulay: Indian Law and the 'Problem of the Female Body*', *Journal of Indian Law and society*', Volume V; Winter (retrieved online on 18-7-2016) at p. 67.

⁶⁸ Skuy David, '*Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century*', *Modern Asian Studies*, Vol. 32, No. 3. (Jul., 1998), pp. 513-557 at p. 517.

Barnes Peacock in 1856 but it could not be passed by the Parliament of her Majesty due to political cum administrative unrest in Indian Subcontinent and the war of 1857. The war resulted into the victory of English rulers and it ended the Mughal rule too. British Monarch took direct control of India as a colony. The Government of India Act, 1858 gave Monarch absolute sovereignty on Indian Territory with an assurance for Indians that they would enjoy legal protection of their ancient rights, customs and usages. One of the basic problems for British rulers was indigenous legal system for a heterogeneous society of India. Since there was diversity of religion, culture and law in India so it was difficult for Britain to transplant English common law into the law of India. Reluctantly, after a scrutiny of twenty years, the draft was approved by the Council and was passed by the British Parliament on 06-10-1860. Probably, promulgation of the penal code was need of British Government in order to control post-war conduct of masses. The Indian Penal Code, 1860 was accented by 'Her Majesty's Parliament in United Kingdom' and was to enforce in the year 1862.⁶⁹

The draft of the Penal Code for India, prepared in the year 1860, was based on the report of Thomas Babington Macaulay. In his historic work, Macaulay not only relied upon Indian literature for proper understanding of Indian cultural and law but he also tried to draft a law in the light of twentieth century's novel ideas and theories. He, therefore, followed Jeremy Bentham's philosophy⁷⁰ and tried to restrict tendency

⁶⁹ British Government had set up four Law Commissions for giving law to India. In Nineteenth Century four such Commissions for India were constituted. The first of those commissions was established in the year 1834 under the Charter Act, 1833 under the supervision of Mr. Lord Macaulay. The commission proposed codification of a penal code, a criminal procedure code and few other laws.

⁷⁰ Jeremy Bentham, a classical legal Positivist, known as the Luther of English jurisprudence, was a staunch believer of separation of law (as it is) from morality (as law ought to be). Jeremy Bentham, an English jurist, was a critique of common law. He was against law made by judges. He criticized the common law for its complexity and uncertainty.

of judiciary of extending laws through its interpretations.⁷¹ The law relating to the offence of murder was part of the draft given by the Commission.

2.3 A SUCCINCT OVERVIEW OF THE LAW OF HOMICIDE AS DRAFTED BY THE FIRST INDIAN LAW COMMISSION

In its original draft the Commission named offence of murder as 'voluntary culpable homicide'. The term under section 294 of the draft was prescribed as follows:

Sec. 294: Whoever does any act or omits what he is legally bound to do, with the intention of thereby causing, or with the knowledge that he is likely thereby to cause the death of any person, and does by such an act omission causes the death of any person is said to commit the offence of 'voluntary culpable homicide.

Word 'homicide' driven from two *Latin* words; one '*homos*' means human being and second '*caedere*' means killing. Literal meaning of homicide is 'killing one who is a human being'.⁷² Under the draft, offence of voluntary homicide was further categories into two offences, i.e. murder and manslaughter. First draft of the Code defined offence of culpable homicide or murder under section 295 and term manslaughter was defined under section 296 as follows:

Sec. 295; Voluntary culpable homicide is 'murder' unless it be one of the three mitigated descriptions hereinafter enumerated; that is to say, First, Manslaughter;

⁷¹ Leader-Elliott Ian, '*Revising the Law of Murder in the Indian Penal Code: A Macaulayan Reconstruction of Provocation and Sudden Fight*'; University of Adelaide Law School, Australia, University of Adelaide Law School Paper No. 2010-002.

⁷² Mohanty Sachidananda, Mohanty Kumar Sujana, Kumar Patnaik Kiran, '*Homicide in Southern India - A Five-Year Retrospective Study*'; Forensic Medicine and Anatomy' Research, Vol.1, No.2, 18-24 (2013)

“Sec. 296: Voluntary culpable homicide is ‘manslaughter’ when it is committed on grave and sudden provocation, by causing the death of the person who gave that provocation.

Explanation; Provocation is designated as ‘grave’ when it is such as would be likely to move a person of ordinary temper to violent passion, and is not given by way of anything thing done in obedience to the law, or by anything authorised by the law of Civil or Criminal Procedure, or by anything done by a public servant in the exercise of the lawful powers of such public servant, or by anything done by any person in the exercise of the right of private defence against the offender.

Word ‘culpable’ means punishable or criminal.⁷³ On rejection of report of first Law Commission, a second Law Commission was constituted and its report was approved by the British Parliament and the Indian Penal Code, 1860 was enacted. Under the Code, wording of expressions like homicide, “voluntary homicide which amounts to murder” and “voluntary homicide which does not amount to murder” were changed to some extent.

2.4 ANALYSIS OF PROVISIONS OF THE INDIAN PENAL CODE, 1860 RELATING TO THE OFFENCE OF MURDER

Chapter XVI of the Indian Penal Code, 1860 deals with the offence of murder under sections 299 to 309. Under the Code, killing a person or depriving one from his life was termed as culpable homicide.⁷⁴ The term was described under the Code as:

Whoever causes death by doing an act with the intention of causing death, or with the intention of causing bodily injury as is likely to cause death, or with

⁷³ Campbell Black, M. A. Henry, ‘*Black’s Law Dictionary*’; Fourth Edition’, at p. 454.

⁷⁴ Under Section 299 of the Indian Penal Code, 1860. As per observation of the Orissa High Court made in *Narasimh vs. The State of Orissa* 1997, 2 Crimes 78 (Ori.) term ‘homicide’ under the law was used as genus while the term ‘murder’ was used as a specie. In other words all offences of murder are culpable homicide but all offences of culpable homicide are not murder.

the knowledge that he is likely by such act to cause death commits the offence of culpable homicide.

Description of offence of culpable homicide under the Code had three parts. One, when murder was committed with intention; Two, when with intention bodily injury was caused which was likely to cause death; three, when an act was done with knowledge that it would likely cause death. These parts of the offence were further clarified by three subsequent illustrations.⁷⁵ Besides illustrations under section 299 of the Code, three explanations were also provided. Under the first explanation it was said that if a person already suffering from any disorder, disease or infirmity and any act, on the part of accused, had accelerated his death it should be deemed that his death was caused by that act. In other words, law makers, indirectly, had reposed a duty on each individual of taking care of others. Second explanation tells that a person who causes injury was responsible for his act even if injured could be saved by medical treatment. It means, subsequent curing or treatment of injured would not lessen the liability of wrong doer. Similarly, third explanation was about death of a child caused in the womb of his mother. Such death of infant was offence of culpable homicide when any of his limb or part of body was brought forth due to an act on the part of accused. It seems that these explanations were for limiting the defence of accused.

The Code under section 300 provided two categories of culpable homicide, i.e. 'culpable homicide which amounts to murder' and 'culpable homicide which does not amount to murder'. First category included all those situations which were murder. While under exceptions to section 300 all those situations were listed where

⁷⁵ *Jai Prakash v. State* (Delhi Administration), [1991] 2 S.C.C. 32, 42, Intention is defined by Indian Supreme Court as "shaping one's conduct so as to bring about a certain event".

culpable homicide did not amount to murder. Simply, culpable homicide was murder in four ways i.e. when death of a person was caused intentionally or when unintentional injury was caused knowingly that it was likely to cause death or when intentionally caused but was of such a nature that in ordinary course of nature it could cause death or person who does such an act which he knew that it was of imminent danger and probably could cause death and such act he did without any excuse for taking risk. Culpable homicide was not murder in five situations as provided under five exceptions to section 300 of the Code. So homicide was not murder; first, where death was caused while offender was deprived of the power of self-control due to provocation of grave as well sudden in nature; second, when death was caused while taking private defence of one's own person or his property; third, when a person exceeding his lawful authority, for the advancement of public justice, committed death of somebody under the belief that he was doing so in discharge of his official duty without having any bad intention towards the deceased; fourthly, when death was caused as a result of a fight which took place all of a sudden under the heat of passion without any premeditation, without taking unreasonable advantage and without acting in violent or unusual way and lastly when an adult person, i.e. above eighteen years of age, had taken risk of death with consent. All these five exceptions were, in fact, defences of accused charged for murder and these defences were / are commonly known as mitigating circumstances. In case of proof of any of mitigating circumstances accused could not be awarded death sentence. Moreover, a principle was given under the Code that death caused by an act known by doer that his act likely causes death would be an offence of culpable homicide as offender had caused

death with intention and knowledge. So offender neither could take plea that death was not his intention nor that he did not know that his act would cause his death.⁷⁶

The Indian Penal Code, 1860 provided two sets of punishments for murder and for culpable homicide which was not murder. For murder, besides liability to pay fine, two alternative punishments were there under section 302 of the Code, i.e. death and life imprisonment.⁷⁷ On the other hand, homicide which was not murder was not punishable with death. However, the offence of homicide not murder was further categorised into two types under section 304 IPC. First, if death was caused with intention or causing injury having likelihood of causing death then, besides fine, its sentence was transportation for life or maximum imprisonment for ten years. Secondly, if act of causing death was done with knowledge and such act was likely to cause death but not with intention to cause death or bodily hurt which was likely to cause death then punishment, besides fine, was imprisonment up to ten years.

Another offence under the Code was 'attempt to murder'. There were two different scenarios of such an attempt. In the first scenario, attempt was for committing murder.⁷⁸ In this scenario, if person intended to be murdered was survived without sustaining any hurt, the doer of the act was liable to be sentenced with imprisonment for a maximum term of ten years. But if he sustained any hurt then he would be liable to be sentenced with transportation for life. Second scenario was where such an attempt of culpable homicide could not be called offence of murder.⁷⁹ If no injury was sustained, the sentence was either imprisonment up till three years or with fine or with both. In case of sustaining any hurt in such an attempt

⁷⁶ The Indian Penal Code, 1860, section 301.

⁷⁷ Transportation for life was a type of punishment wherein person convicted and sentenced had been sent to different territories outside India as punishment.

⁷⁸ The Indian Penal Code, 1860, Section 307.

⁷⁹ See *ibid*, Section 308.

the offender was liable to be sentenced either with imprisonment up to seven years or with fine or with both.

Suicide was also an offence under the Code and it was categorised into three ways. First, if suicide was committed by a minor or unsound minded person or who is delirious or an idiot or who had taken intoxication, the act of abetment was punishable for the abettor. Sentence for abettor, besides fine, was either death or transportation for life or imprisonment up to ten years.⁸⁰ Secondly, when offender of suicide was not suffering from any of the disabilities, mentioned above, then abettor, besides fine, was liable to be sentenced with imprisonment up to ten years.⁸¹ Thirdly, when a sui-cider had taken such an attempt but unsuccessfully. Surprisingly, such an act on the part of offender was also made liable either with the imprisonment up to one year or with fine or with both.⁸² In the year 1870, for rash and negligent act causing death a new provision was inserted through an amendment into the Penal Code that when death, not amounting to culpable homicide was caused, the act was punishable with imprisonment up to two years or with fine or with both.⁸³

The Indian Penal Code, 1860 was the first codified and uniform general substantive law for Indian Sub-Continent which was neither based on indigenous law nor did it follow any of the personal laws of Indians. Similarly, general procedural law of India was the Code of Criminal Procedure, 1898. The Code remained in force in India till its partition in 1947. Both newly created dominions adopted various laws including both Codes, i.e. the Penal Code, 1860 and the Criminal Procedure, 1898. Under the Code of Criminal Procedure for offence of murder normal punishment was

⁸⁰ See *ibid*, Section 305.

⁸¹ See *ibid*, Section 306.

⁸² See *ibid*, Section 309.

⁸³ See *ibid*, Section 304-A.

death. As under section 367(5) of the Code of Criminal Procedure, 1898 it was required that in offences punishable with death if court decides to convict and punish accused for any sentence other than death then it should state reasons for not imposing capital sentence. Same law is in practice in Pakistan but in India the section was repealed by the Parliament in the year 1955. The (Indian) Code of Criminal Procedure, 1973 nonetheless, provided an altogether different position of law and require judges to give reasons for awarding capital sentence rather awarding life imprisonment.⁸⁴ In other words, unlike the law in Pakistan, under Indian Criminal Procedure normal sentence for offence of murder is imprisonment for life and for awarding capital punishment, judge will have to justify his decision.

2.5 ADOPTION OF INDIAN PENAL CODE, 1860 BY PAKISTAN

The Indian Penal Code, 1860 was adopted by Pakistan after partition of the sub-continent and the Pakistan Penal Code, 1860 became the first substantive law of Pakistan.⁸⁵ Under Chapter XVI of the Code, offences relating to human body were divided into two categories. First category was of those wrongs / offences which deprive a human from life.⁸⁶ Second category is of such offences which affect or damage human person or body.⁸⁷ Generally, under a legal system there are two different aspects of criminal law i.e. substantive and procedural. So far as legal

⁸⁴ The (Indian) Criminal Procedure Code, 1973.

⁸⁵ Pakistan adopted the Indian Penal Code, 1860 vide Adoption of Laws Notification, 1949 wherein the name of the statute was modified and it became the Pakistan Penal Code, 1860.

⁸⁶ Offences defined and penalised under sections 299 to 308 of the PPC relate to the offences of depriving other or others from life by various modes.

⁸⁷ Offences defined or penalised under sections 319 to 338 of the PPC relate to various types of injuries affecting human body.

system of Pakistan is concerned, the Pakistan Penal Code, 1860 is considered the general substantive criminal law while the general procedural criminal law is the Criminal Procedure Code, 1898. Both statutes, respectively, deal with substantive and procedural aspects of law of murder.

Law of criminal procedure, *inter-alia*, provides a mechanism for penalising offenders. The Code of Criminal Procedure, 1898 under schedule II divides offences of the Pakistan Penal Code, 1860 into five different categories.⁸⁸ One, whether offence of murder is cognizable or non-cognisable; two, for each offence in order to procure attendance of accused in court whether summons will be issued or warrant of arrest; three, whether offence is bailable or non-bailable; four, whether offence is compoundable or non-compoundable and lastly which court will adjudicate upon the matter.

Generally, in non-compoundable offences compromise between aggrieved party and offender is not accepted for acquittal of culprits.⁸⁹ Schedule II of the Code of Criminal Procedure, 1898, however, nowhere mentioned about persons who can compound offence of murder. So under the process of Islamization of laws in the year 1997 through an amendment under section 345 of the Criminal Procedure Code, 1898 for offence of *qatl* and its various types, legal heirs of deceased were given authority of compounding offence.⁹⁰ The amendment also added punishments of *qisas* and *diyat* law of Islam under section 57 of the Pakistan Penal Code, 1860 like, *qisas*,

⁸⁸ Offences defined under the Pakistan Penal Code, 1860 are categories in five ways under Schedule-II of the Code of Criminal Procedure, 1898.

⁸⁹ All offences punishable under the Penal Code, 1860 were further categorised into various categories like cognizable / non- cognisable, bailable / non-bailable, compoundable / non-compoundable and jurisdiction of court to try such offences. These categories were provided in Schedule II of the Criminal Procedure Code, 1898 as a part of procedural law.

⁹⁰ Relevant entries of the offence of murder, i.e. *qatl*, under section 345 Cr.P.C. were substituted by the Criminal Law (Amendment) Act-II of 1997.

diyat, daman and arsh etc.⁹¹ Similarly, offence of homicide was not compoundable until the promulgation of the *Qisas and Diyat Ordinance, 1990*. The Ordinance replaced the erstwhile law of murder with Islamic law of *qatl*. Since in Islam murder is a compoundable offence so the legislature considered it expedient to amend the procedural counterpart of law of murder as well. Consequently, relevant provisions and entries of Schedule II of the Code of Criminal Procedure, 1898 were amended accordingly.

2.6 CONCLUSION

Criminal justice system of ancient India can be found under religious scripts but law of murder was not codified. In primitive society of India, most of criminal cases were disposed of by the elders of society at village level. However, basic legal principles and guidelines for judges and rulers can be traced in religious scripts like *vedas, srmitis* and *sastras*. In their writings, Manu and Kotiliya had emphasized on the importance of law, procedure for courts, legal institutions and punishments. Indigenous law of India was traditional but not uniform due to the diversity of Indian society in culture, language, religion, caste and profession.

Muslim rulers of India, however, established a comprehensive judicial system. During the period of Muslim dynasties criminal law of Sultanate was based on *Shariah*. Similarly, during Mughal emperors' era, especially Aurangzeb Alamgir, criminal law was codified by compiling the opinions of jurists. When administrative

⁹¹ The Pakistan Penal Code, 1860, under section 53. Under the repealed section of the Code there were six types of punishments including death, transportation, penal servitude, imprisonment (simple or rigorous), forfeiture of property and fine.

powers in India were assumed by the English East India Company, a law commission was established for drafting a new uniform penal code for India. The Indian Penal Code, 1860 was based on common law principles laid down by judges in their decisions. The Indian Penal Code, 1860 also dealt with the offences of murder and injuries to human body. Under the Code, for the offence of taking life of any person term 'culpable homicide' was used. The Code further divided expression culpable homicide into two categories, i.e. homicide which amounts to murder and homicide which does not amount to murder. Both categories had different punishments. Offence of culpable homicide amounting to murder was intentional killing called murder and under the Code it was made punishable with death while offence of culpable homicide not amounting to murder was, in fact, manslaughter, i.e. offence of killing of human without any intention. When Pakistan came into being, law of murder under the Indian Penal Code, 1860 passed by the British Parliament, became the general substantive law of Pakistan and the Code was named as the Pakistan Penal Code, 1860. Offence of murder, its types and punishments thereof were retained under the Pakistan Penal Code, 1860 till the promulgation of the Criminal Law (Second Amendment) Ordinance, 1990. The Ordinance was not a distinct law but through it only those provisions of the Penal Code, 1860 and the Criminal Procedure Code, 1898 were amended which were suggested to be inconsistent with the injunctions of Islam as laid down in the holy *Quran* and the *Sunnah* of Prophet Muhammad (pbuh).

CHAPTER 3

REPUGNANCY OF LAW OF HOMICIDE TO THE INJUNCTIONS OF ISLAM AND ITS INTERPRETATION

3.1 INTRODUCTION

This chapter is about repugnancy of law of murder, as provided under the Pakistan Penal Code, 1860 and the Criminal Procedure Code, 1898, to the injunctions of Islam. This chapter deals with the question of repugnancy, of laws relating to the offence of murder, to the injunctions of Islam as laid down in the Holy *Quran* and the *Sunnah* of Prophet (pbuh). The chapter provides a brief introduction to, meaning of and distinction amongst few synonymous terms like Islamic law, *Sha'riah* and *Fiqh*. It also discusses the first leading case of the Shariat Bench of the Peshawar High Court in *Gul Hasan Khan's* case wherein a three member bench unanimously held some provisions of the Pakistan Penal Code, 1860 and the Code of Criminal Procedure, 1898 to be repugnant to the injunctions of Islam. Under this chapter, discussion on second leading case of *Muhammad Riaz* on law of murder decided by the Federal Shariat Court will further clarify the decision of the Peshawar High Court in the first mentioned case. The third and last leading judgment is the decision of the Shariat Appellant Bench of the Supreme Court of Pakistan in *Gul Hassan Khan's* case wherein finally the apex court of Pakistan declared the then existing law of murder under various provisions of the Pakistan Penal Code, 1860 and relevant provisions of

the Code of Criminal Procedure, 1898 to be repugnant to the injunctions of Islam and also suggested amendments in order to bring law in conformity with those injunctions. Analysis under this chapter also relates as to how through judgments, higher and superior judiciary of Pakistan had shaped out the *qisas* and *diyat* law of Pakistan in order to bring it in harmony with Islamic injunctions.

3.2 ISLAMIC LAW RELATING TO THE OFFENCE OF MURDER

Islamic law relating to the offence of murder, known as *qisas* and *diyat* law, is based on Islamic injunctions as laid down in the holy *Quran* and the *Sunnah* of Prophet Muhammad (pbuh). Islamic law of *qisas* and *diyat* is also known as *Jinayat*, i.e. law of crimes. The term 'Islamic law' not only denotes injunctions of Islam but it includes interpretation of injunctions of Islam as construed by Muslim jurists by applying settled principles of jurisprudence. There are different terms used in lieu of the term 'Islamic law' like *Shariah*, *Fiqh* and *Usul-ul Fiqh*. Many authors had used these terms in their writings differently.

3.2.1 Meaning of 'Islamic Law'

Islamic law has been understood differently by lawyers, jurists and religious scholars. No comprehensive definition could be found of some relating terms to Islamic law like *Shariah*, *Fiqh* and injunctions of Islam. The term 'Islamic law' has been

described by Professor Imran Ahsan Khan Nyazee, the eminent Pakistani jurist, as follows:

Islamic Law is that law which is based on the injunctions of the *Quran* and the *Sunnah* in accordance with the constitutional requirements. In some cases, the law has its dependent rules of evidence and procedure.⁹²

The term has been explained by another jurist, namely Mr. Auwalu H. Yadudu, in a broader perspective. He not only has based Islamic law on four sources i.e. the *Qur'an*, the *Sunnah*, *Ijmah* (consensus of opinions of jurists) and *Qiyas* (analogical deduction) but also equated it with *fiqh* i.e. rules extracted from four sources of law. He wrote:

Islamic Law means 'the totality of content method and juristic heritage which Muslims consider to be their distinct law. This is contained in or derived from four main sources. In modern times the term Islamic Law has come to mean the law derived from the totality of these sources and is often used interchangeable with the term '*fiqh*'. The term *Shari'ah* has come to acquire a very restrictive import referring to only to those rules of Islamic Law which are derived from these sources.⁹³

Similarly, according to Mr. Mashood A. Badrin every law is considered to be the product of its sources and methods so Islamic law is also a product of its sources and methods. In other words, according to Mr. Mashood A. Badrin Islamic law is derived from *Shari'ah* as its source and *fiqh* as its method. Moreover, Badrin tried to distinguish between source (i.e. *Shari'ah*) and method (i.e. *fiqh*) of Islamic law as follows:

⁹² Nyazee Imran Ahsan, *Jurisprudence*, Federal Law House, Rawalpindi (2015) at p. 30.

⁹³ Yadudu Auwalu H., '*Colonialism and the Transformation of Islamic Law*', *Journal of Legal Pluralism*, 1992, pp. 103- 139 at p. 108.

Distinguishing between Shari'ah and Fiqh is crucial for a proper understanding of Islamic law. Although either of the term is often referred to as Islamic law, they are technically not synonymous. Literally, Shari'ah means 'path to be followed' while *fiqh* means understanding. The first refers more to the sources while the second refers more to the methods of understanding and deriving Islamic law. In the strict legal sense *Shari'ah* refers to the corpus of the revealed law as contained in the Quran and in the authentic Traditions (*Sunnah*) of the Prophet Muhammad (PBUH). It is therefore more appropriate to refer to *fiqh* as Islamic Jurisprudence, meaning the legal interpretation and application of the *Shari'ah*.⁹⁴

In short, according to Badrin distinction between two terms reveals that *Shari'ah* is a source of Islamic law and it is divine in nature so it is immutable and unalterable. On the other hand, *fiqh* is basically understanding of *Shari'ah*, interpretation of *Shari'ah* and application of *Shari'ah* which is man-made in its nature thus amenable to change, alter and repeal according to time and circumstances.

3.2.2 Definition of 'Shariah' under the Enforcement of Sharia Act, 1991

The Enforcement of Sharia Act, 1991 was enacted and enforced for providing supremacy of *Shari'ah* on other laws to the effect that injunctions of Islam as laid down in the Holy *Quran* and the *Sunnah* of the Prophet (pbuh) shall be the supreme law of Pakistan.⁹⁵ The Act, under its interpretation clause has provided an exclusive definition of *Sharia'h* as "In this Act "*Shari'ah*" means the injunctions of Islam as laid down in the Holy *Qur'an* and *Sunnah*"⁹⁶. Though this definition of term *Shari'ah* is statute specific but the legislature has confined the term only to the extent of

⁹⁴ Baderin Mashood A., *Establishing Areas of Common Ground between Islamic Law and International Human Rights*, International Journal of Human Rights, Frank Cass, London, Volume 5, No. 2, (Summer 2001) pp. 72-213.

⁹⁵ Section 3 (1) of the Act gives the supremacy of *Shari'ah* on all other laws. It reads as follows: 'Supremacy of *Shari'ah*: The *Shari'ah* that is to say the Injunctions of Islam as laid in the Holy *Qur'an* and *Sunnah*, shall be the supreme law of Pakistan'.

⁹⁶ Section 2 of the Enforcement of Shari'ah Act, 1991.

primary sources of Islamic law, i.e. the *Quran* and the *Sunnah*. In other words, indirectly secondary and subsidiary sources were excluded from the definition of *Shari'ah*. However, an explanation is given under interpretation clause which further clarifies two things. First that principles of interpretation and explanation of the Holy *Qur'an* and the *Sunnah* shall be followed. Second that it was optional to consider expositions and opinions given by the jurists of Islam irrespective of school of thought they belong to. The Act, however, provides two guiding principles as to how one of the interpretations will be preferred. One, that if many interpretations are possible then the interpretation which is found in accordance with Islamic principles, Islamic sources and jurisprudence would be followed. Two, that if such interpretations are equally consistent then one which advances the principles of policy given and Islamic provisions of the Constitution would be preferred.

After discussing opinions of some jurists and relevant provisions of the Enforcement of Shari'at Act, 1991 now it is pertinent to take a cursory view of the constitutional position of Pakistan. Constitutionally speaking, Pakistan is an Islamic Republic⁹⁷ and Islam is its religion⁹⁸. Ignoring all related questions as to whether or not a State has any religion, the point which is necessary to make here is that founding fathers of Pakistan had intended to enable Muslims to order their lives in accordance with the teachings of Islam, Islamic traditions and other requirements of Islam as laid down in the Holy *Qur'an* and the *Sunnah* of Prophet Muhammad (pbuh).⁹⁹ Simply, the *Qur'an* and the *Sunnah* were assumed to be the sources of

⁹⁷ See Article 1 of the Constitution of Islamic Republic of Pakistan, 1973 which reads as follows: "The Republic and its territories. - (1) Pakistan shall be a Federal Republic to be known as the Islamic Republic of Pakistan".

⁹⁸ See Article 2 of the Constitution of Islamic Republic of Pakistan, 1973 which reads as follows: "Islam to be State religion. - Islam shall be the State religion of Pakistan".

⁹⁹ See the Preamble and Article 2A of the Constitution of Islamic Republic of Pakistan, 1973.

Islamic law. Understandably, for same reasons the concept was adopted in successive constitutions and instead referring Islamic law or *Shari'ah* or *Fiqh* the term 'injunctions of Islam as laid down in the holy *Qur'an* and *Sunnah*' was opted and used in the text of the mother law of the land.¹⁰⁰ Moreover, constitutionally reposed jurisdiction of the Federal Shariat Court as well as the Council of Islamic Ideology is meant to test as to whether or not any law is repugnant to Islamic injunctions rather to test as to whether or not a law was repugnant to Islamic law, *Shai'ah* or *Fiqh*.¹⁰¹ Under this study term 'Islamic law' is taken as injunctions of Islam, as laid down in the *Quran* and the *Sunnah* of Prophet (pbuh), interpretation thereof and juristic principles of Islam.

3.3 LAW OF MURDER IN ISLAM AS CONSTRUED BY THE JUDICIARY OF PAKISTAN

In the light of basic concepts as mentioned above now conveniently evolution of law of murder in Pakistan can be discussed. It was the era of General Zia-ul-Haq when process of Islamization of laws took boost as it was one the core premises, objectives and goals enshrined under the Constitution of Islamic Republic of Pakistan and a promise of the dictator as well.¹⁰² The then Chief Martial Law Administrator successfully utilised the issue of Islamic revolution in social, cultural and legal matters ostensibly in order to prolong his regime. His new resolve became so popular,

¹⁰⁰ See Articles 203D, 227(1) and 229 of the Constitution of Islamic Republic of Pakistan, 1973.

¹⁰¹ See Article 203D (1), Article 229 and Article 230(1)(b) of the Constitution of Islamic Republic of Pakistan, 1973.

¹⁰² *Begam Nusrat Bhutto vs. The Chief of Army Staff and Federation of Pakistan*, PLD 1977 SC 657; General Zia-ul-Haq, the then Chief of Army Staff, through a Proclamation dated 05-07-1977 toppled the government of Mr. Zulfikar Ali Bhutto and imposed Martial Law in Pakistan.

charming and novel that it became the talk of the day. As a first step towards enforcement of *Shari'ah*, Zia-ul- Haq through an executive Order, created a Shariat bench at each and every Provincial High Court. Later on, by another Provisional Order the Federal Shariat Court, a successor to Shariat Benches of High Courts, was created by amending the Constitution of Islamic Republic of Pakistan, 1973.¹⁰³ Through few successive constitutional amendments various provisions were amended or added to the constitution in order to ensure the task of Islamization of laws of the land.¹⁰⁴ So provisions of laws relating to the offences of murder and bodily hurts were challenged before the Shariat Bench of the Peshawar High Court. Subsequently, question of repugnancy of these provisions to the Islamic injunctions was to be decided by the Federal Shariat Court and the Shariat Appellate Bench of the apex court of Pakistan. Generally, function of making law, under constitutional design, is the domain of legislature but ironically prior to making any law on the subject matter, higher and superior judiciary of Pakistan during adjudication of murder cases discussed *qisas* and *diyat* law exhaustively and gave directions to the federal legislature to amend relevant provisions of the law in order to remove repugnancy thereof to the injunctions of Islam. So these judgments passed by the constitutional courts, before introducing law of murder complied with injunctions of Islam by the Parliament, are too important to be ignored at this stage. These judgments not only gave impetus to the process of legislation of *qisas* and *diyat* law of Pakistan but also provided a sketch of future law to the legislature.

¹⁰³ The Constitution (Amendment) Order, 1980, whereby the existing Chapter 3A of Part VII of the Constitution of Islamic Republic of Pakistan was replaced with a new Chapter 3A for the establishment of the Federal Shariat Court.

¹⁰⁴ For instance, Article 2-A was inserted to the Constitution to make the pre-amble of the Constitution a substantive part thereof. The Parliament was given name as *Majlis-e Shoora*. Above all, qualifications and disqualifications for the members of *Majlis-e Shoora* were added into the provisions of the Constitution.

3.4 JUDGMENT OF *SHARIAT* BENCH OF THE PESHAWAR HIGH COURT IN *GUL HASSAN KHAN* CASE

First and one of the most important judgments on the subject matter was given in the case of *Gul Hassan Khan* by a three member *Shariat* Bench of the Peshawar High Court.¹⁰⁵ Judgment of the bench was authored by Chief Justice Abdul Hakeem Khan and concurred by two other members but sans any separate notes. The bench unanimously declared various provisions of the Pakistan Penal Code, 1860 and the Criminal Procedure Code, 1898 to be repugnant to the injunctions of Islam. Compendium of two separate *Shariat* petitions of Gul Hassan Khan and Noor Alam Khan is that both petitioners were convicted under section 302 PPC and sentenced to death in two different FIR cases. They assailed decisions of conviction and sentence through their independent petitions before the *Shariat* bench of the Peshawar High Court and thereby took grounds of age, i.e. minority, at the time of occurrence and compromise affected between parties for seeking benefit of tender age and compounding of or waiving of rights of *qisas* and *diyat*. They alleged that since both grounds were available under Islamic law of murder so their cases should have been dealt with under the injunctions of Islam. In other words, appellants challenged the provisions of section 302 of the Penal Code, 1860, sections 401 to 403, 345, Schedule-II of the Criminal Procedure Code, 1898 and law relating to mercy under Article 45 of the Constitution of Pakistan, 1973 on the touchstone of repugnancy to

¹⁰⁵ *Gul Hassan Khan v. Federation of Pakistan and others*, PLD 1980 Pesh. 1 [Shariat Bench]. The bench was comprised of three judges including Abdul Hakeem Khan (Chief Justice), Muhammad Khursheed Khan and Karimullah Khan Durrani.

injunctions of Islam. The bench initially drew a proposition of law in the form of four questions. First that whether penalty prescribed under the Penal Code, 1860 for offence of murder was repugnant to the injunctions of Islam? Secondly, whether a child could be subjected to punishment of death as *qisas*? Thirdly, whether provisions of sections 54 and 55 PPC and those of sections 401 and 402 Cr.PC were also repugnant to the injunctions of Islam? Lastly, whether provisions of Schedule-II of Cr.PC with regard to offence of murder punishable under section 302 PPC showing it to be non-compoundable and those of section 345 Cr.PC, being part and parcel of substantive law, could be questioned before a Shariat bench despite an explanation to Article 203-B of the Constitution of Pakistan, 1973 that a law relating to procedure of a court or tribunal could not be so questioned? After hearing counsels of parties the bench not only relied on bare texts of the *Qur'an* and the *Sunnah* but also considered valuable opinions of Imams and jurists and observed:

The Holy *Qur'an*, all the authentic compilations of the '*Hadis*', the great Imams and the jurists who followed them to date are unanimous on the point that an offence affecting human body can be disposed of on the basis of a pardon or on payment of '*Diyat*' by the person affected, if he is alive, and in case he be dead, by his heirs.¹⁰⁶

The bench in order to justify its above quoted observation referred three verses of the *Qur'an*¹⁰⁷ supported with their Urdu translations of Indian Scholars.¹⁰⁸

Further, the bench of High Court resorted to *Shahih Al-Bukhari*, a famous

¹⁰⁶ *Gul Hassan Khan v. Federation of Pakistan and others*, PLD 1980 Pesh. 1 [Shariat Bench of PHC], at p. 3.

¹⁰⁷ See *Sura-e Baqara* (Chapter II), Verses 178 and 179, *Sura-e Nisa* (Chapter IV) Verse 92 and *Sura-e Al-e Imran* (Chapter V) Verse 45 of the Holy *Quran*.

¹⁰⁸ The bench benefited from Urdu Translations of the holy *Quran* of *Shah Rafi-ud-Din Mohadis Dehlvi* along with its commentary by *Shah Abdul Qadir Mohadis Dehlvi*, *Moarif-ul Quran* by *Maulana Ashraf Ali Thanvi*, *Tafheem-ul Quran* by *Maulana Abu A'ala Maudoodi*, *Marif-ul- Quran* by *Maulana Muhammad Shafi* and English Translation of *A. Yousaf Ali*.

compilation of narrations¹⁰⁹ of the Prophet Muhammad (pbuh), as a second primary source of Islamic law and few books of jurists of *Sunni* school of thought.¹¹⁰ One of the conclusions drawn by the bench was that a child who did not gain puberty was not liable to punishment of *qisas*. Answering the query about the liability of a child for *qisas* in a case of murder, the bench referred to another very important doctrine of *Hanafi* School known as *siyasa* and relying on the authority of *Radd ul Mukhtar*¹¹¹ held that under the doctrine of *siyasa* a child could be sentenced to death but by way of *ta'zir*.¹¹² Second important aspect discussed by the bench, on the authority of famous writing *Kamlia*¹¹³, was that when murder is committed by a child then he could not be punished in *qisas* rather *diyat* would be paid by his kinship / *aqilah*. However, the bench did not mention that how *aqila* can be constituted under Islamic law and that what will be the quantity and mode of payment of *diyat* payable by the members of *aqilah*. The bench also observed that in a case of murder only three alternate choices for legal heirs of deceased were possible including *qisas* (death in the same manner) *afw* (pardon) or *diyat* (compensatory amount in case of compromise) as have been ordained by the Prophet Muhammad (pbuh). The bench held that under the provisions of section 302 PPC these three options were missing which is a sheer violation of the injunctions of Islam. It was further held that government had no authority under Islamic law to commute, remit or reduce any punishment but courts have such powers. The bench unanimously held provisions of sections 54 and 55 PPC, those of sections 345(7), 401, 402, 402-A and 402-B Cr.PC

¹⁰⁹ Six compilations of narrations of the Prophet (pbuh) are considered the most authentic sources of *Ahadiith* by the *Sunni* School including *Al- Saheh Bukhari*, *Al- Saheh Muslim*, *Al-Sunan Abu Daud*, *Al-Sunan Ibne Maja* and *Al-Mishkat*.

¹¹⁰ *Fatawa Alamgiriya*, *Kamlia*, and *Al-Bada-e Al-Sana-e*.

¹¹¹ The *fatwas* was also given under *Sarim Al Maslul* by *Hafiz ibn-e Taymiya*.

¹¹² PLD 1980 Pesh. 1 at p. 17.

¹¹³ See *ibid* at p. 14.

and those parts of its Schedule-II relating to offences against human body to be repugnant to the injunctions of Islam. The bench, however, suggested amendments required to be made in chapter XVI of the PPC in its entirety within the span of two months of its decision.

The bench of the Peshawar High Court avoided mentioning opinions of Muslim jurists from different schools of thought. Since referred literature in the judgment was of *Hanafi* jurists so it can be presumed that the bench intentionally avoided travelling beyond *Hanafi* school of thought as majority of Muslims in Pakistan are *Hanafi* followers. However, many important aspects of law of murder, the bench failed to discuss first, application of *Hanafi* law on non-*Hanafi* Muslims; second, application of law on non-Muslims; third, method of determination of *diyat* and lastly mode of appointment of *aqilah*. Despite all these lacunas, importance of the judgment cannot be ruled out as this was the first decision which opened a door going through which judiciary, subsequently, had settled the involved issues for good.

3.5 JUDGMENT OF THE FEDERAL SHARIAT COURT IN THE CASE OF MUHAMMAD RIAZ

The second leading case on the issue is of *Muhammad Riaz*¹¹⁴ wherein the Federal Shariat Court¹¹⁵ decided a question which was already dealt with and answered by its

¹¹⁴*Muhammad Riaz etc. vs. Federal Government etc.*, PLD 1980 FSC 1. The case was heard and decided by a five member bench of the Federal Shariat Court after its constitution in 1980. For the sake of brevity only main judgment of case is evaluated here. However, disagreement of any member on a point with main judgment is highlighted as well.

¹¹⁵ A Constitutional Court which was constituted under Chapter-3/A of Part VII of the Constitution of Islamic Republic of Pakistan, 1973 substituted by the Constitution (Amendment) Order, 1980. (P.O. No. 1 of 1980). Earlier to this, Chapter 3/A was incorporated by the Constitution (Amendment) Order, 1979 whereby 'Shariat benches of Superior Courts' were constituted.

predecessor Shariat bench of the Peshawar High Court¹¹⁶ in *Gul Hassan Khan* case. Interestingly, one member of the new court, i.e. Mr. Karim Ulla Durrani, was also a judge of the predecessor court. In this case, main judgment was very scholarly authored by a member namely Justice Aftab Hussain whereby nine petitions, having same question of law, were consolidated and decided. Through these petitions various provisions of different laws¹¹⁷ were challenged before the Federal Shariat Court on the touchstone of being violative of the injunctions of Islam. The Court, in regard to its jurisdiction, gave clarification that under the Constitution only a limited jurisdiction, of examining and declaring repugnancy of a law or provision thereof to the injunctions of Islam, was vested with the Federal Shariat Court¹¹⁸ so court could not travel beyond its constitutionally reposed jurisdiction. The court further clarified that nowhere under the Constitution it was mentioned or allowed to give projection to the opinions of any particular school of thought. In this regard the Court observed:

It would therefore, be clear that the language of the constitution does not warrant an attempts at harmonising the laws with any particular jurisprudence (Fiqh) or jurisprudence of any particular school of thought or sect. On the other hand it appears that reference to any particular doctrinal approach (fiqh) has been eliminated deliberately so as to enable the courts to test the validity of a law only on the criteria of commandments laid down in the holy Qur'an or the Sunnah of the Prophet (peace be upon him).¹¹⁹

¹¹⁶ The Shariat bench of the Peshawar High Court heard *Gul Hassan Khan* case and decided it on 01-10-1979. However, after replacement of the bench with the Federal Shariat Court, new Court decided same and similar questions as decided by the Shariat bench in *Gul Hassan Khan* case. The FSC gave its decision on 23-09-1980, almost a year after the predecessor court's decision. A preliminary question regarding maintainability of the petition was raised before the Court but it was repelled by the successor court for the reason that a three member bench of a Shariat bench of the High Court cannot bind a five member bench of the Federal Shariat Court. Secondly, a bench of the High Court could not claim territorial jurisdiction at federal level.

¹¹⁷ Sections 109, 111, 302, 325, 326, 329, 331, 333, 335 and 338 of the PPC, 1860, sections 337, 338, 339, 345, 544-A and second schedule of the Cr.PC, 1898 and sections 114 (b) and 133 of the Evidence Act, 1872.

¹¹⁸ See Article 203-D of the Constitution of Islamic Republic of Pakistan, 1973 which empowers the Federal Shariat Court only to discover the repugnancy of a law or provisions of law to the holy *Quran* and the *Sunnah* of Prophet (PBUH).

¹¹⁹ *Muhammad Riaz etc. vs. Federal Government etc.* PLD 1980 FSC 1, at p. 14.

It is ironic that, regardless of the above stated clarification, in his judgment Justice Aftab Hussain, the honourable member of the Court, referred and relied upon numerous opinions of jurists besides translations and commentaries of the *Quran* and interpretations of narrations of the Prophet (pbuh). His lordship, however, did not rule out the persuasive value of *fiqh* of different schools of thought rather he clearly held that to follow any particular doctrinal approach, i.e. *fiqh*, was not intended by the legislature as the Constitution only requires repairing what is repugnant to divine law, i.e. the *Qur'an* and the *Sunnah*. Further, in case of any difference of interpretations on a point of law, he suggested to follow the opinion which is found more in the line with requirements of modern Muslim society of Pakistan.¹²⁰ This approach was named by his lordship as a methodology for removing inconsistency of laws to the injunction of the divine law.¹²¹

On the issue of sentence of imprisonment in Islamic law, one argument of Mr. Khalid Ishaq, the amicus curiae, was that there was no concept of sentence of imprisonment in Islam but the Court in its decision did not accept it correct. On the other hand, in his arguments Mr. Muhammad Shafi Muhammadi emphasised that when offence of murder is occurred it always resulted to infringement of two types of

¹²⁰ In his Judgment honourable member Mr. Zakaullah Lodhi observed that the Holy *Qur'an* and *Sunnah* should be interpreted in modern perspectives, i.e. in the light of human society's evolution and demands of human society at a particular time of course. He also observed that such process should not defeat the very spirit and the purpose for the attainment of which Holy *Qur'an* dictates.

¹²¹ See *ibid* at p. 15. Methodology was based on principles adopted by the Council of Islamic Ideology and mentioned under '*Majmua Qawneen-e Islam*' by Dr. Tanzil-ur Rahman including; firstly, finding the relevant verse of the holy *Quran* and accept it if clear. Secondly, in case of differences of interpretations of the verse, finding the relevant tradition of the Holy Prophet (pbuh). Thirdly, if there are differences of traditions, harmonising them if possible or finding more authentic tradition. Fourthly, if there is neither any relevant verse nor tradition then finding consensus of opinions of Companions of Prophet (pbuh) or *Imams*. Fifthly, if there are differences of opinions of *Imams* then the opinion which fulfils the requirements of the present era should be preferred and lastly, if there be no opinion adequate and adjustable to modern requirements or acceptable opinion then to opt any of the several views of jurists.

rights, i.e. rights of God and right of men or individuals. He further elaborated that in Islam rights of God are known as *huqooq-Ullah* and rights of men are known as *huqooq-ul-ebad*. So when any offence is committed or omitted, it varies from case to case as to what type of rights in fact had been infringed. In cases where whole society or a fragment of society becomes aggrieved by offence of unjustified murder, i.e. *qatl-e na-haq*, then it amounts corruption in society and rights of God are infringed. He further contended that in offence of murder accused would be punished with death or imprisonment for life and pardon of legal heirs would not be acceptable. In order to justify his arguments Mr. Shafi Muhammadi referred a principle of Islamic law that an offence of corruption in society is considered more severe than that of murder, i.e. *al-finato a'shaddo min al-qatl*,¹²² and also relied upon chapter V, verse no. 33 of the Holy *Qur'an*.¹²² Mr. Shafi Muhammadi, advocate, criticised those Muslim jurists who confine provisions of the verse only to persons who are charged for offences of sedition, highway robbery or utmost robbery within a city. In this regard, he referred to a commentary of the Holy *Qur'an* by Allama Shabir Ahmad Usmani wherein it was provided that generality of the verse could not be cut down and sentence provided therein could be awarded for unjustified murder, i.e. *qatl-e na-haq*.

In his arguments Mr. Ghulam Mujtaba Saleem, advocate, submitted that word *qisas* as used in chapter 2, verse 178 of the holy *Qur'an* itself carries meaning of compoundability. He further submitted that in several verses of the *Qur'an* language thereof itself throws light on gravity of offence of murder.¹²³ By referring these

¹²² Translation of chapter V, verse 33, which reads as "only reward of those who make war upon *Allah* and His messenger and strive after corruption in the land will be that they will be killed or crucified, or have their hands and feet on alternative side cut off, or will be expelled out of the land. Such will be their degradation in the world, and in the Hereafter theirs will be an awful doom".

¹²³ These verses include chapter IV verses 29, 92 and 93, chapter V, verse 32, chapter VI, verse 152 and chapter XVII, verse 33 of the Holy *Quran*.

verses learned counsel had alleged that these verses themselves were distinguishing offences relating to killing a human being, i.e. justified culpable homicide or homicide with right or slaying with right in the course of justice, manslaughter or corruption on earth and culpable homicide amounting to murder. He also said that *qatl* is considered to be the worst sin, i.e. *gunah-e kabira*, in Islam. The counsel further referred the *tafseer* of *ibn-e Kaseer* wherein it was mentioned that destruction of entire world is easier in the eye of Allah than an unjustified murder of a believer. He, similarly, referred to a translation of famous book *Hujjat-Ullah ul Baligha*, vol. II, wherein at page 431 it was written that the worst of the tyranny is murder and it is the biggest sin. The translation at page 432 further adds that premeditated murder, i.e. *qatl-e amd*, is a cause of corruption, i.e. *fasad*, on the Earth which can be stopped only by severe sentence. Moreover, regarding pardon same translation says while dealing with the verse (4:93) that murderer shall not be pardoned by God / society and this is opinion of *ibn-e Abbas*, a companion of the Prophet (pbuh) as well. He further referred two verses of Holy *Qur'an*, i.e. chapter V, verse 45 and chapter II, verse 179, and established that Almighty Allah had provided the most severe punishment for offence of murder.

Although main question was repugnancy of some provisions of criminal law with the injunctions of Islam but the bench, during adjudication, addressed many other connected questions as well. For instance, whether despite pardon blood money, i.e. *diyat*, can be awarded as punishment? Second, was there any offence of murder in Islam? Third, whether FSC is empowered to declare all laws un-Islamic? Fourth, whether in a murder case rulers or State can punish accused who was not liable to *qisas* due to compounding or forgiving of offence by victim? Fifth, how an abettor

can be punished under Islamic law? Sixth question was as to whether whole PPC should be restructured? Seventh, whether exceptions under section 300 PPC are justifiable under Islamic law and lastly, who will pay amount of *diyat* to victim or his legal heirs?

In his decision justice Aftab Hussain, besides highlighting various verses of the Holy *Qur'an*, referred various compilations of narrations of the Prophet (pbuh) wherein blood money, i.e. *diyat*, was paid regardless pardoning offence by legal heirs of the deceased.¹²⁴ Justice Aftab Hussain analysed some provisions of the Penal Code and suggested amendments thereto so that without changing structure of the Code, repugnancy to injunctions of Islam could be eliminated. Unlike the earlier decision of the Shariat bench of the Peshawar High Court, Justice Aftab Hussain discussed five types of murder, i.e. *qatl*, as has been given under the *Hanafi* school including *qatl-e amd*, *qatl shibh-e amd*, *qatl-e khata*, *qatl-e misl-e khata* and *qatl bi-sabab*. He further added that *qisas* as punishment could only be awarded for *qatl-e amd*, i.e. premeditated murder, but for other types of *qatl* sentence was *diyat*, i.e. blood money. Further he said that, except *qatl-e amd*, all other types of *qatl* fall under section 304 PPC hence are equivalent to the offence of culpable homicide not amounting to murder.¹²⁵ About the definition of culpable homicide under section 299 PPC his lordship observed that it was at par with three terms used under Islamic jurisprudence or *fiqh* including *qatl-amd*, i.e. premeditated murder, *qatl-e shib-e amd*, i.e. unpremeditated murder and *qatl-e khata*, i.e. murder by negligence. Further, if homicide is murder then it is equivalent to *qatl-e amd* and if it does not amount to murder then it may constitute any of *qatl-e shib-e amd*, *qatl-e khata*, *qatl-e misl-e*

¹²⁴ For instance, *Sahi Bukhari*, volume III, Ahadis nos. 1774 & 1775, *Al-Mishkat* vol. II, Hadis no. 1204, *Sunan Abu Daud*, vol. III, page 413, and *Sunan ibn-e Maja*, vol. II, Ahadis nos. 399, 400 & 401.

¹²⁵ *Muhammad Riaz etc. vs. Federal Government etc.*, PLD 1980 FSC 1, at p. 33.

khata or qatl-e sabab.¹²⁶ However, his lordship suggested that since in Islam alternate to death penalty was punishment of *diyat* so under section 302 PPC alternative punishment of *diyat*, i.e. blood money, should be added.

Some provisions of the Code of Criminal Procedure, 1898 were also challenged by the petitioners. His lordship, agreeing with the findings of the Peshawar High Court, held that provisions of sections 55 and 56 of the PPC and provisions of sections 401, 402, 402-A and 402-B of Cr.PC, which give jurisdiction to the respective government to suspend, remit or commute sentence awarded by a court, being not procedural in nature so regarding these sections the Court could validly exercise its jurisdiction. Moreover, he said that if legal heirs of deceased in a murder case enter into a compromise with accused, then government had no choice to reject it. It was also held that due to the involvement of preponderant right of Allah on individual's right, the State could reject compromise and award sentence by way of *ta'zir*.¹²⁷ Further, the Court regarding the provisions, procedural in nature, of section 345 Cr.PC held that it had no jurisdiction to give declaration or direction of amending it for the reason that the Federal Shariat Court had no jurisdiction to declare any procedural law un-Islamic. So in the opinion of Justice Aftab Hussain, decision of the Peshawar High Court to that extent, as taken in *Gul Hassan Khan's* case, was not a correct approach.¹²⁸

One of important issues was related to the powers of rulers under Islam as to whether or a ruler can punish an accused who already was pardoned by the legal heirs of deceased. In his judgment Justice Aftab Hussain observed that punishments of life imprisonment and fine were not forbidden in the *Qur'an* or the *Sunnah*. Secondly,

¹²⁶ See *ibid*, at p. 34.

¹²⁷ See *ibid*, at p. 32.

¹²⁸ See *ibid*, at p. 31.

Under *Hanafi* doctrine of *siyasat-e Shari'ah*, as stated by *Imam ibn-e Taimia*, if elements of mischief, corruption and moral depravity are involved in a murder then ruler could impose punishment of imprisonment and fine even if accused was pardoned by victim or legal heirs.¹²⁹ In the opinion of *Hanafi* and *Malki* schools of thought, State is empowered to impose punishment of one hundred whips. It was further observed that according to *Shafi* and *Hanbali* schools of thought, State is empowered to impose any punishment only when offence of murder has elements of corruption, moral depravity and mischief-mongering. To address the query that who will cheque fairness of compromise, the honourable member agreed with the finding and suggestion made by the Shariat bench of the Peshawar High Court in *Gul Hassan Khan* case that it was duty of court to determine genuineness of compromise between parties regardless that compromise was affected before, during or after conclusion of trial or during appeal.¹³⁰ Regarding the liability of abettor who exercises coercion for murder and due to that coercion murder was committed the court observed that in such a situation according to the opinion of majority jurists both, i.e. killer and abettor, would be liable to death under Islamic law. However, justice Zakauallah did not consider it reasonable to agree with minority opinion of *Hanafi* School and observed that only actual doer would be awarded death penalty as *qisas* but not the abettor.¹³¹ There were two options with court either to get passed totally a new law or amending the existing law. So on the point of either restructuring the existing law or just amending it at some places, observation of the Court was as follows:

¹²⁹ In his judgment justice Aftab Hussain referred three sources including a commentary on verse 45 of Chapter V of the *Quran* written by Allama Yousaf Ali, view point of *Maulana Abdul Majid Dariya bandi* and *Kitab ul Fiqh* by *Abdur Rehman Aljaziri*, vol. V, p. 589.

¹³⁰ *Muhammad Riaz etc. vs. Federal Government etc.*, PLD 1980 FSC 1, at p 30.

¹³¹ See *ibid*, at pp. 33 and 52. In his Judgment Justice Zakauallah Lodhi held that death sentence could only be awarded to abettor if coercion was to put the killer under fear of instant death while mere remote and indirect threats were not enough defence.

It is not necessary to change the whole structure of the Code in this respect since the Code is a valuable document prepared with utmost care and attention and almost every word of it has been interpreted by Courts of law during more than a century. Any fundamental change in the structure of the Code might render all those valuable precedents of no use. This will be an irreparable loss in the field of criminal law. It would also create problems for the Courts and the Members of the Bar. The constitutional requirements will be fulfilled by such amendments in law which may remove its inconsistencies if any with the *Qur'an* and the *Sunnah*.¹³²

In his judgment honourable member also held that there were corresponding exceptions in Islamic law as provided under section 300 PPC which were in favour of accused. In such circumstances accused would not be liable to death penalty as *qisas* but only to punishment of *ta'zir*.¹³³ Last but most important aspect of Islamic law was as to how *diyat* will be paid to legal heirs of deceased? His lordship though did not give considerable detail but concisely and fabulously expressed Islamic concept of *aqilah*, i.e. kinship of accused, who was liable to pay *diyat* to legal heirs of the slain. His lordship indicated briefly that *diyat* might be made by helpers, relatives, sympathisers or members of his group as his *aqilah*.¹³⁴ Significantly, what court failed to discuss was the method of constituting *aqilah* in different circumstances and that who in Islamic State was empowered to constitute it.

Importance of the judgment cannot be ruled out for many reasons. One, it was first time when Islamic law of murder was discussed by the Federal Shariat Court exhaustively and government was directed to follow its guideline. Two, the judgment made job of the legislature easier by providing a clear guideline for amendments. Three, previous decision of the Shariat bench of Peshawar High Court was made

¹³² *Muhammad Riaz etc. vs. Federal Government etc.*, PLD 1980 FSC 1, at p. 34.

¹³³ See *ibid*, at pp. 37 and 38.

¹³⁴ See *ibid*, at p. 39.

more simplified and clarified by the Court.¹³⁵ Fourth, a court of federal level decided repugnancy of provisions of law including sections 302, 304 and 304-A of the PPC for not providing compensation and payment of blood money, i.e. *diyat*, and those of sections 324, 325, 326, 329, 331, 333, 335 and 338 PPC for not providing compensation and sentences of *qisas*, *diyat*, *arsh* and *daman*.

3.6 JUDGMENT OF THE SHARIAT APPELLATE BENCH OF THE SUPREME COURT OF PAKISTAN IN *GUL HASAN KHAN'S CASE*

Third important case on the subject matter is appeal case of Gul Hasan Khan.¹³⁶ Decision of Shariat bench of the Peshawar High Court was assailed by Federation of Pakistan, by way of filing an appeal, before the Shariat Appellant Bench of the Supreme Court of Pakistan.¹³⁷ A bench of five judges of the apex court clubbed eleven Shariat appeals together for involving same questions of law and decided them through a common judgment. The Federation of Pakistan through various appeals had impugned the decision of Shariat bench of Peshawar High Courts as well as decisions of the Federal Shariat Court in Muhammad Riaz case and subsequent cases on

¹³⁵ See *ibid*, Short Order of the Court, at p. 59.

¹³⁶ *Federation of Pakistan through Secretary, Ministry of Law and another vs. Gul Hasan Khan*, PLD 1989 SC 633. When decision of the Shariat bench was assailed, the case of Muhammad Riaz was pending adjudication before the Federal Shariat Court. However, after its disposal Federation of Pakistan preferred appeal against its decision as well before the Shariat Appellate Bench of the Supreme Court of Pakistan. Both appeals along with other nine connected appeals were heard and decided by a common judgment.

¹³⁷ Shariat Appeal No. 1 was heard, along with other ten appeals having same questions of law, by a larger bench of (i) Muhammad Afzal Zullah (Chairman), (ii) Nasim Hasan Shan, (iii) Shafi ur Rahman, (iv) Pir Muhammad Karam Shah and (v) Maulana Muhammad Taqi Usmani. Main judgment was authored Pir Muhammad Karam Shah, however, separate notes were given by Maulana Taqi Usmani and Justice Shafi-ur-Rahman.

various grounds. One of such grounds was that impugned decisions were not in accordance with injunctions of the *Qur'an*. Secondly, the Federal Shariat Court had failed to consider many narrations of the Prophet (pbuh) mentioned under authenticated compilations like *Sahih Bukhari* and *Sahih Muslim*. Thirdly, provisions of section 302 PPC were not repugnant to the injunctions of Islam so opinion of the Court was not acceptable. Fourthly, the Court had ignored prevalent social concerns and public welfare in its decisions. Fifthly, decisions of the Court regarding repugnancy of the provisions of PPC and Cr.PC to the injunctions of Islam was not correct hence not acceptable and lastly that there was a controversy between both courts, i.e. Shariat bench of the Peshawar High Court and the Federal Shariat Court on the point of jurisdiction and same would ultimately be resolved by the apex court. The Shariat Appellate Bench of the Supreme Court heard and unanimously decided all appeals. The bench holistically agreed with the decision of the Federal Shariat Court in *Muhammad Riaz* case. However, in his judgment Mr. Justice Pir Muhammad Karam Shah disagreed with the decision of the Federal Shariat Court on few points. For instance, disagreement of the Appellate bench was on the finding of Justice Aftab Hussain that when legal heirs settle a matter through compromise then they cannot forgive *diyat*. Nonetheless, Justice Pir Muhammad Karam Shah, under the authority of *Al-Tashrih Al-Jenai Al-Islami* by Abdul Qadir Aodah, had opined that under injunctions of Islam there were three options for legal heirs of deceased, i.e. to demand *qisas* or to demand *diyat* or to compound offence on any other consideration. He further elaborated that if legal heirs consider it appropriate even they can forgive accused without demanding anything from accused.¹³⁸ Second disagreement of his

¹³⁸*Federation of Pakistan through Secretary, Ministry of Law and another vs. Gul Hasan Khan*, PLD 1989 SC 633, at p. 655.

lordship relates to the finding of the Court that the Federal Shariat Court under Article 203-B of the Constitution of Pakistan, 1973 has no jurisdiction to amend any procedural provisions of section 345 of the Criminal Procedure Code, 1898. The Appellate bench observed that provisions of section 345 Cr.PC were not only procedural but substantive as well so decision of the Peshawar High Court on this point was held correct and same was approved.¹³⁹ The effect of the decision of the Appellate Bench was that impugned judgment of the Federal Shariat Court was upheld by declaring various provisions of the PPC, 1860 and the Criminal Procedure Code, 1898 to be repugnant to injunctions of Islam as laid down in the Holy *Qur'an* and the *Sunnah* of the Prophet (pbuh) and the federal legislature was directed to bring those provisions in conformity with injunctions of Islam by introducing appropriate amendments.¹⁴⁰ On the point of stringency and severity of punishment of *qisas* than *diyat*, in his judgment, Justice Pir Muhammad Karam Shah quoted Imam Malik who opined¹⁴¹ that in case of *ta'zir*, punishment may become more stringent than *qisas* while Justice Taqi Usmani extended his personal opinion that punishment in *ta'zir* should not be more severe than that by way of *qisas*.¹⁴² The bench not only declared the then law of murder to be against injunctions of Islam but made its decision effective from 23rd March 1990 and that by that point of time, to the extent of repugnancy, the provisions would cease their effect.

The Shariat Appellate Bench of the apex court did not discuss mitigating circumstances under section 300 PPC. A mitigating circumstance reduces the severity of offence of murder and converts it homicide not amounting to murder. It is also a

¹³⁹ See *ibid*, at p. 657.

¹⁴⁰ Sections 54, 55, 109, 110, 111 and 299 to 338 of the PPC, 1860 while sections 337, 338, 339A, 345 and 381 of the Cr.PC, 1898 were held to be repugnant to the injunctions of Islam.

¹⁴¹ *Federation of Pakistan vs. Gul Hasan Khan*, PLD 1989 SC 633 at p. 660.

¹⁴² See *ibid*, at p. 671.

debatable question as to whether mitigating circumstances are recognised under Islamic criminal law or not? On this point view adopted by Justice Aftab Hussain in *Muhammad Riaz* case was that it was not difficult to reconcile the exceptions to section 300 PPC with the injunctions of Islam. In this regard he observed:

Exceptions to section 300 also do not present any difficulty in respect of reconciliation with Qur'an and Sunnah. The first exception is where death is caused when the offender was deprived of power of self-control by grave or sudden provocation or by mistake or accident. Death caused by accident or mistake is nothing but murder by error [...]. Provocation when grave and sudden would take the matter out of the category of intended or premeditated murder.¹⁴³

View of Justice Aftab Hussain in *Muhammad Riaz* case was neither rejected nor objected by majority of members of the bench of Shariat Appellate Court in *Gul Hasan Khan's* case.¹⁴⁴ However, Justice Muhammad Taqi Usmani, a member of the bench, took a different view on the exemption of grave and sudden provocation under Islamic law. According to him, Islamic law does not recognise grave provocation and who kill their wives and their paramours due to grave provocation for committing a sex act, are not protected under Islam but they are absolved from liability of murder because the deceased, by committing an offence punishable with death, had lost his status of *ma'sum-ud-dam* which means he had lost right of protection of law.¹⁴⁵ However, argument of Justice Usmani was not found convincing by Professor Imran Ahsan Khan Nyazee. According to Professor Nyazee, by a closer examination of the traditions quoted by Justice Usmani it becomes clear that under such cases element of

¹⁴³ *Muhammad Riaz etc. vs. Federal Government etc.*, PLD 1980 FSC 1, at pp. 35, 36.

¹⁴⁴ *Federation of Pakistan vs. Gul Hasan Khan*, PLD 1989 SC 633. Justice Pir Muhammad Karam Shah, at page 654 of his judgment, agreed with the decision of the Federal Shariat Court except at few points. However, view of the FSC on provocation, sudden as well as grave, was not objected by Justice Pir Muhammad Karam Shah and majority of other members.

¹⁴⁵ See *ibid*, at pp. 674 to 676.

grave provocation was involved.¹⁴⁶ Professor Nyazee has given a further reason that if a suspect of offence punishable with death becomes *ghair-ma'sum-ud-dam* then killing is lawful in the cases of blasphemy, apostasy, murder, treason and unlawful sexual intercourse. Professor Nyazee explains further that a killer of his wife still retains the status of *ma'sum-ud-dam* under Islamic law and he is protected from shedding of his blood. He further emphasised that cases of *shubha fil-dala'il*, i.e. mistake of law, were applicable in days when law was not clear but now when law has become published and known, ignorance of law is no excuse. He also points out that Islamic procedure of *lia'n*, in cases where husband doubts character of his wife, negates the justification of killing a wife.

Although the bench upheld the decision of the Federal Shariat Court, disagreeing at some points, but few important aspects of the *qisas* and *diyat* law, discussed by the Federal Shariat Court, were not taken up by the Appellate Bench including the *Hanafi* School's doctrine of *siyasah*, concept of *qasamah* and principle of *aqilah*. However, under main judgment the Shariat Appellate Bench of the Supreme Court, instead mentioning the *Hanafi* doctrine of *siyasah shariah*, conceded the authority of court or power of ruler of awarding punishment of *ta'zir*. It was also observed by the bench regarding punishing accused of offence of murder by way of *ta'zir* that accused could be punished by ruler or court by way of *ta'zir* under the principles of 'maslihat-e aama' and 'mafad-e aama', i.e. public interest, but with an ambiguous opinion that where *qisas* is not applicable death should not be awarded as *ta'zir*.¹⁴⁷

¹⁴⁶ Nyazee, Imran Ahsan Khan, *Grave and Sudden Provocation in Islam*, Advanced Legal Studies Institute, Islamabad. Online retrieved on 11-07-2016.

¹⁴⁷ See *ibid*, at pp. 658, 659.

3.7 CONCLUSION

Analysis of three early cases can be summarised in this concluding paragraph. In the case of *Gul Hassan Khan* before the Shariat Bench of the Peshawar High Court petitioner had challenged his conviction under section 302 (b) PPC and death sentence on the ground that impugned decision was contrary to Islamic law for under Islamic law ground of tender age and compromise between parties are valid grounds for acquittal of accused which are missing under the law. He therefore, prayed for declaring relevant provisions of law to be repugnant to Islam injunctions. The petition was allowed and provisions of section 302 (b) PPC were declared to be repugnant to injunctions of Islam as they do not provide option of compounding offence nor a minor was exempted from execution of death sentence. The bench also declared un-Islamic few other relevant provisions of the Pakistan Penal Code, 1860 and the Code of Criminal Procedure Code, 1898 to the offence of murder.

After the decision of the Peshawar High Court, through a constitutional amendment a new Court, i.e. the Federal Shariat Court, was constituted which replaced the Shariat Benches of provincial High Courts. Resultantly, a similar Shariat Petition was moved before the Federal Shariat Court challenging some provisions of law of murder on the ground of repugnancy thereof to the injunctions of Islam. Through its detailed judgment the Federal Shariat Court in the case of *Muhammad Riaz* approved earlier decision of the Peshawar High Court with a few differences. Decisions given by both courts were based on *Hanafi* law as all references, commentaries and translations, relied upon, were of *Hanafi* jurists. Both courts however, had emphasized upon the doctrine of *siyasah* and principle of *aqilah*, two

important techniques of *Hanafi* law for adjudication and implementation of *qisas* and *diyat* law.

The decision of the Shariat Bench of the Peshawar High Court in *Gul Hassan Khan's* murder case and the decision of the Federal Shariat Court given in *Muhammad Riaz'* case were consecutively challenged before the apex court. The Supreme Court decided all similar cases through a common judgment in *Gul Hasan Khan* case. In fact, decision of the apex court was an elaboration of the findings of both earlier cases. However, the apex court unlike courts below analysed opinions of other non-*Hanafi* jurists of Sunni school of thought as well. For reasons best known to the bench, *Hanfi* school's doctrine of *aqilah* and concept of *qasamah* were neither discussed nor recommended by the apex court in its judgment. Nonetheless, the Appellate Bench finally declared various provisions of the PPC and Cr.PC to be repugnant to Islamic injunctions and directed the federal legislature to amend those provisions to make the existing law as *Shari'ah* compliant. Regarding the scope of provocation, which might be grave as well as sudden, majority members of the bench did not disagree with the earlier finding of the Federal Shariat Court in *Muhammad Riaz'* case except minority opinion given by Justice Usmani. As the larger bench of the apex court did not discuss under main judgment the ground of provocation under the law of *qatl-i-amd* in Islam so an inference can be drawn that majority of judges was not willing to incorporate mitigating circumstances of the erstwhile law into the new Islamised law. Nonetheless, one member of the bench emphasised the scope of ground of provocation in Islam.

CHAPTER 4

LEGISLATION AND ENFORCEMENT OF *QISAS* AND *DIYAT* LAW OF PAKISTAN

4.1 INTRODUCTION

The first Draft Ordinance of *qisas* and *diyat* law of Pakistan was finalised in the year 1980 by the Council of Islamic Ideology but it could not be made law. However, complying with the directions of the Supreme Court of Pakistan, given in *Gul Hasan Khan's* case, law relating to the offence of murder was amended in order to bring it in accordance with the decision of the apex court through the Criminal Law (Second Amendment) Ordinance, 1990. This chapter concisely explores the legislative process of *qisas* and *diyat* law in Pakistan. Since law of *qisas* and *diyat* in Pakistan was enacted in the light of judgment of the apex court so this chapter deals with three earlier versions of legislation. The chapter gives an analysis of the provisions of the first Draft Ordinance, 1980. An analysis of the provisions of the Criminal Law (Second Amendment) Ordinance (VII of 1990) in comparison with the earlier Draft Ordinance, 1980 is also provided under this chapter. This chapter also covers main features of the Criminal Law (Amendment) Act (II of 1997) and highlights points of divergence with the Draft Ordinance, 1980 and the Ordinance (VII of 1990). The chapter also introduces to the subsequent important amendments into the Act (II of 1997). In the end, it discusses the extent to which the legislature had complied with the Supreme Court's directions given in the judgment of *Gul Hasan Khan's* case.

4.2 EVOLUTION OF *QISAS* AND *DIYAT* LAW THROUGH LEGISLATIVE PROCESS

Decision of apex court in *Gul Hasan Khan's* case was to cease the effectiveness of various provisions of the Pakistan Penal Code, 1860 and the Code of Criminal Procedure, 1898 relating to bodily injuries and murder from 23-03-1990.¹⁴⁸ The then government, however, successfully got extension of time till 05-09-1990 by filing a revision petition before the apex court.¹⁴⁹ Therefore, the government at any cost had to get pass and promulgate an amended law within extended time. About a decade before directions given by the Supreme Court in *Gul Hasan Khan's* case, a draft of *qisas* and *diyat* law was prepared by the Council of Islamic Ideology. The Chairman of the Council, Justice Afzal Cheema was to accomplish the task of drafting new law relating to bodily hurts and murder according to *Shariah*.¹⁵⁰ Two drafts, one of *qisas* and *diyat* law and other of *hudood* laws were prepared in the year 1979 by the Islamic Council. The draft of *qisas* and *diyat* law, along with five other laws, was presented before the then President Zia-ul-Haq for issuing a proclamation for implementation of new laws but the President refused to approve and implement the draft containing *qisas* and *diyat* law because the result of Bhutto's trial could be different under Islamised law of murder¹⁵¹ due to pardon and compromise, two salient features of Islamic law of murder. Trial of Mr. Zulfiqar Ali Bhutto, a former prime minister of

¹⁴⁸ *Federation of Pakistan vs. Gul Hasan Khan*, PLD 1989 SC 633 at p. 645.

¹⁴⁹ *Federation of Pakistan and Another vs. NWFP Government and Others*, PLD 1990 SC 1172.

¹⁵⁰ The Council of Islamic Ideology, successor of the Advisory Council for Islamic Ideology of the Constitution of Pakistan 1962, was incorporated under Article 228 of the constitution of Islamic Republic of Pakistan, 1973 for the purpose of determining as to whether a law was or was not repugnant to the injunctions of Islam.

¹⁵¹ Wasti Tahir, '*The Application of Islamic Criminal Law in Pakistan: Sharia in Practice*', Brill's Arab and Islamic Laws Series, Volume II, Edition 2009, at p. 107.

Pakistan, for offence of murder was conducted by a five member bench of the Lahore High Court and was concluded with his conviction and death sentence.¹⁵² Since under the then criminal law of Pakistan offence of murder was non-compoundable, so seeking any protection of compromise or pardon was out of question. Conviction and sentence awarded by trial court was assailed by Mr. Bhutto before the Supreme Court through filing a criminal appeal which was dismissed and his sentence of death was confirmed on 06-02-1979.¹⁵³ After few days of the decision of Bhutto's case, through a Presidential Order No. 3 of 1979 Shariat Bench in each High Court was created which could decide the fate of law inconsistent with injunctions of Islam.

Initiative of legislating Islamic law of murder in Pakistan was first taken up in the year 1980 when a Draft Ordinance was finalised but it could not be made law. A second attempt was the Criminal Law (Second Amendment) Ordinance, 1990 which was enforced as the first *qisas* and *diyat* law of Pakistan but the Ordinance was further amended more than twenty times in order to make it flawless and more refined.¹⁵⁴ In the light of a judgment of the Lahore High Court in *Muhammad Ashraf v. The State*¹⁵⁵ the Ordinance was finally amended and an Act was passed by the Parliament as the Criminal Law (Amendment) Act, 1997. Despite all legislative efforts, judges through interpretation had to fill in the gaps of new law and it was not less than a challenge for the Pakistan judiciary. Before detailed discussion on

¹⁵² *The State vs. Zulfiqar Ali Bhutto and others*, PLD 1978 Lah. 523. In this case five accused persons were charged under sections 392, 120-B, 301 and 311 PPC and all of them, including Zulfiqar Ali Bhutto, were sentenced to death for the murder of Nawab Muhammad Ahmad Khan Kasuri.

¹⁵³ The bench of trial court unanimously convicted him under sections 120-B/115, 109, 111, 301, 302 and 311 PPC and punished with death. The decision of trial court was assailed, by Mr. Bhutto by preferring an appeal, to the Supreme Court of Pakistan but appeal was dismissed and decision of trial court was sustained by the apex court. A review petition against the decision of the Supreme Court was also filed which was dismissed as well by the apex court. The judgment given in review petition is reported as PLD 1979 SC 741.

¹⁵⁴ See the decision of the larger bench of the apex court in *Riaz Ahmad vs. The State*, 1998 SCMR 1729.

¹⁵⁵ PLD 1991 Lah. 347.

interpretative role of judiciary regarding *qisas* and *diyat* law of Pakistan, it is better to take a bird's eye view of the legislative role in drafting the Draft Ordinance, 1980, promulgating the Ordinance (No. VII of 1990) and passing the Act (II of 1997).

4.3 THE DRAFT ORDINANCE, 1980 ON *QISAS* AND *DIYAT* LAW – FIRST ATTEMPT TOWARDS ISLAMIZED LAW

The first draft of *qisas* and *diyat* law was prepared by the Council of Islamic Ideology in the year 1980 under chairmanship of Mr. Justice Afzal Cheema but it could not be enforced for not getting approval of the then President. The Draft Ordinance was known as the Offences against Human Body (Enforcement of *Qisas* and *Diyat*) Ordinance, 1980 and it was applicable to every citizen of Pakistan whether he be within or outside the territory of Pakistan or to any ship or aircraft registered in Pakistan irrespective of its presence in the world.¹⁵⁶ Interpretation clause of the Draft Ordinance defined some Arabic terms and expressions into English. Alternative word used for offence of murder was '*qatl*' and instead defining it, kinds of *qatl* were given under interpretation clause of the Draft as '*qatl*' means *qatl-i-amd*, *qatl-e shib-hul-amd* or *qatl khata*.¹⁵⁷ Under the Draft Ordinance, term *qisas* was defined exclusively as a punishment by causing similar hurt at the same part of the body of offender as he has committed *qatl-i-amd* in exercise of right of *wali* or *awliya*.¹⁵⁸ While term '*ta'zir*' was a type of punishment other than *qisas*, *diyat*, *ursh*, *daman* or *hadd*.¹⁵⁹ Term '*diyat*' was defined under the Draft as compensation to be paid by a convict or his

¹⁵⁶ See section 1 of the Draft Ordinance, 1980.

¹⁵⁷ See section 2 (l) of the Draft Ordinance, 1980.

¹⁵⁸ See section 2 (m) of the Draft Ordinance, 1980.

¹⁵⁹ See section 2 (n) of the Draft Ordinance.

'*aqilah*' to the heirs of victim as compensation for committing *qatl*.¹⁶⁰ An accused, charged for causing hurt, when was convicted by a judge and sentenced with *qisas* was named under the Draft as *ghair-masoom* which means a guilty person.¹⁶¹ Similarly, a person who was declared guilty by a court for offence of *qatl* was named as *ghair masoom-ud-dam*.¹⁶² Word *mustamin* was defined as "a non-Muslim citizen of a non-Muslim State who is on a lawful temporary visit to Pakistan".¹⁶³ Moreover, a person who was finally held guilty of *qatl-i-amd* was termed as *ghair masoom-ud-dam* for legal heirs of victim but for other persons he would be *masoom ud-dam*, i.e. having no liability against others for offence of *qatl*.¹⁶⁴ Term *qatl-i-amd* was defined under section 4 of the Draft Ordinance as follows:

Whoever intentionally causes the death of any other person by means of an act which in the ordinary course of nature is sufficient to cause death or is likely to cause death is said to commit *qatl-e amd*.¹⁶⁵

There drafters had placed two categories of punishment for the offence of *qatl-i-amd* under section 5 of the Draft Ordinance, 1980 i.e. punishment of death as *qisas* and death as *ta'zir*. Sentence of death could be inflicted on offender of murder under any of the two categories but requirements of evidence for sentence of death as *qisas* were different than that of awarded as *ta'zir*.

¹⁶⁰ See section 2 (d) of the Draft Ordinance.

¹⁶¹ See section 2 (e) of the Draft defined the term as "*ghair-masoom* means a citizen of Pakistan, a Muslim citizen of any other State or a *mustamin* who has been finally convicted by a court in Pakistan of an offence punishable with the same kind of hurt which is caused to him by another person". On the other hand, expression *masoom* was negatively defined under section 2 (h) as "a person other than *ghair-masoom*" means a non-convict and innocent.

¹⁶² See section 2 (k) of the Draft which defined the term as "*ghair masoom-ud-dam*' means a citizen of Pakistan, a Muslim citizen of any other State or a *mustamin* who has been finally convicted of an offence punishable with death".

¹⁶³ See section 2 (k) of the Draft Ordinance.

¹⁶⁴ An Explanation was added under Section 2 (f) for clarifying that a person held *ghair masoom-ud-dam* by a judge is not for all *ghair-masoom-ud-dam*.

¹⁶⁵ See section 4 of the Draft Ordinance.

4.3.1 Death Punishment of *Qatl-i-Amd* as *Qisas* under the Draft Ordinance

Under the Draft Ordinance, 1980 accused was liable to be sentenced to death as *qisas* when victim was *masoom-ud-dam*, i.e. not guilty of any *qatl*. Proof of *qatl-i-amd* liable to *qisas* was either confession of accused or deposition of two male Muslim witnesses fulfilling the criterion of *Tazkiyah-al-Shuhood*. However, if accused was non-Muslim then witnesses could be non-Muslim.¹⁶⁶ There were five categories, under the Draft, of offenders of *qatl-i-amd* when accused was not liable to *qisas*. One, when accused was child or unsound minded but his *aqilah* was to pay *diyat* to the legal heirs of deceased. Two, father or grandfather was also not liable to *qisas* when he murdered his son or grandson. Three, when legal heir of deceased was also son or grand-son of offender, such offender of *qatl-i-amd* was not liable to *qisas*. Four, when *wali* of deceased is not, despite efforts, known and lastly when *qatl* was committed on the instance of deceased. However, in the last four categories of offence of *qatl*, offender was liable to pay *diyat* to the legal heirs of victim.¹⁶⁷

Under the Draft Ordinance, in few circumstances, death punishment as *qisas* was not enforceable. First, when before enforcement of *qisas* offender passes away. Secondly, when any *wali* of the victim waives right of *qisas* or compounds offence. Thirdly, when offender himself comes in a position to exercise right of *qisas* on the death of any *wali* and lastly when a person cannot claim *qisas* against offender.¹⁶⁸ The Draft Ordinance also discussed the concepts of waiver (*afw*) and compromise (*sulh*) in case of *qatl*. Waiver or *afw* was an option for an adult and sane *wali* of victim to waive his right of *qisas* at the time of execution of *qisas* without demanding

¹⁶⁶ See section 10 (ii) of the Draft Ordinance.

¹⁶⁷ See section 12 of the Draft Ordinance.

¹⁶⁸ See section 13 of the Draft Ordinance.

any compensation from accused. However, the State as a *wali* of deceased was not allowed to wave right of *qisas*. Similarly, no one was allowed to waive right of *qisas* on behalf of *wali* either minor or insane. If two or more victims were there, waiver of *qisas* by legal heirs of one victim was not considered waiver for other offenders. On the other hand, when there are more offenders of *qatl* then waiver to the extent of one accused was not waiver for all accused persons.¹⁶⁹ However, compounding of offence was another option when, instead waiving right of *qisas*, compromise was affected between parties and *wali* of deceased had agreed on receiving some consideration from offender.¹⁷⁰ Such consideration or compensation was named under the Draft Ordinance as *badl-e sulh*. Unlike punishment of *qisas*, father or grandfather was allowed to compound *qisas* on behalf of minor or insane but not on less *badl-e sulh* than amount of *diyat*.¹⁷¹ According to the Draft Ordinance, compensation, i.e. *badl-e sulh*, must be mutually agreed which could be moveable property like cash or immovable property.¹⁷² Another salient feature of the Draft Ordinance was that, regardless of waiver of *qisas* or compounding offence of *qatl* by any *wali* of deceased, courts were empowered to award any sentence of imprisonment up to twenty five years as *ta'zir*.¹⁷³

In case of *qatl-i-amd*, the Draft Ordinance also provided method of execution of punishment of death as *qisas*. As per given method, execution of death punishment was to take place in public, in presence of legal heirs of deceased or their representative and offender was to beheaded by an authorised officer with the help of

¹⁶⁹ See section 14 of the Draft Ordinance.

¹⁷⁰ See section 15 (1) of the Draft Ordinance.

¹⁷¹ See section 15 (2) of the Draft Ordinance.

¹⁷² See section 15 (4) & (5) of the Draft Ordinance.

¹⁷³ See section 16 of the Draft Ordinance.

sword or in any other way causing minimum pain to the offender.¹⁷⁴ Moreover, permission of execution of sentence was to be given by a *wali* or *awliya* or their representative or in absence of both by a representative of State. However, under the Draft Ordinance, a pregnant lady was exempted from execution of sentence of death till miscarriage or for two years after the birth of child.¹⁷⁵

4.3.2 Punishment of *Qatl-i-Amd* by Way of *Ta'zir* under the Draft Ordinance, 1980

Under the Draft Ordinance, 1980 if victim of the offence of *qatl* was not *ma'soom-ud-dam*, i.e. he himself was convict or guilty of offence and lost protection of law, then accused was not liable to punishment of *qisas* but liable to sentence by way of *ta'zir*. In the Draft Ordinance under the category of *ta'zir* punishment there were three options of punishment and the offender could be sentence with either of such punishment. The accused of *qatl-i-amd* was either liable to be sentenced with life imprisonment and whipping but not more than thirty nine stripes or with death or with *diyat*.¹⁷⁶ Further, when proof required for *qisas* sentence was not available, or *qisas* could not be enforced or offender was not liable to the punishment of death as *qisas* then presiding officer of the court could punish accused by way of *ta'zir*.¹⁷⁷ However, when court awarded sentence of *diyat* then it was also empowered to inflict any sentence of imprisonment up to twenty five years.¹⁷⁸

¹⁷⁴ See section 19 (1) of the Draft Ordinance.

¹⁷⁵ See section 19 (3) of the Draft Ordinance.

¹⁷⁶ See section 5 (ii) & (iii) of the Draft Ordinance.

¹⁷⁷ See section 5 (ii) (a)(b)(c) & (d) of the Draft Ordinance.

¹⁷⁸ See proviso of Section 5 of the Draft Ordinance.

4.3.3 Types of Qatl under the Draft Ordinance, 1980

The Draft Ordinance, 1980 provided three types of *qatl*. One, *qatl-i-amd* as discussed above. Kinds of *qatl-i-amd* were also provided under the Draft Ordinance like killing one by stone, club, hammer, strangulation, poisoning and drowning in water.¹⁷⁹ Similarly, *qatl-i-amd* included a *qatl* committed conjointly¹⁸⁰, a *qatl* committed by consecutive acts of different persons¹⁸¹, a *qatl* committed by *ikrah-e tam*¹⁸², a *qatl* committed by *ikrah-e naqis*¹⁸³ and a *qatl* committed by aid whether by persuasion, inducement or instigation.¹⁸⁴ However, quantum of sentence was slightly different for each kind of *qatl-e amd*. Second type of *qatl* was *qatl-e shib-hul-amd* which was an offence of *qatl-i-amd* but committed with a weapon or an act which normally and usually was not likely to cause death of other person.¹⁸⁵ Offender of *qatl-e shib-hul-amd* was liable to sentence of imprisonment up to 25 years and his *aqilah* was responsible to pay *diyat* to the legal heirs of deceased when victim / deceased was innocent, i.e. *masoom-ud-dam*. But if victim was *ghair masoom-ud-dam*, i.e. guilty of offence, then offender was liable to punishment of rigorous imprisonment up to twenty five years and whipping up to twenty five stripes.¹⁸⁶ Third type of *qatl* was *qatl-i-khata* which was a *qatl* without intention.¹⁸⁷ Punishment of *qatl-i-khata* was *diyat* to be paid by the *aqilah* of offender when victim was innocent i.e. *masoom-ud-dam*. But punishment for offender of *qatl-i-khata* was any imprisonment up to ten

¹⁷⁹ See section 4 of the Draft Ordinance.

¹⁸⁰ See section 6 of the Draft Ordinance.

¹⁸¹ See section 7 of the Draft Ordinance.

¹⁸² See section 8 (a) of the Draft Ordinance.

¹⁸³ See section 8 (b) of the Draft Ordinance.

¹⁸⁴ See section 9 of the Draft Ordinance.

¹⁸⁵ See section 20 of the Draft Ordinance.

¹⁸⁶ See section 21 of the Draft Ordinance.

¹⁸⁷ See section 22 of the Draft Ordinance.

years when victim was *ghair masoom-ud-dam*, i.e. one who is guilty of offence and had lost protection under law.¹⁸⁸

Under the Draft Ordinance, *diyat* was a compensation which was to be paid by the convict or his *aqilah* to the heirs of deceased.¹⁸⁹ It was valued, case to case, keeping in view financial position of offender, his *aqilah* and heirs of deceased.¹⁹⁰ Interestingly, *diyat* of a deceased woman, under the Draft Ordinance, was half than that of a man.¹⁹¹ Two scales for determination and fixation of *diyat* were given under section 25 of the Draft Ordinance, 1980. One scale was 10,000/- Dirham *Shara'i* which becomes equal to 30.63 grams silver or the value of the silver in money. The second scale was 1000/- Dirham *Shara'i*, which becomes equal to 4.36 grams gold or value of the gold in money.

Liability to pay *diyat* was of accused in case of *qatl-i-amd*. However, if any other type of *qatl*, for instance, *qatl-e shib-i amd* or *qatl-i-khata* or *qatl- bil-sabab*, was committed and proved other than confession of accused then his *aqilah* was liable to pay *diyat* to the heirs of deceased.¹⁹² Further, *diyat* was to be divided amongst legal heirs of deceased in accordance with their shares in inheritance.¹⁹³ Another principle of *Shari'ah*, as enshrined under a narration of Prophet (pbuh), was followed under the Draft that an offender of *qatl* was not entitled anything from the inheritance of deceased whether offender be a legal heir or a beneficiary under will.¹⁹⁴

¹⁸⁸ See section 23 of the Draft Ordinance.

¹⁸⁹ See section 2 (d) of the Draft Ordinance.

¹⁹⁰ See section 25(1) of the Draft Ordinance.

¹⁹¹ See section 25 (2) of the Draft Ordinance.

¹⁹² See section 26 of the Draft Ordinance.

¹⁹³ See section 27 of the Draft Ordinance.

¹⁹⁴ See section 28 of the Draft Ordinance.

4.3.4 Islamic Concepts of *Aqilah* and *Qasamah* under the Draft Ordinance

Two important concepts, i.e. *aqilah* and *qasamah*, of Islamic law were given under the Draft Ordinance, 1980. The *aqilah* of accused was to be determined by court in each and every murder case. Term *aqilah* was defined under the Draft Ordinance as follows:

An *aqilah* means all male adult and sane members of a group, class of persons, association, institution, organisation, company, corporation, establishment, department, trade union, organised tribe or a *bradri* through which the convict receives or expects to receive help and support.¹⁹⁵

Every member of *aqilah* including convict, according to the Draft Ordinance, was responsible only to pay his respective share of *diyat* but where no *aqilah* could be constituted then accused was alone responsible to pay *diyat* to legal heirs of deceased.¹⁹⁶ In case of failure to pay *diyat*, the share of each member of *aqilah*, was to be recovered from his property as arrears of land revenue and until payment of *diyat* accused was to remain in jail.¹⁹⁷ In a case of *qatl* when neither offender is known to complainant or to the State nor traceable during investigation, then Islamic law provides a mechanism to trace accused. The mechanism was known as *qasamah*, i.e. oath taking by all members of the vicinity, where offence *qatl* was committed. Under the Draft Ordinance, if offender was unknown or could not be traced then each members of the vicinity, on the demand of *wali* or *awliya* of deceased, was to affirm on oath that he had not killed the victim nor he had any knowledge about his killer. According to the Draft Ordinance, in order to complete process of *qasamah* from the

¹⁹⁵ See section 29 of the Draft Ordinance.

¹⁹⁶ See section 30 of the Draft Ordinance.

¹⁹⁷ See section 31 of the Draft Ordinance.

concerned vicinity, at least fifty members should be there to depose. If it becomes impossible to complete fifty numbers then the available suspects were to repeat oath in order to make total oaths fifty.¹⁹⁸

A concise analysis of some important provisions of the Draft Ordinance makes it clear that under the first draft principles of *aqilah* and *qasamah* were part of the proposed law. The Draft Ordinance was an independent legislation on the pattern of *Hudood* Ordinance. The Draft, in fact, depicted true picture of *qisas* and *diyat* law wherein *aqilah* of accused was made responsible for contributing in the payment of *diyat* so that society could owe its responsibility towards its members. When members of a society are made responsible for payment of *diyat*, the society asserts its constant pressure and watch out its members so that they could be restrained from depriving others from right to life. Resultantly, by this means crime rate could be controlled.

4.4 THE CRIMINAL LAW (SECOND AMENDMENT) ORDINANCE (VII OF 1990) - FIRST STATUTE ON *QISAS* AND *DIYAT* LAW

After preparing the above discussed Draft Ordinance, a long span of ten years elapsed when an Ordinance known as the *Qisas* and *Diyat* Law Ordinance, 1990 was finally enforced but reluctantly. The Federal Government promulgated *qisas* and *diyat* law on 05-09-1990 honouring its commitment made in front of the apex court of Pakistan. Since Parliament was not in session so the Ordinance was promulgated by President

¹⁹⁸ See section 100 of the Draft Ordinance.

Ghulam Ishaq Khan, during an interim government of Prime Minister Ghulam Mustafa Jatoi. Through the Ordinance provisions of law relating to murder and bodily hurts under the Penal Code, 1860 and the Criminal Procedure Code, 1898 were amended in order to bring those in line with the directions of the Court rather to bring in conformity with Islamic injunctions. The Ordinance retained a considerable part of the earlier Draft Ordinance, 1980 but ignored few important aspects thereof. The Ordinance was not independent law like Draft Ordinance rather it mere amended provisions of substantive and procedural laws relating to offence of murder. The Ordinance substituted provisions of section 53 PPC for introducing Islamic punishments including (i) *qisas*, (ii) *ta'zir*, (iii) *diyat*, (iv) *arsh*, (v) *daman*, (vi) death (vii) life imprisonment, rigorous & simple, (viii) forfeiture of property and fine.¹⁹⁹ Sections 299 to 338 of the Pakistan Penal Code, 1860 based on common law of homicide and hurts were substituted to some extent with *qisas* and *diyat* law of Islam.²⁰⁰ The Ordinance under its interpretation clause, i.e. section 299 PPC, provided definitions and descriptions of various terms and expressions. Mostly, definitions of the earlier Draft Ordinance, 1980 were retained. However, offence of *qatl* was defined differently. Term culpable homicide was replaced with Islamic term of *qatl* and it was re-defined under section 299 (j) PPC as “‘*qatl*’ means causing death of a person”. Term *diyat* was also re-defined under the Ordinance and it was made payable by accused rather by his *aqilah*.²⁰¹ Term *ta'zir* was slightly changed by removing sentence of *hadd* from its exceptions. Similarly, various expressions like *masoom-ud-dam*, *ghair masoom*, *ghair masoom-ud-dam*, *mustamin*, and *qisas* defined under the Draft Ordinance, 1980 were not included under interpretation

¹⁹⁹ See section 2 of the Ordinance.

²⁰⁰ See section 4 of the Ordinance.

²⁰¹ See section 299 (e) of the Pakistan Penal Code, 1860.

clause of the Ordinance, 1990. Definition of *qatl-i-amd* was re-phrased under the Ordinance. Offence of *qatl* was further classified into different types. First type of *qatl* was *qatl-i-amd*, i.e. premeditated murder, and it was defined:

Whoever, with the intention of causing death or with the intention of causing bodily injury to a person, by doing an act which in the ordinary course of nature is likely to cause death, or with the knowledge that his act is so imminently dangerous that it must in all probability cause death, causes the death of such person, is said to commit *qatl-e amd*.²⁰²

Punishment of offence of *qatl* was provided under section 302 PPC under three clauses thereof. Under clause (i) punishment of *qatl-i-amd* was death as *qisas*.²⁰³ For awarding sentence of death as *qisas* either offence should be confessed by accused voluntarily and truly before competent court or it must be proved by evidence as required under Article 17 of the *Qanun-e Shahadat* Order, 1984. It is relevant to mention here that Article 17 of the Order deals with competence and numbers of witnesses. Competence of a witness to depose can be determined in accordance with Islamic injunctions as laid down in the Holy *Quran* and the *Sunnah*. In fact, the Ordinance, 1990 departed from criterion provided under the Draft Ordinance and dropped qualifications of witness, i.e. to be a male in gender and two in number. The legislature did not mention about requirements of competence of a witness in Islam except referring to the injunctions of Islam most probably for the reason that there was no unanimity of Muslim jurists on the point. So it was another challenge for judges to determine competence of each witness before recording his deposition for awarding sentence of *qisas*. Second type of sentence of *qatl* under the Ordinance was *ta'zir*. If proof required under section 304 PPC was not available then

²⁰² See section 300 of the Pakistan Penal Code, 1860.

²⁰³ The Ordinance, 1990 did not define the term '*qisas*'.

under *ta'zir*, for *qatl-i-amd*, there was choice for courts under clause (ii) of section 302 PPC either to award sentence of death or imprisonment for life. It was discretion of courts either to award normal sentence of death or lesser sentence of imprisonment of life depending on facts and circumstances of case. Third type of sentence under clause (iii), relatively more confusing clause for judges and lawyers, of section 302 PPC was any imprisonment up till twenty-five years, in cases where *qisas* as sentence was not applicable. Mode of execution of capital sentence as provided by the Draft Ordinance of *qatl-i-amd* in *qisas* was changed by the Ordinance and instead execution of death sentence in public, it was for judiciary to give direction regarding method of execution of death sentence awarded by way of *qisas*.²⁰⁴ Offence of *thag* was added by the Ordinance under the Chapter - XVI of the Penal Code.²⁰⁵

The Ordinance of 1990 retained concepts of waiver (*afw*) and compounding offence through compromise by legal heirs, i.e. *walis* of the deceased, as provided under the Draft Ordinance, 1980. However, according to section 311 PPC as amended through the Ordinance (VII of 1990) even in cases of *qatl-i-amd* where *wali* either has waived his right of *qisas* or has compounded offence, court had discretionary power to punish any offender with imprisonment of any term up to ten years as *ta'zir*. Court was empowered to enhance punishment up to fourteen years imprisonment, if offender was either convicted previously or he was a habitual offender or a professional culprit. Concepts of waiver of offence (*afw*) and compounding of offence (*sulh*) were applicable to all other offences under Chapter XVI, PPC.²⁰⁶ One of the most vague and confusing provisions of the Ordinance was given under section 338-F PPC whereby criminal courts, irrespective of their hierarchy, were given power

²⁰⁴ See section 314 of the PPC as amended by the Ordinance (VII of 1990).

²⁰⁵ See section 326 of the PPC as amended by the Ordinance (VII of 1990).

²⁰⁶ See section 338- E of the PPC as amended by the Ordinance (VII of 1990).

of interpretation and application of the provisions of Chapter XVI, PPC by seeking guidance by the injunctions of Islam as laid down in the Holy *Qur'an* and the *Sunnah* of Prophet (pbuh).²⁰⁷

Provisions of the Ordinance, 1990, however, were aloof to many hallmarks of the earlier Draft Ordinance, 1980. For instance, Islamic concepts of *aqilah* and *qasamah*, liability of half of the *diyat* when victim was woman and mode of execution of death sentence of *qatl* in *qisas* were totally missing from the Ordinance, 1990. Method of valuation of *diyat* was also changed though the Ordinance, 1990. However, besides three kinds of *qatl* as mentioned under the Draft Ordinance, 1980, the Ordinance of 1990 added *qatl-bil-sabab* as forth kind of *qatl*.

4.5 THE CRIMINAL LAW (AMENDMENT) ACT (II OF 1997)

The Ordinance was itself a controversial law so could not be passed by the Parliament for seven years. However, in the year 1997 a bill of *qisas* and *diyat* law was presented before Parliament by Nawaz Sharif's government. The bill was passed only within twenty minutes' span of time, without any debate on its contents and bypassing general rules and procedure of enacting law. The opposition parties in Parliament boycotted the session when their demand of debate and discussed was not conceded and bill was passed by the majority party in the Parliament.²⁰⁸ Main purpose of passing the Act was to give approval by *Majlis-e-Shoora*, i.e. the Parliament, to the existing law which was enforced in shape of Ordinance. So no major changes can be

²⁰⁷ Section 338- F of the PPC as amended by the Ordinance (VII of 1990).

²⁰⁸ Wasti Tahir, '*The Application of Islamic Criminal Law in Pakistan: Sharia in Practice*', Brill's Arab and Islamic Laws Series, Volume II, Edition 2009, at p. 100.

identified into the earlier law except few. For instance, addition of definition of 'qisas' as "a 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*, in exercise of the right of the victim or a *wali*".²⁰⁹ Secondly, provisions of section 302 (i) (ii) & (iii) PPC are re-numbered as 302 (a) (b) & (c) PPC sans any change in the text and similar change was introduced into all other sections and clauses of the Act. Thirdly, under section 307 PPC a new clause is added whereby court is required to satisfy itself by taking down statement on oath of a *wali* or all *walis* of deceased and other persons, where a *wali* or *walis* has / have waived right of *qisas* or compound right of *qisas* voluntarily and without any duress. Court can give its opinion as to whether waiver or compromise is made voluntarily and without any duress. Fourthly, provisions of section 311 PPC of the Ordinance are replaced with new provisions but by retaining the punishment of imprisonment as *ta'zir*, where *wali* either has preferred to waive right of *qisas* or has compounded the offence. However, a yardstick is given to courts for the exercise of this power courts will have to see the principle of *fasad-fil-arz*. Astonishingly, the principle is nowhere defined under the Act. However, under an explanation to section 311 PPC it is provided that the principle includes past conduct of offender, his previous conviction, offence committed brutally or offence committed in shocking way outrageous to public conscience or offender being a potential danger for the society or vicinity. Fifthly, value of *diyat* 30,630 grams of silver is replaced with words. The Criminal Law (Amendment) Act (II of 1997) was further amended various times in order to make it more perfect and flawless.

²⁰⁹ See section 299 (k) PPC as amended by the Act II of 1997.

4.5.1 *Amendments into the Law after Promulgation of the Criminal Law (Amendment) Act (II of 1997)*

The *qisas* and *diyat* law was promulgated through the Criminal Law (Amendment) Act (II of 1997) and it was further amended many times. Few important amendments are introduced through the Criminal Law (Amendment) Act, 2004 (I of 2005). Through the Act (I of 2005), a new clause (ii) is inserted under section 299 (i) whereby offence committed in the name or on the pretext of honour is defined as offence of *karo kari*, *siyah kari* or like traditions and practices. Secondly, a new proviso is added under clause (c) of Section 302 PPC and it is clarified that offence of murder committed on the name of honour is excluded from the category of offences which fall under section 302 (c) PPC rather the same shall fall within the ambit of either clause (a) or clause (b) of section 302 PPC. Purpose of this amendment is to discourage a trend of courts to give a murderer the least possible sentence due to involving defence or mitigating circumstance of *ghairat*, i.e. family honour. Thirdly, the Act (I of 2005) excludes murderer from the definition of *wali* under section 305 PPC if *qatl* is committed on the pretext of honour. Fourthly, sentence of *ta'zir* is enhanced from fourteen years' imprisonment to twenty five years' imprisonment for a minor or insane who is able to realise consequence of his act in two matters, i.e. where *qisas* is neither liable under section 306 PPC nor enforceable under section 307 (c) PPC. Fifthly, a proviso is added under section 310 PPC whereby in case of compounding of *qisas* to give a female in marriage or *badl-e sulh* to the victim party is prohibited. Sixthly, section 310-A PPC is inserted through the Act (I of 2005)

whereby handing over a lady or girl to the victim in marriage or *badal-i sulh* is made punishable with any term of punishment but it should be minimum rigorous imprisonment of three years and maximum ten years. Sixthly, under section 311 PPC, expression 'keeping in view of' is replaced with expression 'if the principle of *fasad-fil-arz* is attracted'. Similarly, under same section words 'in its discretion' are omitted and besides sentence of imprisonment of fourteen years as *ta'zir*, sentence of death or imprisonment of life are added. Moreover, by adding a proviso under same section it is ensured that an accused of *qatl* committed on the name of *ghairat* must be punished with imprisonment but not less than ten years. The principle of *fasad-fil-arz* is further extended by adding offence of *qatl* committed on the pretext of honour. Seventhly, sentence of *qatl-e shibh-e-amd* is enhanced from fourteen years' imprisonment to twenty five years' imprisonment. Eighthly, offence of attempt to commit *qatl-i-amd* on the pretext of honour is made punishable with imprisonment up to five years.²¹⁰ Some more amendments are introduced into the law through the Pakistan Penal Code (Amendment) Act, (XV of 2010). Time period for payment of *diyat* whether in lump sum or in instalments is extended from three to five years by the Act (XV of 2010) and in case where accused who fails to pay *diyat* amount within five years, court is empowered by same amendment either to furnish surety or to release him on parole.²¹¹ The Act (XV of 2010) also inserted subsection (2) under section 338-G PPC whereby the Federal Government is given power to make rules regarding creation of a fund for the purpose of making payment of *diyat*, *arsh* and *daman* by State on behalf of convicts who cannot pay the same due to poverty and weak financial position. The rules also relate to soft loan facility for such poor convicts, to

²¹⁰ See section 324 PPC as amended by the Criminal (Amendment) Act, (XXVI of 2005).

²¹¹ See section 332 as amended by the Criminal (Amendment) Act, (XV of 2010).

provide job to them and to overall protection of rights of victims in the matters of *diyat*, *arsh* and *daman*. However, no clear provisions are there under section 338-G PPC regarding payment of *diyat* to legal heirs of deceased who is murdered by unknown criminals.

Similarly, section 310-A PPC inserted into the Penal Code, 1860 in the year 2005 is subsequently substituted by the Criminal Law (Amendment) Act (XXV of 2011). According to the new substituting provisions of section 310-A PPC an act of giving a lady or a girl to any member of the victim party of the offence of *qatl-i-amd* in marriage or in *badl-i sulh*, *wanni* or *swara* for settling any civil dispute or criminal liability is an offence which is punishable with imprisonment up to seven years or for minimum imprisonment of three years and also with fine to the tune of half million rupees. Interestingly, the amendment to the extent of containing a civil liability is added under the law of murder against general scheme of the Pakistan Penal Code, 1860.

The Act (XXV of 2011) also added offence of disfiguring or defacing somebody under the offences of hurt under section 332 of the Penal Code and it is defined as “disfigurement of face or disfigurement or dismemberment of any organ or any part of organ of human body which impairs or injures or corrodes or deforms the symmetry or appearance of a person”.²¹² The Act further inserted two new provisions under the Code and added an offence of hurt caused by corrosive substance and also provided punishment for the offence.²¹³

²¹² See an Explanation under section 332 of the Code, added through the Criminal Law (Amendment) Act (XXV of 2011).

²¹³ Offence of hurt caused by corrosive substance was added under new section 336-A of the Code and its punishment was provided under new inserted section, i.e. section 336-B PPC.

4.6 CONCLUSION

This chapter deals with the evolution of law of *qisas* and *diyat* through legislation. The Draft Ordinance, 1980 provided concept of *aqilah* that male family members, relatives, friend or colleagues of accused were to contribute in *diyat*. *Aqilah* was to be constituted by court in each case depending on its nature and circumstances. Islamic concept of *aqilah* involves society in matters of *qatl* where offence affects the whole society by infringing public rights or *huquq-ullah*. Members of *aqilah*, being very near to culprit in social life, can create a check on him for avoiding such incident in future. Concept of *aqilah* is useful in many regards. For instance, *aqilah* owes responsibility to keep a miscreant refrain from committing any such offence as a preventive measure. Secondly, *aqilah* can impose social pressure on accused before and after commission of offence of *qatl* so that he could not become habitual and thirdly, due to intervention of *aqilah* victim family might feel condolence and might not become revengeful towards accused. Second important feature of the Draft Ordinance, 1980 was principle of *qasamah* through which accused could be traced in *qatl* cases where offender was unknown or untraceable. Unfortunately, both pivotal principles of Islamic law were ignored by law makers subsequently.

The Ordinance of 1990, was the first statute on *qisas* and *diyat* law which was promulgated in order to honour a commitment of the then government made before the Supreme Court of Pakistan. Through the Ordinance provisions relating to offence of murder were either amended or substituted under the Penal Code, 1860 and the Criminal Procedure Code, 1898 without disturbing sequence of provisions of both statutes. Since no bill could be moved by government on *qisas* and *diyat* law before

the Parliament so it had to extend the Ordinance about twenty times. Ultimately, a bill of *qisas* and *diyat* law was presented before the Parliament after about seven years. Astonishingly, the bill was passed by violating general procedure of enacting laws as no discussions and debates in either house of Parliament took place. Resultantly, within no time parliament converted the Ordinance, 1990 into an Act (II of 1997). The Act was mere an extension of the erstwhile Ordinance. It neither provided standard of test of *Tazkiyah-al-Shahood* nor disclosed any grounds, reasons, standards or yardsticks for courts in order to opt any of two alternative punishments provided under section 302 (b) as *ta'zir*. Moreover, it is still considered a big puzzle that which cases would fall under section 302 (c) PPC. A justification of doing so can be guessed that legislators might had intended to left it up to the judiciary to determine type as well as quantum of imprisonment in the light of evidence available on record. Naturally, the presiding officers of courts had to opt any of the punishments themselves exercising their discretion and intellect sans any guidance under statutory law. During application of the *qisas* and *diyat* law of Pakistan judiciary had to face difficulties. In order to fill the gaps of legislation courts had two options. First option was to resort to the erstwhile law or to follow precedent law. Second option with courts were to exercise their unlimited power under section 338-F PPC of seeking guidance from the injunctions of Islam for the purposes of interpretation and application of new law. When judges tried to find a way out of the legal quagmire they gave inconsistent and contradictory decisions on various law points.

CHAPTER 5

PUNISHMENT OF *QATL-I-AMD* AS *QISAS* UNDER SECTION 302 (a) PPC AND PROOF OF *QATL-I-AMD* LIABLE TO *QISAS* UNDER SECTION 304 PPC

5.1 INTRODUCTION

Provisions of section 302 PPC deal with three categories of punishment of *qatl-i-amd*, i.e. premeditated murder. First category is punishment of death as *qisas* and for awarding death punishment as *qisas* evidence of witnesses, who must be competent in this regard, is required under section 304 PPC. Provisions of section 304 PPC contain two types of evidence, i.e. either there should be voluntary and true confession of accused or witness must qualify the test of *Tazkiyah-al-Shahood*, as provided under Article 17 of the *Qanun-e Shahadat* Order, 1984. This chapter discusses punishment of *qatl-i-amd* by way of *qisas* on the basis of evidence available in any of the above discussed discourses. Many questions have been dealt with under this chapter. First, in how many ways admission of guilt of accused can be recorded? Secondly, for what type of confessional statement accused can be sentenced to death as *qisas*? Thirdly, can a person convicted under section 302 (a) PPC on the basis of his confession be punished with any sentence other than death as *qisas*? Fourthly, what evidence for awarding punishment of death by way of *ta'zir* for *qatl-i-amd* is required? Fifthly, are there any requirements for satisfying the test of *Tazkiyah-al-Shahood* under law? Lastly, whether mode of execution of death punishment passed under section 302 (a)

PPC as *qisas* is different from that of awarded by way of *ta'zir* under section 302(b) PPC?

5.2 DEATH PUNISHMENT OF *QATL-I-AMD* AS *QISAS*

Punishment of death for *qatl-i-amd* can be awarded under section 302 PPC by way of *qisas*. Word '*qisas*' is *Arabic* in its origin and its root word is '*qass*' which has different literal meanings including 'to follow', 'to tell', 'to cut' or 'to relate'.²¹⁴ Under Islamic law this word is used in the meaning of retaliation or equality. Term '*qisas*' is translated by Muhammad Asad as 'just retribution'.²¹⁵ Islamic *qisas* and *diyat* law is also known as *al-jinayaat*. Aim of criminal law is to protect society by discouraging and preventing offences through punishing culprits. Islamic *qisas* and *diyat* law applies in cases of killing a human being and inflicting any hurt on human body. So *qisas* is a punishment wherein guilty person has to suffer from same injury he causes to victim. Underlying principle of *qisas* punishment is equality and similarity. On the other hand, equal and similar treatment qua the offender by way of *qisas* quenches victim's thrust of revenge as well.

Offence of *qatl-i-amd* is punishable with death as *qisas* under section 302 (a) of the Pakistan Penal Code, 1860. However, criterion for proof of *qatl-i-amd* liable to punishment of death as *qisas* is given under section 304 PPC. In other words, an offender of *qatl-i-amd* can only be punished with death as *qisas* when his offence is proved in accordance with the requirements of provisions of section 304 PPC.

²¹⁴ Mohamed Mahfodz, '*The Concept of Qisas in Islamic Law*'; Islamic Studies (Islamabad) 21: 2 (1982)

²¹⁵ Wasti Tahir, '*The Application of Islamic Criminal Law in Pakistan - Sharia in Practice*'; Brill's Arab and Islamic Laws Series, Volume 2 (2009) at p. 66.

5.3 PROOF OF *QATL-I-AMD* REQUIRED FOR SENTENCE OF DEATH AS *QISAS*

Punishment of death by way of *qisas* u/s 302 (a) PPC requires any of two forms of evidence as provided under section 304 PPC. Provisions of section 304 PPC further require that an accused of *qatl-i-amd* can only be punished with death as *qisas* when there is voluntary and true confession made by accused before the court of competent jurisdiction or prosecution proves offence of *qatl-i-amd* by evidence as required under Article 17 of the *Qanun-e Shahadat* Order, 1984.

Provisions of Article 17 (1) of the *Qanun-e Shahadat* Order, 1984 deal with quality of a witness for proving a fact in issue or a relevant fact. It is further provided under article 17 (1) of the *Qanun-e Shahadat* Order, 1984 that quality, i.e. competence of a witness, and quantity, i.e. number of witness, will be determined in accordance with the injunctions of Islam as laid down in the Holy *Qur'an* and the *Sunnah* of the Prophet Muhammad (pbuh). However, nowhere under section 304 PPC and under article 17 QSO criterion of a witness has been provided. To the extent of number of witnesses required under clause (2) of article 17 of the *Qanun-e Shahadat* Order, 1984 it is provided that a written instrument, of a matter involving financial or future obligation, must be attested by two men or one man and two women. In all other matters, i.e. matters not pertaining to financial or future obligation, deposition of a man or a woman is sufficient for proving a fact. However, to the extent of determining competence of a witness legislature, impliedly, left it up to courts to

decide it in accordance with the injunctions of Islam. This ambiguity of law resulted into contradictory and inharmonious decisions of courts.

5.4 CONVICTION UNDER SECTION 302 (a) PPC AND PUNISHMENT OF DEATH AS *QISAS* ON THE BASIS OF CONFESSION OF ACCUSED AS A PROOF OF *QATL-I-AMD*

After promulgation of the Criminal Law (Second Amendment) Ordinance, 1990 trial courts, i.e. Courts of Sessions Judges / Additional Sessions Judges, in cases of *qatl-i-amd* frequently recorded convictions under section 302 PPC and punished offenders with death by way of *qisas* on the basis of their confession. Intriguingly, trial courts had equated different statements of accused persons with confession hence convicted and punished them under section 302 (a) PPC. Generally, confession is an admission of guilt made by accused. The question that what statement is sufficient for awarding death punishment by way of *qisas* was answered in different ways. In strict legal sense and according to criminal law practice in Pakistan, confessional statement can be recorded by a competent Magistrate following a procedure provided under the provisions of sections 164 and 364 of the Code of Criminal Procedure, 1898 and the Rules and Orders of the Lahore High Court.

The Code of Criminal Procedure, 1898 provides various opportunities to an accused for recording his narrative. First of all, accused is given opportunity to record his confessional statement during investigation under sections 164 and 364 Cr.PC before a competent court. Secondly, after submission of complete investigation report under section 173 Cr.PC in cases of murder, when court frames formal charge under

section 265-D Cr.PC, accused is asked under section 265-E Cr.PC as to 'whether he is guilty or has any defence to make?' In reply to the question, accused has option to admit his guilt. Thirdly, during trial when prosecution evidence is closed, accused is given a chance under section 342 of the Code to explain circumstances given under prosecution evidence. At this stage as well accused can admit his offence. Lastly, since under the 'statement of accused' he is given an option to depose on oath under section 340 (2) Cr.PC so he can admit his guilt on oath. In all or any of these stages accused has option to admit his guilt.

5.4.1 Conviction under Section 302(a) PPC and Sentence of Death as Qisas on the Basis of Statement of Accused under Sections 164 & 364 Cr.PC Recorded before the Court of Magistrate

Statement of accused, during investigation of the case, regarding admission of his offence may be recorded by a competent Magistrate under sections 164 and 364 of the Code of Criminal Procedure, 1898. Such statement is called confession of accused if duly recorded with free consent of accused. Superior courts, however, in several cases did not agree with trial courts' decisions of conviction under section 302 (a) PPC and punishment of death as *qisas* even confessional statement was voluntary and free from all sorts of illegalities. For instance, in the case of *Muhammad Asif*, a murder was committed in Abbottabad Session Court when, on appearance of accused in a murder trial, suddenly a prosecution witness in same case fired at him with gun inside the court room.²¹⁶ Accused was arrested from court and during investigation he

²¹⁶*Muhammad Asif vs. The State*, 2000 YLR 1778 Pesh.

voluntarily recorded his confessional statement before Magistrate. During trial, the Magistrate who recorded confession and the Sessions Judge in whose court occurrence had taken place, deposed against accused. Accused though did not opt to plead his guilt when charged was framed but in his statement under section 342 Cr.PC before trial court he took plea of self-defence by explaining that when, on the day of occurrence, he entered into the court room as a witness the deceased had threatened him of dire consequences. So in self-defence he fired at him. Keeping in view the ocular evidence of two judicial officers, trial court convicted accused under section 302 (a) PPC with death as *qisas* by dispensing with the necessity of the process of *Tazkiyah-al-Shahood* as conduct of eye witnesses was above board and their truthfulness had satisfied conscience of the court. Trial judge also gave direction that punishment of death be executed by shooting to death through at least three masked policemen publicly in a suitable place as required under section 314 (1) PPC. Decision of trial court was challenged by convict accused before the High Court through filing an appeal against conviction and punishment. The High Court maintained punishment of death but by way of *ta'zir* by altering conviction under section 302(b) PPC. In his judgment Justice Mian Shakirullah Jan observed that while awarding sentence of death by way of *qisas* court should have undertaken the exercise of *Tazkiyah-al-Shahood* or purgation and satisfaction of conscience of the court from his personal knowledge is not sufficient. Regardless of the fact that accused admitted his guilt in his confessional statement before Magistrate, at the time of framing charge and in his statement under section 342 Cr.PC, mind-boggling observation of the High Court that confessional statement recorded before Magistrate did not qualify the condition of a true and voluntary confession made before

competent court. Mere, on the point that in his statement under section 342 Cr.PC accused specifically said that his confessional statement was not correctly recorded by Magistrate, conviction of accused was altered from section 302 (a) PPC to 302 (b) PPC and it was directed that he be hanged by neck till he is dead. Similarly, in the case of *Muhammad Ali*, appellant's confession was not considered sufficient for conviction under section 302 (a) PPC and court awarded him punishment of death by way of *qisas*.²¹⁷ Compendium of the facts of this case is that accused murdered his wife and her paramour when he found them sleeping together, half nakedly. He himself appeared before police station in blood stained clothes and admitted commission of two murders. He recorded his confessional statement before the court of a lady Magistrate who as a witness deposed before trial court against the accused. On conclusion of trial on the basis of his confession accused was convicted under section 302 (a) PPC and was sentenced to death as *qisas*. On appeal a division bench of the High Court observed that confession of accused was voluntary and true also supported and corroborated by other pieces of evidence so same was sufficient to convict accused. However, the bench was not convinced with the correctness of conviction under section 302(a) PPC and held as follows:

As regard the conviction, the learned trial Judge has convicted the appellant under section 302(a) P.P.C. For the conviction of said offence the evidence as provided under section 304, P.P.C. is required to be led by the prosecution but the same has not been led as the appellant had retracted from the confession as such he did not make confession before the trial Court nor the required evidence is available on the record as per section 304, P.P.C. therefore, the ingredients of section 302(a), P.P.C. are not attracted. From the evidence available on the record an offence punishable under section 302(b), P.P.C. has been made out therefore, the appellant is convicted for the said offence.²¹⁸

²¹⁷ *Muhammad Ali alias Muhammad vs. The State*, 2006 MLD 802 Kar.

²¹⁸ See *ibid* at p. 807.

Moreover, the bench repelled defence of grave and sudden provocation as accused saw both deceased persons sleeping half nakedly but did not see them committing sexual intercourse for which accused had to adduce four eye witnesses for proving his defence. The High Court convicted accused under section 302(b) PPC and maintained sentence of death but by way of *ta'zir*. Similarly, in the case of *Abdul Ghayas* accused admitted murder of his real brother by Kalashnikov fire in his confessional statement recorded by the concerned Magistrate.²¹⁹ Accused, later on, in his statement under section 342 Cr.PC retracted from his confessional statement and denied its truthfulness. Trial judge convicted him under section 302 (a) PPC and sentenced him to death as *qisas*. However, while deciding appeal from conviction judges of the High Court gave split judgment and case was referred to a referee judge who affirmed the decision of trial judge, confirmed death sentence and dismissed appeal but sentence was awarded under section 302 (b) PPC as *ta'zir*. In this case the court also was not willing to make confession of accused a basis of punishment of death as *qisas*.

On the other hand, in exceptional cases, despite subsequent retraction from confession conviction under section 302(a) PPC and sentence of death as *qisas* on the basis of confession was maintained by all forums till the apex court. For instance, in the case of *Allah Bakhsh*, accused admitted his offence before Magistrate by recording his confessional statement.²²⁰ Again at the stage of framing charge, accused admitted his guilt that he had killed the deceased. However, in his statement under

²¹⁹ *The State vs. Abdul Ghayas*, 2008 MLD 74 Quetta. In this case a division bench of the High Court, of Justice Ahmed Khan Lashari and Justice Mehta Kailash Nath Kohli, gave a split judgment. However, referee judge namely Muhammad Nadir Khan agreed with the decision of Justice Ahmad Khan Lashari, confirmed murder reference and maintained death sentence.

²²⁰ *Allah Bakhsh vs. The State*, PLD 2006 SC 441. Ironically, Justice Mian Shakirullah Jan who gave benefit of retracting from confession to accused in Muhammad Asif case denied same relief subsequently in this case by concurring with Justice Abdul Hameed Dogar.

section 342 Cr.PC he denied prosecution case and pleaded innocence. On conclusion of trial, court convicted him under section 302 (a) PPC and awarded him punishment of death as *qisas* on the basis of his confession. The High Court also confirmed murder reference and sentence of death as *qisas*. Leave to appeal was dismissed by the Supreme Court with an observation that confession recorded before Magistrate was volunteered and there was no illegality and misreading of evidence in the case.

The query that what constitutes a valid confession was finally resolved by the apex court recently when a three member bench of the apex court in a case of kidnapping for ransom and *qatl-i-amd* observed that a Magistrate must follow all precautions laid down in the Lahore High Court Rules and Orders otherwise confession will be of no legal effect.²²¹ Another bench, numerically of equal strength, of the apex court of Pakistan in another case provided a list of requirements of recording judicial confession of accused and the bench as per its considered view observed that confessional statement whether recorded before the court of Magistrate or in front of trial court should not be on oath and for recording confessional statement safeguards of section 364 Cr.PC and procedure provided under High Court Rules and Orders must be followed.²²²

5.4.2 Conviction under Section 302 (a) PPC and Sentence of Death as Qisas on the Basis of Statement of Accused under Section 265-E Cr.PC at the Stage of Framing of Formal Charge

²²¹ *Azeem Khan and another vs. Mujahid Khan and others*, 2016 SCMR 274.

²²² *Muhammad Ismail vs. The State*, 2017 SCMR 713.

Pleading guilty by accused at the stage of framing formal charge was taken in some cases equivalent to confession. So in some cases, on the basis of pleading guilty, trial courts convicted accused under section 302 (a) PPC and sentenced to death as *qisas* but appellate courts discouraged such practice. For instance, in the case of *Tariq Mehmood* trial court, on pleading guilty to charge framed against him, convicted accused under section 302(a) PPC and awarded him punishment of death as *qisas*.²²³ But the Peshawar High Court while deciding murder reference and appeal remanded the case to trial court for *denovo* trial and decision afresh. The High Court observed that no doubt accused had made voluntary confession at the stage of framing charge but its truthfulness will be seen after recording available evidence collected during investigation. Similarly, in *Khalil Ahmad's* case, accused was convicted under section 302 (a) PPC and was awarded death sentence as *qisas* on the basis of his pleading guilty without giving him show cause notice under section 243 Cr.PC.²²⁴ However, appeal of accused was accepted, murder reference under section 374 Cr.PC was rejected and case was remanded to trial court for conducting *de novo* trial strictly in spirit of law after framing fresh charge. Since the trend was discouraged by higher judiciary so in subsequent cases trial courts avoided to convict accused on the basis of their pleading guilty at the stage of framing charge.

In a recent case of *Aurangzeb*²²⁵, despite pleading guilty of committing murder on 14-05-2010 and despite that he himself gave information thereof to the concerned police station the accused was acquitted by the High Court. In the FIR accused reported that when he saw his wife and deceased in compromising position in his house he killed him with axe. He also pleaded guilty at the stage of framing

²²³ *Tariq Mehmood vs. The State*, 2000 PCr.LJ 837 Pesh.

²²⁴ *Khalil Ahmad vs. The State*, 2006 MLD 685 Kar., also reported as 2006 YLR 351 Kar.

²²⁵ *Aurangzeb vs. The State*, 2015 YLR 912 Pesh.

charge. However, at the time of his statement under section 342 Cr.PC the accused kept mum when questions were put to him regarding commission of offence of murder by him. During trial of the case three prosecution witnesses and two court witnesses deposed against him. On completion of trial, court convicted the accused under section 302 (c) PPC and awarded him sentence of three years' simple imprisonment. The High Court on appeal, in disregard of a proviso under clause (c) of section 302 PPC added through an amendment in the year 2004, gave benefit to accused who committed murder in the name and on the pretext of honour (*ghairat*) and acquitted him of the charge. In the judgment of the case the High Court observed that the murder was an occurrence of sudden provocation and it was not committed due to family honour or *ghairat*. The High Court finally acquitted accused on the ground of case of no evidence. This is a very strange judgment of the Peshawar High Court wherein despite his reporting the matter to the Police Station and despite pleading guilty before trial court mere on the basis of mitigating circumstance of sudden and grave provocation accused was acquitted.

5.4.3 Conviction under Section 302 (a) PPC on the Basis of Statement of Accused under Section 342 Cr.PC and Sentence of Death as Qisas

During trial of a criminal case when prosecution closes its evidence, accused under section 342 Cr.PC is given an opportunity to explain circumstances mentioned in prosecution evidence. After enforcement of the *Qisas* and *Diyat* Ordinance, 1990, trial courts in various murder cases had taken statement of accused, recorded under section 342 Cr.PC, at par with confessional statement and on the basis of such

statement awarded punishment of death as *qisas* under section 302 (a) PPC.²²⁶ For instance, in the case of *Abdul Waheed*²²⁷ a three member bench of the Supreme Appellate Court heard an appeal from the decision of Special Court of Speedy Trials.²²⁸ Before trial court, accused in his statement under section 342 Cr.PC took defence of sudden and grave provocation for he saw deceased and his sister in compromising position. Trial court, despite admission of accused in his statements under section 342 Cr.PC and under section 340 Cr.PC sentenced him under section 302(c) PPC, due to his defence of family honour and provocation. On appeal, appellate court observed, on the basis of *Gul Hasan Khan's* case²²⁹ that ground of provocation, of sudden as well as grave nature, is not an exception *per se* unless offence of *zina* is proved by accused. Therefore, appellate court altered conviction to section 302 (a) PPC due to his confession and punished him with death as *qisas*.

The decision of *Abdul Waheed's* case was not followed as precedent subsequently. For instance, in the case of *Ali Muhammad* wherein a single member bench of the Lahore High Court disposed of a criminal appeal of a murder case.²³⁰ Accused Ali Muhammad and others allegedly killed the deceased and case was registered on 24-10-1990 while the Ordinance, 1990 was enforced on 05-09-1990. Accused persons were charged under sections 364/302/148/149 PPC. All accused denied charges except Ali Muhammad who admitted murder of deceased but under severe provocation when he saw deceased and his wife in compromising position.

²²⁶ Even in *Nasir Mehmood and another vs. The State*, 2015 SCMR 423, a three member bench of the Supreme Court differed on the point of evidentiary value of statement of accused. Majority view of Justice Ijaz Ahmad Chaudhry and Justice Qazi Faez Isa, at page 429 of the judgment, was that statement of accused under section 342 Cr.PC is more reliable than that of accused recorded under section 164 Cr.PC during police custody. However, minority view of Justice Dost Muhammad Khan was different.

²²⁷ *The State vs. Abdul Waheed alias Waheed* and another, 1992 PCr.LJ 1596.

²²⁸ These courts were constituted under the Special Courts for Speedy Trials Ordinance, 1991.

²²⁹ PLD 1989 SC 633.

²³⁰ *Ali Muhammad vs. The State*, 1993 PCr.LJ 557 Lah.

Trial court convicted and sentenced Ali Muhammad under repealed section 304-I PPC. The High Court while hearing an appeal construed proper section as section 302 (a) PPC and observed that trial court might be oblivious of the *Qisas* and *Diyat* law Ordinance, 1990. The High Court found the statement of Ali Muhammad accused, wherein he took plea of self-defence and grave and sudden provocation, more correct and in accordance with medical evidence than the version of prosecution and acquitted accused of charge. Importantly, accused could not prove his defence before the court even then he was given advantage of his defence unlike case of *Abdul Waheed*. Similarly, in a triple murder case trial court convicted and sentenced one of the accused persons with death as *qisas* under section 302(a) PPC.²³¹ All accused persons denied their guilt except accused Taj Muhammad, i.e. the appellant, who admitted his involvement in his statement under section 342 Cr.PC. Taj Muhammad, in his statement, stated that he had slapped Muhammad Yousaf, a prosecution witness, a day prior to the occurrence on a dispute of changing flow of irrigation water with complainant party including deceased. He further said that in order to take revenge deceased appeared at his residence; attacked on his family members; injured his wife who succumbed to injuries later on and also injured his daughter. Trial court rejected defence version, accepted version of complainant party so convicted and sentenced accused Taj Muhammad with death as *qisas*, most probably due to admission on his part in his statement made under section 342 Cr.PC and prosecution evidence. On appeal the High Court held that offence of murder of three persons was not proved as required under the provisions of section 304 PPC so conviction and sentence was altered to under section 302(b) PPC. Again in the case of *Muhammad*

²³¹ *Taj Muhammad and two others vs. The State*, 1993, PCr.LJ 1025 SAC.

Nawaz trial judge, after recording two different versions, accepted defence version correct, rejected prosecution version and due to admission of accused in his statement under section 342 Cr.PC awarded him death sentence as *qisas*.²³² Trial court relied upon incriminating part of defence version while rejected plea of provocation. On appeal, court focused on the other part of defence of accused wherein he took plea that he found deceased and his wife in objectionable position so he under grave and sudden provocation caused injuries to him. So, a division bench of the Lahore High Court altered sentence of death as *qisas* under section 302(a) PPC to sentence of seven years' rigorous imprisonment under section 302(c) PPC and observed that accused could not be sentenced to death as *qisas* for few reasons. First, that plea or defence of accused in his statement under section 342 Cr.PC did not amount to voluntary confession; secondly, evidence of case was not processed through the test of *Tazkiyah-al-Shahood* and lastly that deceased was not *masoom-ud-dam* as he was found engaged in an indecent act with the wife of accused. In the case of *Pervaiz alia Paiji*,²³³ accused was convicted under section 302 (a) PPC and sentenced with death as *qisas* on the basis of ocular evidence and Post Mortem Report. Accused during investigation and in his statement under section 342 Cr.PC took defence of grave and sudden provocation as his sister was under a danger of being outraged by the deceased. Appellate court accepted statement of accused under section 342 Cr.PC to be correct and relying on the precedent of *Ali Muhammad* case²³⁴ convicted accused under section 302(c) PPC and punished him with ten years' rigorous imprisonment. Importantly, there was no proof of the defence plea of accused except his statement under section 342 Cr.PC. Similarly, the Lahore High Court in *Imam Bukhsh vs. The*

²³² *Muhammad Nawaz vs. The State*, 1994 MLD 1704 Lah.

²³³ *Pervaiz alia Paiju vs. The State*, 1999 PCr.LJ 1915 Lah.

²³⁴ *Ali Muhammad vs. Ali Muhammad and another*, PLD 1996 SC 274.

*State*²³⁵, without referring any precedent case, had altered conviction and sentence of a convict in a double murder case from section 302(a) PPC to section 302 (c) PPC. In this case trial court on the basis of statement of accused under section 342 Cr.PC and statement under section 340 (2) Cr.PC convicted him under section 302 (a) PPC and punished him with death as *qisas*. In his defence, accused took plea that when he saw both deceased persons in compromising position; he under sudden and grave provocation killed both. The High Court was not willing to consider statements of accused as confession therefore, taking his defence as a mitigating circumstance altered conviction and sentence. Again, in the case of *Talib Hussain vs The State*²³⁶, accused was convicted under section 302 (a) PPC on the basis of his statement under section 342 Cr.PC and ocular evidence. In his statement under section 342 Cr.PC he took plea of self-defence as in his presence deceased was strangulating his father and had he not given deceased a blow of stick he would have killed his father. The appellant gave no statement on oath under section 340 (2) Cr.PC. However, he produced a defence witness who deposed in his favour and supported the plea raised by the appellant. The High Court accepted appeal by reducing punishment from death as *qisas* under section 302 (a) PPC to ten years' rigorous imprisonment under section 302 (c) PPC for the reason that offence was committed unintentionally and appellant did not repeat blow of stick and occurrence took place at the spur of moment.

The controversy in the precedent cases regarding evidentiary value of statement of accused under section 342 Cr.PC was finally settled in *Abdus Salam's* case. In this case father of accused reported the occurrence to Police Station that in his presence accused came to his house and demanded Rs. 100 from his mother and

²³⁵ *Imam Bukhsh vs. The State*, 1999 YLR 19 Lah.

²³⁶ PLD 1994 Lah. 43.

said that if she refuses he would kill her.²³⁷ On her refusal, accused hit her with iron rod and she passed away at the spot. Accused admitted his guilt in his statement under section 342 Cr.PC before trial court. He also submitted his written arguments before trial court wherein he took defence that he was under grave as well as sudden provocation and under the influence of drug. Close relatives of accused, i.e. father, sister and sister in law, deposed against him as prosecution witnesses. So Sessions Judge, Quetta convicted accused under section 302 (a) PPC, punished him with death as *qisas* and held that he be hanged by neck till he be dead. Basis of conviction, as per judgment of trial court, were statement of accused under section 342 Cr.PC admitting his guilt and depositions of prosecution witnesses fulfilling the requirements of section 304 PPC. Learned trial judge further explained that provisions of sections 306, 307 and 308 PPC were not attracting in the case. The High Court Balochistan dismissed appeal and confirmed murder reference under section 374 Cr.PC. Leave to appeal was granted by the apex court to consider legality of conviction and sentence as it was contended by the counsel for accused that punishment of *qisas* could not be awarded when requirement of section 304 PPC were not fulfilled. It was also contended by him that when a *wali* of victim is direct descendent of accused, he is not liable to *qisas* under section 306 PPC. Nonetheless, for considering some important questions a three member bench of the apex court recommended constitution of a larger bench to answer those questions. Consequently, a larger bench of the Supreme Court on the point of value of statement of accused under section 342 Cr.PC observed

²³⁷*Abdul Salam vs. The State*, 1997 SCMR 29. Originally, a jail appeal from the judgment of the High Court Balochistan was filed and it was heard by a three member bench of the Supreme Court comprising of Justice Saleem Akhar, Justice Manzoor Hussain and Justice Mir Hazar Khan Khoso. Three member bench, however, raised three important questions and recommended a larger bench to answer those question. A larger bench of five members pronounced its judgment, reported as *Abdus Salam vs. The State*, 2000 SCMR 338.

that such statement does not amount to confession and evidence of prosecution was also not subjected to *Tazkiyah-al Shahood* as required under section 304 PPC so conviction under section 302(b) PPC was required to be recorded rather under section 302 (a) PPC. Regarding punishment of accused it was held by the Supreme Court, in the light of evidence recorded, that both lower courts rightly punished the accused with death.

Law settled by a larger bench of the apex court was followed in subsequent cases and punishment of death as *qisas* under section 302 (a) PPC on the basis of statement of accused was altered. For instance, in the case of *Muhammad Riaz*, appellant and his two brothers were convicted under section 302 (a) PPC. Two of accused persons were sentenced to death as *qisas*.²³⁸ In his statements under section 342 Cr.PC and under section 340(2) Cr.PC accused *Muhammad Riaz* admitted murder but took plea of grave and sudden provocation as deceased entered into his house to abduct his sister. The High Court Lahore though did not mention about alteration of conviction under section 302(b) PPC but altered death sentence of both accused appellants to life imprisonment due to plea of accused taken in his defence. Similarly, in a double murder case of *Muhammad Imran*, accused was convicted under section 302 (a) PPC on the basis of statement of accused under section 342 Cr.PC.²³⁹ But on appeal, the High Court substituted his conviction under section 302 (c) PPC and sentenced him for twenty years' imprisonment on each count for the reason that both murders were committed by accused due to family honour. In another interesting case of *Nazir Ahmad*,²⁴⁰ accused confessed his guilt of committing murder of his real brother and burying his dead body in courtyard of his house. His

²³⁸ *Muhammad Riaz vs. The State*, 2005 YLR 1058 Lah.

²³⁹ *Muhammad Imran vs. The State*, 2008 YLR 1290 Lah.

²⁴⁰ *Nazir Ahmad vs. The State*, 2010 MLD 1684 Lah.

confession was made at three stages; first when charge was framed; secondly in his statement under section 342 Cr.PC and thirdly when in his statement on oath. Trial court convicted him and sentenced him to death as *qisas* under section 302 (a) PPC. However, in appeal the High Court substituted conviction to section 302 (c) PPC and sentenced accused with ten years' rigorous imprisonment. Justification of decision given by the High Court was as follows:

Therefore, in the given circumstances and after having accepted appellant's confessional statement, we are of the view that it is not a pre-planned murder as the appellant suddenly gave a blow on the head of the deceased because it is very common in the village life that the villagers / farmers normally keep with them "kassis" or "takas" to irrigate lands or to cut the fodder.²⁴¹

Similarly, in the case of *Pehlwan*, accused was charged for murders of his wife and her paramour.²⁴² In his statement under section 342 Cr.PC, accused admitted murder but took defence of sudden and grave provocation as he saw both of them in compromising position. Trial court on the basis of statement of accused sentenced him to death as *qisas*. On appeal, the High Court did not consider it just to maintain his conviction and sentence due to his statement in absence of any substantive evidence. Consequently, his conviction was altered under section 302 (c) PPC and he was sentenced with twenty five years' rigorous imprisonment. Likewise, in the case of *Akbar*²⁴³ both accused persons, i.e. father and son, were charged for murders of *Riaz Ahmad* and a daughter of *Akbar* committed due to their illicit relationship. Time and place of both murders were different. Charge to the extent of murder of daughter of accused was dropped for waiving right of *qisas* by her legal heirs. Consequently, co-accused was acquitted from case giving him benefit of doubt. However, in murder

²⁴¹ See *ibid*, at p. 1691.

²⁴² *Pehlwan and another vs. The State*, PLD 2001 Quetta 88.

²⁴³ *Akbar vs. The State*, 1997 PCr.LJ 1887.

trial of accused *Riaz Ahmad*, version of accused *Akbar* was that he saw both the deceased persons in compromising position and exercising his right of self-defence and under grave and sudden provocation he had killed both of them. On conclusion of trial, judge convicted accused *Akbar* under section 302(b) PPC and awarded him sentence of life imprisonment despite his admission under section 342 Cr.PC. Moreover, report of swab test also strengthened the version of defence. Conviction and sentence of accused was assailed before the High Court through an appeal and the High Court on the ground of grave and sudden provocation due to family honour took lenient view and held that accused was neither liable to *qisas* under section 302(a) PPC nor *ta'zir* under section 302(b) PPC. Consequently, his conviction was altered to section 302(c) PPC and he was punished with rigorous imprisonment of five years under section 302(c) PPC. In other words, in this case version of accused in his statement under section 342 Cr.PC was not taken as confession for awarding him sentence of death as *qisas*. Similarly, in the case of a police constable namely *Mir Hazar* who was on duty to check vehicles at a police post.²⁴⁴ When a driver did not stop his car on the asking of constable; following a direction of his senior constable fired at car causing death of a person. Promptly, a criminal case of murder was lodged against constable and he was arrested after few days. During investigation, he confessed his guilt before Assistance Commissioner. In trial, after closing evidence of prosecution witnesses, statement of accused under section 342 Cr.PC was recorded and he though admitted his guilt but took defence of his duty and order of his senior. Trial court on the basis of pleading his guilt convicted him under section 302 (a) PPC and sentenced him to death as *qisas*. The High Court did not confirm murder

²⁴⁴ *Mir Hazar vs. The State*, 2002 PCr.LJ 270 Quetta.

reference rather allowed appeal of accused and due to unintentional act, an act done in good faith and for the reason of negligence on the part of accused, convicted accused under section 302 (c) PPC and sentenced him to seven years' rigorous imprisonment.

The settled law, however, was not followed in *Shera Masih* case.²⁴⁵ In this case four persons were charged for the offence of murder and two of them admitted their guilt in their statements under section 342 Cr.PC but took plea of self-defence. Trial Court convicted *Shera Masih* under section 302(a) PPC and sentenced him to death as *qisas*. A division bench of the High Court confirmed his conviction and maintained sentence. However, a three member bench of the apex court while explaining the value of statement of accused observed as follows:

The admission of occurrence by the accused with a different version is not confession of guilt and the court, without splitting up it, can reject or accept the same in toto but if the admission in part or full is of the nature which provides support to prosecution case, the same can be used for the purposes of corroboration.²⁴⁶

Moreover, the apex court held that since accused appellants did not substantiate their plea of self-defence with evidence so their admission corroborates the version of prosecution case. The supreme court gave very strange decision while disposing of appeal by convicting *Shera Masih* under section 302(a) PPC and awarding him sentence of life imprisonment without mentioning any reasons and justifications.

²⁴⁵ *Shera Masih and another vs. The State*, PLD 2002 SC 643.

²⁴⁶ See *ibid*, at p. 653.

5.5 REQUIREMENTS OF TEST OF *TAZKIYAH-AL-SHAHOOD* / PURGATION OF WITNESS AS A PROOF OF *QATL-I-AMD* LIABLE TO DEATH AS *QISAS*

Statutory law is silent as to how the test of *Tazkiyah-al-Shahood* on a witness will be observed by courts in cases of *qatl-i-amd* for awarding punishment of death as *qisas* under section 302 (a) PPC. So trial courts at district level were handicapped to examine a witness for determining his competence according to the test of *Tazkiyah-al-Shahood*. Resultantly, murder cases were being disposed of by trial courts haphazardly and mere relying on arguments of counsels of parties and their personal wisdom. The Supreme Court as well as the Federal Shariat Court, in few cases relating to *hudood* offences tried to provide a guideline in this regard. Some leading cases, wherein superior judiciary explored pre-requisites of test of *Tazkiyah-al-Shahood* as required under *Hudood* laws, under section 304 PPC and under Article 17 of the *Qanun-e Shahadat* Order, 1984 are discussed here. First case on the subject is the case of *Ghulam Ali*²⁴⁷ wherein Shariat Appellate Bench of four members under the chairmanship of Justice Muhammad Afzal Zullah, discussed *Tazkiyah-al-Shahood* in a considerable detail. In this case accused was charged for theft liable to *hadd* under section 9 of the Ordinance, 1979. It is required under section 7 of the Offences Against Property (Enforcement of *Hudood*) Ordinance, 1979 that for proving theft liable to *hadd* either accused pleads guilty or there should be two Muslim male witnesses qualifying the requirements of *Tazkiyah-al-Shahood* that they are known

²⁴⁷ *Ghulam Ali vs. The State*, PLD 1986 SC 741. Accused was convicted under section 9 of the Offences Against Property (Enforcement of *Hudood*) Ordinance, 1979 and ordered that his right hand to be amputated from the joint of wrist. The Federal Shariat Court dismissed appeal and confirmed punishment and the decision was assailed before the Shariat Appellate Bench of the Supreme Court.

for their truthfulness and for abstaining from major sins, i.e. *kaba'ir*. An explanation under same section defined the term as “*Tazkiyah-al-Shahood* means the mode of inquiry adopted by a court to satisfy itself as to the credibility of a witness”. In this case since known standards and modes of *Tazkiyah-al-Shahood* were not followed by the courts below so the apex court held that accused was not liable to *hadd* offence. The apex court precisely mentioned the requirements of *Tazkiyah-al-Shahood* in the judgment including open and secret modes of enquiry about truthfulness of witnesses, presence of *muzakki*²⁴⁸, i.e. a referee or the person who gives evidence about truthfulness of a witness in court, questioning *muzakki* about his antecedents and character, conducting enquiry in *hadd* cases as condition precedent, framing a questionnaire by court for collecting information through *muzakki* and examination of *muzzaki* by court when he submits report. Second case on the subject matter is *Mumtaz Ahmad's case*²⁴⁹ wherein accused persons were convicted for committing offence of *haraaba* / bank robbery and they were sentenced by trial court to amputation of their right hand and foot of left side from ankle. In appeal a three member bench of the Federal Shariat Court held unanimously that though offence stood fully proved but sentence of *hadd* could not be imposed as exercise of *Tazkiyah-al-Shahood* was not conducted. In his judgment Justice Gul Muhammad Khan reiterated requirements of *Tazkiyah-al-Shahood* as mentioned in *Ghulam Ali* case and further held that *Tazkiyah-al-Shahood* even could be undertaken at the end of evidence at least in criminal cases.²⁵⁰ A third leading case of this category is *Sanaullah vs. The State*, wherein requirements of *Tazkiyah-al-Shahood* are discussed

²⁴⁸ See *ibid*, at p. 755.

²⁴⁹ PLD 1990 FSC 38, also reported as 1991 PSC 450 FSC.

²⁵⁰ See *ibid*, at p. 49.

by the court in a considerable length.²⁵¹ His lordship Mr. Justice Tanzil-ur-Rahman authored the judgment of appeal case filed against the decision of trial court. In this case trial court convicted appellant under section 9 of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 and punished him with amputation of right hand from joint of wrist. However, court of appeal set aside the decision of trial court for the reason that during trial of the case requirements of test of *Tazkiyah-al-Shahood* were not ascertained by the court so accused could not be punished with *hadd*. Resultantly, accused was convicted under sections 380 PPC and 14 of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 and sentenced him to five years' rigorous imprisonment. The Court on the point of requirements of *Tazkiyah-al-Shahood* observed:

It seems that the learned Sessions Judge or the subordinate judiciary, as a whole, particularly the Sessions / Additional Sessions Judges who try Hudood cases know very little about the concept, scope and the essentials of *Tazkiyah-al-Shahood*.²⁵²

The Federal Shariat Court due to the importance of matter, as stated above, had discussed *Tazkiyah-al-Shahood* in detail referring various verses from the Holy *Qur'an*, narrations of Prophet (pbuh) and opinions of well-known Muslim jurists.

Word '*Tazkiyah*' was defined as follows:

Tazkiyah means the mode of enquiry conducted by the Court in order to ascertain whether the evidence of the witness is accepted or not and for the purpose of declaring a witness [*adil*] (bearing good moral character) or *GhairAdil*. Actually, *Tazkiyah* is the responsibility of the Court so that the *Qazi* may protect himself from the evidence of [*fasiq*] a sinful person.²⁵³

²⁵¹ *Sanauallah vs. The State*, PLD 1991 FSC 186.

²⁵² See *ibid*, at pp. 213, 214.

²⁵³ See *ibid*, at p. 214.

Without going into the details of judgment here only requirements of *Tazkiyah-al-Shahood* identified by the bench are summarised. First, court will enquire from defendant / *mash-hood alaih*, before or after recording evidence of a witness, about credibility of witness. If defendant / *mash-hood alaih* acknowledges credibility of witness then court need not to determine *tazkiyah* of witness unless judge requires so. Secondly, if defendant does not acknowledge credibility of witness then it becomes incumbent upon court to conduct enquiry about truthfulness of a witness. Thirdly, in cases of *hudood* and *qisas*, *Tazkiyah-al-Shahood* is obligatory even defendant raises no objection on the credibility of a witness. Fourthly, for ascertaining probity (*adalat*) of witness court will conduct open and secret enquiry. Fifthly, enquiry as to the credibility of witnesses should be conducted by trustworthy and well-informed persons called *muzakki*. Sixthly, *muzakki* should not have any dispute or enmity with witness but he may be immediate relative of witness. Seventhly, a child, a blind and a sinful person cannot be appointed as a *muzakki*. Last case of this category is *Amjad Javed vs. The State*²⁵⁴ wherein the Supreme Court of Pakistan regarding the test of *Tazkiyah-al-Shahood* while relying on *Mumtaz Ahmad's* case observed:

There is no denying the fact that '*Tazkiyah-al-Shahood* may be undertaken at the end of the evidence at least in criminal cases. It can be done even at the appellate stage or by remanding case if the facts and circumstances of the case so warrant. If a party to the case assails the credibility of a witness then *Tazkiyah-al Shahood* is necessary in every case otherwise it is must only in *hudood* and *qisas* cases whether any party objects or not.'²⁵⁵

The *ratio decidendi* of the above discussed cases on the requirements of *Tazkiyah-al-Shahood* was followed in numerous subsequent cases. For instance, in a

²⁵⁴ 2002 SCMR 1247.

²⁵⁵ See *ibid*, at p. 1251.

case, *Manzoor and others vs. The State*, trial court convicted and sentenced accused of *qatl-i-amd* under section 302 (a) PPC to death as *qisas* as one of the witnesses who deposed against the accused in trial proceedings was found by the court to be a truthful witness.²⁵⁶ The High Court on appeal maintained the conviction and sentence recorded by the trial court. However, on the force of cases of *Ghulam Ali* and *Sanaullah*, the counsel for accused namely Mr. Asif Saeed Khan Khosa, before the Supreme Appellate Court, raised an objection that trial court failed to appreciate the requirements of evidence to qualify the test of *Tazkiyah-al Shahood* for punishment of *qisas* in *qatl-i-amd*. The apex court, therefore, modified conviction from 302 (a) PPC to 302 (b) PPC and punished accused persons with life imprisonment. Similarly, in the case of *Muhammad Asif vs. The State*²⁵⁷, a division bench of the Peshawar High Court relying upon above precedent case laws also reiterated almost the same guideline for test of purgation.

Law settled in the above discussed cases became the precedent law of Pakistan which bound all lower courts as the provisions of Articles 189, 201 and 203- GG of the Constitution of Islamic Republic of Pakistan, 1973 require that all subordinate courts follow the decisions of the Supreme Court, the High Courts and the Federal Shariat Court, respectively. Unfortunately, in practice conducting enquiry or exercise of *Tazkiyah-al-Shahood* for determining veracity of a witness has never been observed by lower courts in cases of *qatl-i-amd*. Rather, presiding officers of trial courts, in murder cases, normally frame charge under section 302 (b) PPC and without exercising *Tazkiyah-al-Shahood* record depositions of witnesses.

²⁵⁶ *Manzoor and others vs. The State*, 1992 SCMR 2037.

²⁵⁷ 2000 YLR 1778 Pesh.

5.6 CONVICTION UNDER SECTION 302 (a) PPC AND SENTENCE OF DEATH AS QISAS ON THE BASIS OF EVIDENCE AS PROVIDED UNDER SECTION 304 PPC AND ARTICLE 17 OF THE QANUN-E SHAHADAT ORDER, 1984

After promulgation of Criminal Law (Amendment) Ordinance, 1990 in numerous murder cases trial courts recorded conviction under section 302 (a) PPC where offence was proved by evidence other than confession of accused. Trial courts, however, while recording conviction under section 302 (a) PPC miserably failed to comply with the requirements given under section 304 PPC and under article 17 of the *Qanun-e Shahadat* Order, 1984. Before case law analysis it is better to discuss a few important cases where basic confusions were tried to be resolved by judiciary. In *Muddassar alias Jimmi's* case a bench of two judges of the apex court of Pakistan discussed the newly enacted law when a trial court in a murder case failed to mention specifically that under what subsection of section 302 PPC accused was convicted and sentenced.²⁵⁸ Trial court also did not assign any reason for not imposing sentence of *qisas* or sentence of imprisonment of 25 years or lesser than that. The bench observed that section 304 PPC had nexus with article 17 of the *Qanun-e Shahadat* Order, 1984 and that failure on the part of trial court by ignoring provisions of both sections was alarming. The court, however, compared the provisions of section 304 PPC with those of article 17 QSO by keeping both in juxtaposition for the purpose of proper understanding of them. According to the observation of court provisions of section 304 PPC play an important role in ascertaining the fate of those found guilty

²⁵⁸*Muddassar alias Jimmi vs. The State*, 1996 SCMR 3.

of offence of murder. If evidence fulfils criterion mentioned under section 304 PPC then accused might be convicted and sentenced under section 302 (a) PPC but if not so then he might be convicted and punished to death under clause (b) of section 302 PPC by way of *ta'zir* or to imprisonment for life. Interestingly, the apex court did not differentiate the scope of provisions of section 302 (c) PPC from those of clauses 302 (a) and 302 (b) PPC. Similarly, in *Abdus Salam vs. The State*²⁵⁹ a three member bench of the Supreme Court recommended constitution of a larger bench for answering three questions. First that, where *qatl-i-amd* cannot be punished as *qisas* under section 302(a) PPC, is there any bar in awarding punishment of death under section 302 (b) PPC? Secondly, what is the standard of proof required under section 304 PPC for awarding punishment of death as *qisas* under section 302 (a) PPC? Thirdly, what distinctive standard of proof would be required and guiding principles should be followed for awarding punishment of *ta'zir* under section 302 (b) PPC? A larger bench of the Supreme Court did not answer these questions in detail. However, in answer to first question it was observed that where punishment could not be awarded as *qisas* alternatively sentence under section 302 (b) as *ta'zir* can be awarded. In its answer to second question, the bench just approved its decision given in *Manzoor's* case.²⁶⁰ However, the bench in its answer to third question nowhere mentioned any distinctive standards and guiding principles for awarding punishment of death as *ta'zir* under section 302 (b) PPC except that normal sentence under section 302 (b) PPC is death and lesser sentence could only be awarded when there involves any of the mitigating circumstances. Case law analysis on the point of recording conviction

²⁵⁹ 2000 SCMR 338.

²⁶⁰ 1992 SCMR 2307.

under section 302 (a) PPC on the basis of ocular evidence and punishment of death as *qisas* can be provided under following few categories.

5.6.1 Conviction and Sentence of Death under Section 302 (a) PPC as Qisas Awarded by Trial Courts and Confirmed by Appellate Court on the Basis of Ocular Evidence

There are only few reported cases wherein death sentence awarded under section 302 (a) PPC by trial court, on the basis of ocular evidence, was maintained by appellate courts. *Muhammad Yaqub vs. The State*²⁶¹ is the first case of this category wherein a three member bench of the Federal Shariat Court maintained sentence of death under section 302 (a) PPC for *qatl-i-amd* awarded by trial court. Another case of this category is a double murder case of *Waris Shah* wherein three accused persons were nominated.²⁶² All accused professed innocence at the stage of framing charge. They stated that a false FIR was lodged against them and false evidence was fabricated. On conclusion of trial, all accused were convicted for *qatl-i-amd* under section 302(a) /34 PPC and were sentenced to death as *qisas*. The High Court on appeal neither discussed relevant law nor evaluated evidence recorded in trial rather it merely confirmed murder reference and dismissed appeal by holding that case against appellants was proved beyond reasonable doubt. Third mind boggling decision of this category was given by the Lahore High Court in the case of *Nazir*.²⁶³ In this case five accused were tried for committing murder of two persons on 12-02-1991 within a

²⁶¹ 1998 PCr.LJ 638 FSC.

²⁶² *Waris Shah vs. The State*, 1999 MLD 375 Lah.

²⁶³ *Nazir vs. The State*, 2000 YLR 2638 Lah.

police station or immediately outside the police station, district Chiniot. Trial court on conclusion of trial acquitted four persons and convicted accused *Nazir* under section 302 PPC and punished him with death for committing both murders. Trial court in its decision, however, did not mention the exact part of section 302 PPC for the conviction and sentence of accused. On appeal, the High Court without considering criterion of evidence as required under section 304 PPC clarified that conviction of accused due to brutal nature of offence fall under section 302 (a) PPC and his sentence was death by way of *qisas*. Importantly, no precedent case was relied upon by the High Court. Similarly, a fourth strange decision was given by the Lahore High Court in the case of *Muhammad Khan*.²⁶⁴ Trial court convicted accused under section 302(a) PPC and sentenced him to death as *qisas* on the basis of ocular and medical evidence. Nonetheless, witnesses were not subjected to the test of purgation. The High Court also did not cite any precedent case on the subject. Even without discussing and without observing the scope of the provisions of section 304 PPC and article 17 QSO appellate court maintained conviction and punishment under section 302(a) PPC as *qisas*. In a fifth case, the apex court had declined leave to appeal in the case of *Khalid Mehmood*.²⁶⁵ The petitioner sought leave to appeal by filing a petition under Article 185(3) of the Constitution of Islamic Republic of Pakistan, 1973 challenging the judgment of the Lahore High Court, Rawalpindi Bench. The High Court maintained conviction of accused under section 302(a) PPC and confirmed sentence of death by way of *qisas*. There was no confession on the part of accused but in his statement, under section 342 Cr.PC, he admitted murder and took defence of provocation as the deceased had called his name as a son of bitch. Before the apex

²⁶⁴ *Muhammad Khan vs. The State*, 2001 YLR 612 Lah.

²⁶⁵ *Khalid Mehmood vs. The State*, 2003 SCMR 914.

court, counsel for accused alleged that proof of *qatl-i-amd* as required under section 304 PPC is absent so sentence of death as *qisas* is not justified. But the Supreme Court did not take notice of conviction in the light of requirements of proof of *qatl-i-amd* under section 304 PPC for awarding sentence of *qisas*. Even no precedent case law was referred or relied upon. Sixth milestone case of this category is *Nadeem vs. The State*²⁶⁶ wherein victim was a seven years' old boy. Trial judge convicted accused on the basis of circumstantial evidence of well-connected and unbroken chain of events for offences of sodomy under section 12 of the *Zina* Ordinance, under section 377 PPC and for *qatl-i-amd* under section 302 (a) PPC. For *qatl-i-amd* accused was sentenced to death by way of *qisas* and there was no confession on the part of accused. He even refused his involvement under his statement under section 342 Cr.PC. The bench miserably failed to evaluate the quality of ocular evidence as required under section 304 PPC for awarding sentence of death by way of *qisas* and blindly confirmed conviction and death sentence under section 302 (a) PPC. Moreover, no case law was cited in judgment to justify the decision. Similarly, in the case of *Muhammad Ijaz* a three member bench of the Supreme Court of Pakistan dismissed leave to appeal.²⁶⁷ In this case trial court convicted and sentenced accused under section 302 (a) PPC. On appeal, High Court confirmed murder reference and dismissed appeal. Interestingly, in the judgment of the apex court it was nowhere mentioned that whether High Court maintained conviction under section 302 (a) PPC or altered it under section 302(b) PPC. Another case of this category is *Javed Iqbal's* case who allegedly murdered one hundred children. He was convicted and sentenced

²⁶⁶ 2005 PCr.LJ 1010.

²⁶⁷ *Muhammad Ijaz vs. The State*, 2008 SCMR 819. In *Muhammad Anwar's* case and in the case of *Muhammad Ejaz*, Justice Faqir Muhammad Khokhar was a member of the bench. He wrote judgment in latter case but even then two different approaches were adopted.

by trial court under section 302 (a) PPC but before execution of punishment of death as *qisas* he committed suicide.²⁶⁸

5.6.2 Conviction before Trial Court under Section 302 (a) PPC Altered to Conviction under Section 302(b) PPC while Death Sentence was Confirmed but by Way of Ta'zir

In numerous murder cases conviction and sentence awarded by trial courts under section 302 (a) PPC was substituted to conviction under section 302 (b) PPC and sentence of death as *ta'zir* for the reason that courts failed to exercise test of *Tazkiyah-al-Shahood* on witnesses. For the sake of brevity and conciseness only those cases are discussed in detail which are important for their facts. For instance, in the case of *Hakim Anayat Ullah Khan*, a fifteen years' old young school going boy was brutally murdered. Conviction and sentence of death as *qisas* was altered to conviction under section 302 (b) PPC and sentence of death as *ta'zir* by the Supreme Appellate Court for the reason that evidence as required under section 304 PPC was not available.²⁶⁹ Similar decision was given by the Supreme Appellate Court in *Mahmood vs. The State*.²⁷⁰ In the case of *Zia Ullah*, a three member bench of the Federal Shariat Court heard and decided a murder reference of trial court and appeal of accused. Trial court convicted appellant under section 17 (4) of the 'Offences Against Property (Enforcement of Hudood) Ordinance (VI of 1979)' and under section 302 (a) PPC and was sentenced to death as *qisas*. Conviction and punishment

²⁶⁸ Wasti Tahir, *The Application of Criminal Law in Pakistan*, Brill (2009) at p. 175.

²⁶⁹ *Hakim Inayat Ullah Khan vs. The State*, 1993 PCr.LJ 1138, SAC.

²⁷⁰ *Mahmood vs. The State*, 1993 PCr.LJ 1047 SAC.

under both laws require evidence of witnesses fulfilling the criterion of *Tazkiyah-al-Shahood*. The Federal Shariat Court by its decision altered conviction under section 302(b) PPC and death sentence as *ta'zir* for the reasons that trial court failed to adopt procedure of *Tazkiyah-al-Shahood* as required under section 7 of the Ordinance and also that it was not clear that which mode trial court adopted for ascertaining the credibility of witnesses.²⁷¹ Similarly, in the case of *Murid Hussain* trial court convicted him under section 302 (a) PPC and he was sentenced to death as *qisas*.²⁷² There was no confession of accused. He also denied charges levelled against him in prosecution evidence. Astonishingly, trial court sentenced him to death as *qisas* because prosecution agency proved its case by evidence beyond reasonable doubt. The High Court on appeal altered conviction of accused under section 302 (b) PPC because evidence required under section 304 PPC for conviction under section 302 (a) PPC and sentence by way of *qisas* was not available. However, sentence of death under section 302 (b) PPC was awarded because accused displayed unashamed highhandedness by killing deceased in broad daylight in a busy market place and secondly that there was no mitigating circumstance for taking lenient view in awarding lesser of sentences under section 302(b) PPC. Similarly, in the case of *Amjad Javed* a three member bench of the Supreme Court allowed leave to appeal against the decision of the High Court wherein conviction and sentence under section 302 (a) PPC awarded by trial court was maintained. The apex court altered conviction under section 302(b) PPC maintaining death punishment but by way of *ta'zir* for the reason that requirements of section 304 PPC were not observed by two courts

²⁷¹ *Zia Ullah alias Jaji vs. The State*, 1999 PCr.LJ 1821 FSC.

²⁷² *Murid Hussain vs. The State*, 2000 YLR 1315 Lah.

below.²⁷³ In subsequent cases same approach was adopted by the superior judiciary.²⁷⁴

5.6.3 Conviction before Trial Court under Section 302 (a) PPC, Altered to Conviction under Section 302(b) PPC and Death Punishment was Substituted to Life Imprisonment as Ta'zir

Hundreds of decisions of trial courts in murder cases where accused was convicted and punished with death as *qisas* under section 302 (a) PPC on the basis of evidence of witnesses when assailed through appeals, conviction was altered to section 302 (b) PPC for the reason that requirements of the test of *Tazkiyah-al-Shahood* were not fulfilled. However, lesser punishment of imprisonment for life under section 302 (b) PPC was awarded due to involving some extenuating circumstance. For instance, in the case of *Atif Shahbaz* murder was committed in retaliation because the deceased had earlier killed a cousin of the accused.²⁷⁵ Appellate court considered it unsafe to confirm death sentence for accused was instigated to do so due to an earlier murder of his cousin. Hence accused was convicted and sentenced to life imprisonment under

²⁷³ *Amjad Javed vs. The State*, 2002 SCMR 1247.

²⁷⁴ For instance, *Muhammad Azhar alias Ajja vs. The State* 2002 PCr.LJ 1690 Lahore; *Muhammad Riaz vs. The State*, 2002 YLR 1248 Lahore; *Muhammad Riazul vs. The State*, 2002 YLR 1248 Lahore; *Rashid Ahmad vs. The State*, 2003 PCr.LJ 480 Lahore; *Muhammad Hussain and Another vs. The State*, 2003 PCr.LJ 1015 Lahore; *Abdul Hussain vs. The State*, 2003 PCr.LJ 1847 Karachi; *Haji vs. The State*, 2003 PCr.LJ 1881 Lahore; *Abdul Wahid vs. The State*, 2003 SCMR 668; *Azhar alias Bhai Khan vs. The State*, 2003 YLR 499 Karachi; *Abdul Hussain vs. The State*, 2003 PCr.LJ 1847 Karachi; *Mustahsam Mahmood vs. The State*, 2004 MLD 1769 Lahore; *Muhammad Hussain vs. The State*, 2006 YLR 2912 Lahore; *Muhammad Anwar vs. The State*, 2007 MLD 91 Lahore; *Muhammad Ayub alias Mahboob Ahmad vs. The State*, 2007 PCr.LJ 93 Lahore; *Alam Javed vs. The State*, 2008 SCMR 1477; *Khizar Hayat vs. The State*, 2011 SCMR 429 and *Namoos Khan and another vs. The State*, 2017 PCr.LJ 34 Sindh.

²⁷⁵ *Atif Shahbaz vs. The State*, 1999 PCr.LJ 365 Lah.

section 302 (b) PPC. Similarly, in the case of *Faiz Muhammad*²⁷⁶, the Lahore High Court awarded punishment of life imprisonment for motive could not be proved and cause of occurrence had remained shrouded in mystery. In another case accused *Muhammad Yousaf* was twenty years' old at the time of occurrence so he was awarded life imprisonment as *ta'zir*.²⁷⁷ The High Court held conviction of accused under section 302 (a) PPC unjustified and observed that it was the duty of prosecution to prove the case positively whether it was *qatl-i-amd* liable to *qisas*, not liable to *qisas* or liable to *ta'zir*. Moreover, it was observed that trial court was duty bound to scrutinise the applicability of exceptions under clauses (b) and (c) of section 302 PPC and after having satisfied itself about the non-applicability of both exceptions should award punishment of death by way of *qisas* under section 302 (a) PPC.

In some cases weak and vague justifications were given by courts for awarding lesser sentence under section 302 (b) PPC. For instance, in *Noor Khan's* case²⁷⁸ purpose of awarding life imprisonment was to meet the ends of justice. Similarly, in *Muhammad Fayyaz vs. The State*²⁷⁹ life imprisonment was awarded for the reasons that both parties had suppressed actual facts of the incident and that something must have happened between the parties compelling accused to do away with the deceased which was not brought on record. Similarly, in the case of *Riasta alias Nanha*²⁸⁰ for the reasons of single shot the High Court took lenient view and awarded punishment of life imprisonment. Another strange decision in the case of *Mahboob alias Booba*²⁸¹ is noted wherein the High Court observed that there was

²⁷⁶ *Faiz Muhammad vs. The State*, 1999 YLR 1398 Lah.

²⁷⁷ *Muhammad Yousaf vs. The State*, PLD 2000 Kar. 94.

²⁷⁸ *Noor Khan vs. The State*, 2001 MLD 771 Lah.

²⁷⁹ 2001 PCr.LJ 453 Quetta.

²⁸⁰ *Riasta alias Nanha vs. The State*, 2003 PCr.LJ 331 Lah.

²⁸¹ *Mahboob alias Booba vs. The State*, 2003 PCr.LJ 1002 Lah.

something behind the incident which both parties had concealed from the court and due to concealment from both sides lenient view was taken and accused was sentenced to life imprisonment. Similarly, in *Abdul Rehman vs. The State* lenient view was taken because murder was committed under the heat of movement.²⁸²

Law settled in precedent cases that some extenuating circumstances justify the lenient view of punishment under section 302 (b) PPC was followed in subsequent cases. Nonetheless, for giving benefit to murderers of lesser punishment courts had to identify extenuating circumstance in cases of *qatl-i-amd* like sudden provocation and humiliation at public place²⁸³, using filthy language²⁸⁴, failing to prove alleged motive²⁸⁵, fire-arm injury not direct cause and death might have caused due to doctor's negligence²⁸⁶, an unintended murder occurred after exchange of hot words between parties and accused followed a direction of his father to kill the deceased²⁸⁷, sudden and unintended murder²⁸⁸, minority of accused²⁸⁹ and many doubts in prosecution evidence²⁹⁰.

5.6.4 Conviction and Sentence under Section 302(a) PPC Awarded by Trial Courts, Altered to Conviction and Sentence under Section 302(c) PPC

In rare cases conviction and punishment awarded by trial court to accused in murder cases were altered to conviction and sentence under section 302 (c) PPC where

²⁸² *Abdul Reman vs. The State*, 2004 YLR 778 Lah.

²⁸³ *Munawar Ali vs. The State*, 2004 YLR 2085 Kar.

²⁸⁴ *Muhammad Nawaz vs. The State*, PLD 2005 SC 40.

²⁸⁵ *Aurangzeb alias Rangu vs. The State*, 2006 YLR 2423 Lah.

²⁸⁶ *Muhammad Ashraf vs. The State*, 2006 YLR 2652 Lah.

²⁸⁷ *Ala-ud-Din vs. The State*, 2008 PCr.LJ 424 Lah.

²⁸⁸ *Muhammad Rafique alias Mango vs. The State*, 2008 YLR 2549 Lah.

²⁸⁹ *Sohail Sajid vs. The State*, 2009 SCMR 356.

²⁹⁰ *Jan Muhammad alias Janoo vs. The State*, 2016 YLR 2359 Sindh.

maximum possible sentence is twenty-five years' imprisonment. For instance, in *Ghulam Haider's* case due to involvement of family honour (*ghairat*) conviction of accused was altered from section 302 (a) to section 302 (c) and he was sentenced to rigorous imprisonment for fourteen years.²⁹¹ Similarly, in *Muhammad Yasin vs. The State*, a sudden and free fight took place in a street between two groups on a petty matter. Many persons from both sides took part into the brawl; severely beaten each other and one of the injured persons lost his life.²⁹² On conclusion of trial, accused was convicted under section 302 (a) PPC and punished to death as *qisas*. However, the High Court on appeal altered his conviction from section 302 (a) to section 302 (c) PPC and sentenced him with rigorous imprisonment of seven years.

5.6.5 Acquittal of Accused by Appellate Court by Setting Aside Conviction and Sentence Recorded under Section 302 (a) PPC by Trial Court

Last category of precedent cases on the topic is of those cases where conviction and sentence under section 302 (a) PPC were altered to acquittal by court of appeal. For instance accused *Muhammad Iqbal*, convicted under section 302 (a) PPC and sentenced to death as *qisas* by trial court, was subsequently acquitted of charge of murder by the High Court due to insufficient evidence.²⁹³ Similarly, in *Saifullah's* case²⁹⁴ five brothers were booked in two murders of *Saifullah* and a lady namely *Mst. Zarro*, the wife of one of the accused persons. It was in the prosecution story that *Saifullah* deceased wanted to marry his cousin *Mst. Zarro* but one of the accused

²⁹¹ *Ghulam Haider vs. The State*, 1996 PCr.LJ 2021 Lah.

²⁹² 1999 PCr.LJ 633 Kar.

²⁹³ *Muhammad Iqbal vs. The State*, 1996 PCr.LJ 1740 Lah.

²⁹⁴ *Seva and three others vs. The State*, 1997 MLD 1252 Lah.

persons namely *Khairoo* managed to get married to her and this was the motive of the murder of *Saifullah* and the lady. But as per defence version both deceased were found in objectionable position hence were killed by *Khairoo*, the proclaimed offender. Trial court blindly convicted two brothers, i.e. *Meva* and *Seva*, under section 302 (a) PPC and both were sentenced to death as *qisas*. Two other accused persons were convicted under section 302(c) PPC and were punished with ten years' rigorous imprisonment. Appellate court, however, acquitted all accused persons from charges, giving all of them benefit of doubt. Interestingly, in the case of *Muhammad Amin*²⁹⁵ trial court acquitted three co-accused persons by giving them benefit of doubt and convicted appellant under section 302 (a) PPC and sentenced him to death as *qisas* on the basis of admission of accused made under section 342 Cr.PC wherein he stated that when he saw his sister and deceased in objectionable position he hit and killed the deceased under provocation. Trial court disbelieved prosecution version and relied upon the defence of accused made in his statement. The High Court on appeal held that plea of accused, that when he saw accused making love with his sister he under provocation killed him, could not be proved by him. However, the High Court extended benefit of doubt, already given by trial court to other three co-accused, to appellant accused and acquitted him of charge. Nowhere, in the judgment, was mentioned about the test of *Tazkiyah-al-Shahood*. Similarly, in *Qasim and others vs. The State*²⁹⁶ accused who were convicted under section 302 (a) PPC and sentenced to death as *qisas* by trial court were acquitted of charge on the basis of benefit of doubt and due to having no proof of *qatl-i-amd* as required under section 304 PPC.

²⁹⁵ *Muhammad Amin vs. The State*, 2000 YLR 1150 Lah.

²⁹⁶ *Qasim and others vs. The State*, 2004 PCr.LJ 181 Kar.

5.7 CONCLUSION

Discussion under this chapter can be summed up here. After implementation of *qisas* and *diyat* law in Pakistan, conviction under section 302 (a) PPC and punishment of death by way of *qisas* had been a hard way for both judges and lawyers. Case law discussion under this chapter reveals few important results. First that in precedent cases there has been inconsistency on the point that on what type of admission of accused, conviction and sentence under section 302 (a) can be awarded.²⁹⁷ Secondly, it has been quite difficult for courts to understand the concept of valid and lawful confession of accused. Regarding pre-requisites of judicial confession recorded in cases entailing capital punishment before a Magistrate, recently, the apex court in the cases of *Azeem Khan and another*²⁹⁸ gave a guideline about recording confessional statement of accused. Similar guideline was reiterated by the Lahore High Court in *Zia Ullah vs. The State and others*.²⁹⁹ Thirdly, few essentials, for exercising *Tazkiyah-al-Shahood*, no doubt have been laid down by superior court but trial courts in murder cases normally do not observe the same. Lastly, after the decision of apex court in *Muhammad Ziaul Haque vs. The State*, 1996 SCMR 869, it is incumbent upon judges to mention the exact clause of section 302 PPC so that quantum of sentence could be determined.

²⁹⁷ For instance, the Peshawar High Court in the case of *Muhammad Asif vs. The State*, 2000 YLR 1778 Peshawar dismissed murder reference despite confession of accused duly recorded by a competent court. The Sindh High Court in *Muhammad Ali alias Muhammad vs. The State*, 2006 MLD 802 Karachi due to retraction from true and voluntary confession altered conviction from section 302 (a) PPC to section 302 (b) PPC. However, in the case of *Allah Bakhsh vs. The State*, PLD 2006 SC 441 accused was sentenced under section 302 (a) PPC but the apex court despite retraction from confession was not willing to alter decision of two courts below.

²⁹⁸ *Azeem Khan and another vs. Mujahid Khan and others*, 2016 SCMR 274.

²⁹⁹ *Zia Ullah vs. The State and others*, 2018 PCr.LJ 1104 Lah.

CHAPTER 6

PUNISHMENT OF *QATL-I-AMD* UNDER SECTION 302(b) PPC AS *TA'ZIR* AND EXTENUATING CIRCUMSTANCES

6.1 INTRODUCTION

Under the scheme of Macaulayan Penal Code, there are two types of defences – general and special. General defences given under Chapter IV, PPC are called general exceptions. In other words, an offender who proves before the court that his case is covered under these exceptions; he cannot be called an offender and deserves acquittal of charge as he committed no offence. Besides these complete defences or general exceptions, there are some partial defences under the law of murder, i.e. *qatl-i-amd*, known as extenuating circumstances and mitigating circumstances. If an accused proves before the court that he was compelled under any of such circumstances; he cannot be punished severely and court may inflict upon him a minimum possible punishment. Prevalent practice in Pakistan is that offenders who beseech protection of any of extenuating circumstances their cases fell under section 302 (b) PPC and culprits who seek refuge of any of mitigating circumstances their cases fell under section 302 (c) PPC. Unlike mitigating circumstances, which were mentioned under section 300 of the erstwhile law, extenuating circumstances are not

provided under the Penal Code but courts have to identify such a circumstance from the facts of a murder case.

As it has been discussed above, punishment by way of *ta'zir* can be inflicted when evidence to prove *qatl-i-amd* as required under the provisions of section 304 PPC and article 17 QSO is not available. Moreover, under clause (b) of section 302 PPC two alternative punishments of offence of *qatl-i-amd* as *ta'zir*, i.e. punishment of death or imprisonment for life, are provided. The legislature left it up to the courts to impose the most appropriate sentence on the conclusion of trial keeping in view the facts and circumstances of the case. So this chapter deals with alternative *ta'zir* punishments under section 302 (b) PPC and explores reasons and justifications for imposing lesser punishment because death sentence in cases of *qatl-i-amd* is a rule while imprisonment for life is an exception. In this chapter, through case law analysis, extenuating circumstances as identified by judges during adjudication of murder cases have been discussed. The chapter provides case law analysis to elaborate as to how courts on same extenuating circumstance took different decisions qua punishment.

6.2 EXERCISE OF DISCRETION IN AWARDING *TA'ZIR* PUNISHMENT UNDER SECTION 302 (b) PPC EITHER DEATH OR LIFE IMPRISONMENT FOR *QATL-I-AMD*

The Pakistan Penal Code, 1860, according to its scheme, provides punishments for most of the offences in shape of imprisonment and / or fine or with both. For the offence of murder, before the promulgation of *qisas* and *diyat* law, under section 302

of the (repealed) PPC, punishment was death or transportation of life and fine. Intention of drafters of the Code might be to give judges discretionary power in deciding quantum of punishment so that in the light of evidence judges could be able to decide appropriate type of punishment and its magnitude keeping in view the nature of offence. Under the exercise of such discretion judges could award severe punishment of death in more heinous and brutal nature of offences or where evidence is impeccable. But in cases of doubt or due to involvement of some circumstance, judges could take a lenient view in awarding punishment.³⁰⁰ In cases of *qatl-i-amd* due to extenuating circumstance courts usually prefer lesser punishment of imprisonment for life under section 302 (b) PPC.

Regardless of promulgation of new Islamized law relating to offence of *qatl-i-amd*, Pakistan judiciary kept on deciding quantum of punishment following the line adopted by courts before and even after partition of Indian Subcontinent in the year 1947. Perhaps judges, trained and experienced under law given by her Majesty's Parliament, when did not find any provisions under the Criminal Law (Second Amendment) Ordinance, 1990 about any criterion of awarding lesser punishment for offence of *qatl-i-amd*, became handicapped but to follow the precedent law. Therefore, presiding officers of criminal courts kept on deciding murder cases in accordance with the repealed law and precedents thereof. Naturally, gaps between law and practice were to be filled by judiciary and in all subsequent cases many issues, cropped up in murder cases, were adjusted by courts. Since there was no comprehensive list about extenuating circumstances under statutory law so it was open for lawyers to allege any fact or circumstance, best found to them, for getting

³⁰⁰ In many decisions of higher and superior judiciary both terms, i.e. extenuating circumstances and mitigating circumstances have been used alternatively and interchangeably. For instance, *Ahmad Nawaz vs. The State*, 2011 SCMR 593.

relief of lesser punishment in murder cases. In the case of *Abdul Malik and others*³⁰¹ a five member bench of the apex court regarding suitable punishment in murder cases warned as follows:

The cases entailing capital charge are to be decided with utmost care. When law vests a discretion in Courts to award sentence of death or life imprisonment, it casts a heavy duty to balance the various considerations which underlie these sentencing provisions. The circumstances surrounding the offence, the question of mens rea, the principle of proportionality of sentence, of the gravity of the offence charged, the considerations of prevention or of deterrence and of rehabilitation may also be kept in view if the circumstances of the cases and the law applicable so warrant.³⁰²

Generally, no hard and fast rule applies in cases of *qatl-i-amd* for awarding death penalty or imprisonment for life. Generally, death punishment is considered to be more severe than that of imprisonment for life. In cases of *qatl-i-amd*, severe punishment of death is awarded as normal punishment under the law of Pakistan. However, if a judge finds any of the extenuating circumstances in evidence then he can travel away from normal punishment and can award lesser punishment of imprisonment for life under section 302 (b) PPC. But for awarding lesser punishment under section 302 (b) PPC judges are supposed to supply reasons and justifications in their judgments for doing so. If, in absence of any extenuating circumstances, accusation of murder is proved beyond reasonable doubt, normal penalty is death which is awarded as a rule.³⁰³ Provisions of section 367(5) of the Criminal Procedure Code, 1898 require a judge of trial court to state reasons for awarding punishment of

³⁰¹ *Abdul Malik and others vs. The State and others*, PLD 2006 SC 365.

³⁰² See *ibid*, at p. 284.

³⁰³ The principle has been settled by superior judiciary and enunciated in the cases of *Muhammad Sharif vs. Muhammad Javed alias Jeda*, PLD 1976 SC 452, *Mst. Bismillah vs. Muhammad Jabbar*, 1998 SCMR 862 and *Pervez vs. The State*, 1998 SCMR 1976. The apex court in these precedents has reiterated a principle that in normal punishment under section 302(b) PPC trial court is not required to give reasons and justifications for awarding the penalty.

imprisonment of life, if he convicts accused for offence punishable with death but prefers to sentence him for any punishment other than death. However, law under Indian Criminal Procedure Code, on this point, has been changed.³⁰⁴ It has been further clarified by the Supreme Court that requirements enshrined under section 367 (5) Cr.PC are for trial courts only but not for appellate or revisional courts.³⁰⁵ In short, despite having a proof of *qatl-i-amd*, courts have power to travel from inflicting normal penalty of death keeping in view the facts and circumstances of each murder case. Importantly, an extenuating circumstance only extenuates punishment but not the offence. At what occasions a trial court can award lesser of the two punishments under section 302 (b) PPC depends on the facts of a murder case.

6.3 EXTENUATING CIRCUMSTANCES AND PUNISHMENT OF IMPRISONMENT FOR LIFE IN CASES OF QATL-I-AMD LIABLE TO TA'ZIR UNDER SECTION 302 (b) PPC

Extenuating circumstances, in a murder case, allow a court to award punishment of non-severe nature or of lesser intensity.³⁰⁶ There is altogether no uniform criterion for

³⁰⁴ The Indian Criminal Procedure Code provides a diametrically opposite principle. Indian corresponding provisions of the Code of Criminal Procedure were modified in the year 1955 by amending the relevant provisions of law and introducing a new principle. The same modified provisions were kept intact by Indian Legislature when law was re-enacted in 1973 under section 354 (3) of the Code of Criminal Procedure, 1973 which reads as follows;

“354(3) when the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded and in the case of sentence of death, the special reasons for such sentence.”

³⁰⁵ *Hassan vs. The State*, PLD 2013 SC 793.

³⁰⁶ In cases of *qatl-i-amd*, circumstances like brutality, nature of weapon of offence, method of occurrence if found present, courts usually convict and sentence accused with normal penalty of death without causing or mentioning any reason. On the other hand, if circumstances like expectation of life, tender age, private avenge, family honour, local tradition are involved then courts become inclined to convict and sentence accused to life imprisonment in murder cases under section 302 (b) PPC. However, where a court departs from normal penalty of death on charge of murder such departure has

courts that what circumstances can or cannot extenuate sentence of *qatl-i-amd*. Higher and superior judiciary in Pakistan, however, identified various extenuating circumstances in murder cases including expectancy of life, tender age, obsession of revenge, local traditions and family honour /*ghairat*.³⁰⁷ It is expedient to provide here a detailed analysis of precedent cases wherein extenuating circumstances are considered for taking lesser view of punishment.

6.3.1 Doctrine of Life Expectancy as an Extenuating Circumstance

In numerous cases judges awarded imprisonment for life under section 302 (b) PPC on the ground of expectancy of life. One of such earlier leading cases on this point is *Ghulam Hussain's case*.³⁰⁸ In this case a larger bench of five judges of the Supreme Court allowed leave to appeal to consider correctness of a decision of the High Court of West Pakistan sitting at Peshawar whereby a division bench of the High Court converted conviction and sentence of accused *Zainullah* from section 302 PPC to conviction under section 304 PPC and imposed ten years' sentence of imprisonment. The complainant of case filed appeal against the decision which was allowed and conviction under section PPC was altered to conviction under section 302 of the Code and sentence of transportation of life was awarded on the ground that accused was

to be justified in the first instance and on good grounds too. Not only trial court but revisional court, i.e. the High Court, in a murder case if prefers to dismiss revision petition, filed by the State or complainant, should also give cogent reasons rather than making a short order. For details see *Piran Ditta and three others vs. The State*, PLD 1976 SC 300.

³⁰⁷ In *Ajun Shah's case*, PLD 1967 SC 185, the apex court of Pakistan about the scope of extenuating circumstances observed as "the man is after all a creature of his environment. His action therefore must be judged in the background of the society to which he belongs. Though he may not be entitled to rely on the doctrine of provocation, still the above circumstances may be taken into account for not imposing the extreme penalty. Private revenge cannot be regarded as a mitigating circumstance. The question of sentence in each case must depend on the facts of the case and that in this particular case the criminality is not of a kind which should be visited with extreme penalty."

³⁰⁸ *Ghulam Hussain vs. Zainullah*, PLD 1961 SC 230.

given full expectation of life when the High Court decided appeal of accused in his favour. Counsel for appellant argued that sentence of death should be restored but then chief Justice of Pakistan, Mr. Justice A. R. Cornelius sentenced accused for transportation of life and observed:

In view of the length of time which has elapsed since the occurrence and the intervening incidents, in particular that as a result of the decision of the High Court, Zainullah was given a full expectation of life, we consider that the justice of the case will be sufficient met by the lesser sentence.³⁰⁹

However, in *Kala Khan's* case³¹⁰, expectancy of life was not accepted a sole ground for reducing sentence. In this case trial court convicted two accused under section 302(b) PPC but sentenced them differently. One accused was sentenced to death and the other to life imprisonment. High Court did not agree with the decision of trial court and acquitted one accused. But a three member bench of the Supreme Court, on appeal, with majority decision set aside the decision of High Court and restored the verdict of trial court by reversing order of acquittal into conviction. A review petition on the ground of expectation of life was also dismissed by the apex court with following observation:

It has been held by this Court that the doctrine of expectation of life has no application to an erroneous order causing grave miscarriage of justice but if inordinate delay occurs in the disposal of the appeal against the order of acquittal then the appellate Court may refrain from exacting the extreme penalty of death. But this would depend on the facts and circumstances of each case. Here, there is only a delay of two years which cannot be described an inordinate so as to entitle the petitioner to the benefit of the lesser penalty. Moreover, in awarding the capital sentence, the trial Court has held that there was no extenuating circumstance to mitigate the sentence.³¹¹

³⁰⁹ See *ibid*, at p. 234.

³¹⁰ *Kala Khan and others vs. Misri Khan and others*, 1979 SCMR 347.

³¹¹ See *ibid*, at p. 349.

Similarly, in *Muhammad Ramzan's* case High Court allowed a revision petition and enhanced sentence of convict from life imprisonment to death in a murder case after three years of the decision of trial court. The apex court on appeal reduced sentence to life imprisonment on the ground that for more than two years convict was given full expectation of life.³¹² Ground of expectancy of life was again discussed in detail by the Supreme Court in the case of *Maqbool Ahmad* wherein it was held that at one time the principle was taken as a ground for reduction of sentence in murder cases where convicts of death penalty were detained in jails for a long time but in view of changed circumstances the apex court in past one and a half decades repeatedly held that the theory no longer hold the field.³¹³ However, in *Abdul Malik's* case, wherein a five member bench of the apex court has observed that not only ground of expectancy of life but provisions of Article 13 (a) of the Constitution of Pakistan and other factors will also be looked at while deciding the question of lesser view of punishment under section 302 (b) PPC.³¹⁴

Even after promulgation of *qisas* and *diyat* law in Pakistan, in the year 1990, same ground had been adopted in practice. Expectancy of life as a ground for avoiding death sentence is used in three ways. First, when delay occurs in disposing of murder case.³¹⁵ Secondly, when life imprisonment is awarded but other party

³¹² *Muhammad Ramzan vs. The State*, PLD 1966 SC 129.

³¹³ *Maqbool Ahmad and others vs. The State*, 1987 SCMR 1059.

³¹⁴ *Abdul Malik and others vs. The State*, PLD 2006 SC 365.

³¹⁵ On this ground death punishment was avoided and life imprisonment was preferred in *Muhammad Aman vs. The State*, 1987 SCMR 124; *Maqbool Ahmad and others vs. The State*, 1987 SCMR 1059; *Moahzam Shah vs. Mohsan Shah and another*, 1995 SCMR 1190; *Raheem Bakhsh vs. Abdul Subhan*, 1999 SCMR 1190; *Muhammad Hanif and others vs. The State and others*, 2001 SCMR 84; *Muhammad Aslam and others vs. The State and others*, 2001 SCMR 223 and *Khurram Malik and others vs. The State and others*, PLD 2006 SC 354.

approaches to higher forum for enhancement of sentence to death.³¹⁶ Thirdly, where convict of death sentence had remained in jail for a considerable time. In some recent cases the law has been interpreted with more clarity. For instance, in *Agha Dinal Khan's* case³¹⁷ accused was convicted under section 302 (b) PPC and he was awarded death punishment. Reference sent by trial court was rejected while appeal of accused was partly accepted by the High Court whereby death penalty was reduced to life imprisonment. The High Court did not find any mitigating circumstance but reduced sentence for the reason that case was of ten years old. The Supreme Court agreeing with the decision of the High Court held that since a long time of ten years had elapsed so accused had acquired expectancy of life hence capital punishment was not justified. The *ratio* of *Maqbool Ahmad* case was distinguished by a five member bench of the apex court in *Dilawar Hussain vs. The State* and principle of expectancy of life was revived.³¹⁸ In this case though petition of accused for taking lesser view of punishment under section 302 (b) PPC on the ground of delay in deciding his case was dismissed but subsequently a larger bench of the apex court reviewed the decision of a three member bench and due to his eighteen years' incarceration his death sentence was altered to imprisonment for life. Similarly, in the case of *Hasan and others*³¹⁹ punishment of accused, who were sentenced to death but they spent about twenty two years in jail, was reduced from death to imprisonment of life basing on doctrine of expectancy of life. Interestingly, in a recent review petition, filed under

³¹⁶ See cases of *Mst. Razia Begum vs. Jahangir and others*, PLD 1982 SC 302; *Mst. Promilla and others vs. Safeer Alam and others*, 2000 SCMR 1166; *Amir Khan and others vs. The State and others*, 2002 SCMR 403; *Aziz Muhammad vs. Qamar Iqbal and others*, 2003 SCMR 579; *Abdul Haq vs. Muhammad Amin alias Manna and others*, 2004 SCMR 810; *Abdul Malik and others vs. The State and others*, PLD 2006 SC 365; *Haji Tahir Hussain vs. Sqlain and others*, 2008 SCMR 817 and *Ifikhar Ahmed Khan vs. Asghar Khan and another*, 2009 SCMR 502.

³¹⁷ *Agha Dinal Khan vs. Saffar and others*, 2008 SCMR 728.

³¹⁸ 2013 SCMR 1582.

³¹⁹ *Hasan and others vs. The State and others*, PLD 2013 SC 793.

Article 188 of the Constitution of Pakistan, 1973 before the Supreme Court of Pakistan, sole ground of expectancy was not accepted by a five member bench of the Supreme Court for taking lesser view of punishment under section 302 (b) PPC.³²⁰ The bench tried to clarify earlier precedent cases and did not agree with convict appellant that since he had spent a time equal to duration of life imprisonment or more than that in jail so this ground as an extenuating circumstance is sufficient for his release by converting his sentence of death to life imprisonment. The petition was dismissed by the bench and life expectancy as a sole ground for reducing death to life imprisonment was not given any weight. Hence settled law is that though sometimes doctrine of life expectancy is considered by courts for taking lesser view of sentence but it is not a sole ground for sentence to be commuted under section 302 (b) PPC from death sentence to punishment of life imprisonment.

6.3.2 Tender Age of Offender

Childhood and femaleness are two grounds which often protect minors and women in criminal cases. Sometimes, age of offender is considered a ground for awarding lesser punishment under section 302 (b) PPC. For instance, in *Ghulam Rasool* case three persons of 17 to 18 years of age were booked for an unprovoked murder.³²¹ They were convicted and sentenced to death by trial court. High Court by giving advantage of tender age reduced their punishment from death to transportation of life. Against the decision of the High Court, complainant's petition for leave to appeal was admitted by the Supreme Court for deciding the legality of reducing punishments

³²⁰ *Khalid Iqbal and two others vs. Mirza Khan*, PLD 2015 SC 50.

³²¹ *Ghulam Rasool vs. Ali Akbar and others*, PLD 1965 SC 363.

under section 302 PPC on a sole ground of tender age. Motive of murder as stated in the statement of accused under section 342 Cr.PC was that a brother of deceased had abducted sister of one of the accused persons eight years before. Although at that time the matter was patched up by the father of abductee after receiving an amount of Rs. 1500/- but it could not refrain victim party from taking revenge. The apex court maintained the decision of High Court whereby punishment of offenders was reduced to life imprisonment due to tender age.

Ground of tender age as an extenuating circumstance was kept alive by courts even after promulgation of *qisas* and *diyat* law in Pakistan. For instance, in the case of *Muhammad Nadeem*³²² trial court convicted a minor accused under sections 365-A and 302 (b) PPC for kidnapping cum murder and sentenced him to death. The Lahore High Court finding no illegality in the judgment of trial court dismissed appeal of accused and maintained his conviction as well as sentence under both charges. Leave to appeal was granted by the Supreme Appellate Court to reconsider the legality of conviction and sentence on the ground of minority of accused. The court, however, was pleased to reduce death sentence to life imprisonment on two counts and held:

The age of the appellant at the time of commission of the offence, when he was allegedly studying in 9th Class, was ranging between 15 to 18 years and he could very well avail of the benefits of section 306(a), P.P.C., which makes the offence of Qatl-i-Amd not liable to Qisas, or makes the offence of Qatl-i-Amd liable to Tazir, if the offender is minor. Section 302, P.P.C. has also been re-enacted. These provisions of law, like old section 302, P.P.C. provide for death penalty or imprisonment for life for Qatl-i-Amd liable to Tazir but since minor (a person less than 18 years old) has especially been dealt with therein, the intention of the law-giver seems to be to give some concession to a minor offender in the matter of sentence if a charge for Qatl-i-Amd liable to Tazir stands proved against him, unless the special circumstances of a particular case necessitate the awarding of death penalty to him.³²³

³²² *Muhammad Nadeem vs. The State*, 1992 PCr.LJ 1520 SAC.

³²³ See *ibid*, at p. 1535.

Similarly, in *Iftikhar-ul Hassan's* case, trial judge convicted accused Israr Bashir under section 302 (b) PPC and awarded him punishment of death for committing murder of Sohail Ahsan.³²⁴ The Lahore High Court, on appeal of accused, converted sentence of death to sentence of payment of *diyat* and imprisonment up to fourteen years under section 308 PPC on the ground that at the time of commission of offence of murder accused was minor and was not liable to *qisas*. The apex court, however, allowed leave to appeal and relying on many of its earlier cases clarified the ambiguity under the new scheme of law of *qisas* and *diyat* that in cases of *ta'zir* section 308 PPC does not attract. Hence the apex court, maintaining conviction of accused under section 302 (b) PPC, as awarded by trial judge, set aside the judgment of the High Court and punished accused with life imprisonment as *ta'zir* without mentioning that whether lesser punishment was awarded due to minor age or some other extenuating circumstance. Another important case of this category is the case of *Iftikhar Ahmad Khan*³²⁵ where accused was convicted and sentenced to death under section 302 (b) PPC. Nonetheless, the Lahore High Court, Rawalpindi Bench maintaining conviction reduced sentence of accused to life imprisonment on, *inter alia*, the ground of teenage. Decision of the High Court was challenged before the Supreme Court by filing leave to appeal. Leave was allowed by the Supreme Court to consider quantum of punishment under section 302 (b) PPC. The accused was on release from prison so the Supreme Court declined to alter imprisonment for life to death sentence. The apex court in its judgment provided a list of circumstances due to which penalty of death must be imposed including acts of brutal, horrific, heinous and

³²⁴ *Iftikhar-ul Hassan vs. Israr Bashir*, PLD 2007 SC 111.

³²⁵ *Iftikhar Ahmad Khan vs. Ashgar Khan*, 2009 SCMR 502.

shocking in nature, acts involving element of terrorism, creating panic to the society as a whole or in part, callous, cold blooded and involving grave inhuman attitude.

6.3.3 Local Tradition and Desire of Avenge as Extenuating Circumstances

One of the reasons for awarding lesser of punishments under section 302(b) PPC might be a tradition of society. In a couple of cases, local tradition and family duty were taken by courts as circumstances to extenuate sentence. In the case of *Ghulam Rasool* the then chief justice of Pakistan Mr. A.R. Cornelius in his judgment, on importance of social sentiment of revenge for restoring family honour emphasized as:

We note at the same time that the crime was one committed out of a sense of honour which is jealously nursed among the rural classes. A great many cases come before the Courts in which an insult to honour is avenged after a considerable lapse of time, because it is felt too deeply to be ever forgotten, and it is a matter of tradition that in some form it should be avenged if the person insulted is not to be deemed to be devoid of self-respect. Here, the case seems to be that the boy Ali Akbar felt the disgrace to his family caused by the abduction of his sister, from the very start, and nursed his grievance, as is customary in the class to which he belongs, waiting for an opportunity when he would have the strength and resource to avenge it. This is not to say that the law condones such offences, but at the same time in awarding sentences, for actions of excess performed by members of a community, it would be harsh indeed to brush aside all considerations of the strength of the sentiment prevailing in that community to which such excess is to be ascribed.³²⁶

Similarly, in the case of *Ajun Shah*³²⁷ when deceased, who was killer of father and brother of accused, appeared in front of accused he being already obsessed with desire to kill him lost his balance of mind and opened fire at him. On conclusion of trial, accused was convicted and sentenced to death for committing murder in broad

³²⁶ *Ghulam Rasool vs. Ali Akbar and others*, PLD 1965 SC 363 at pp. 365, 366.

³²⁷ *Ajun Shah vs. The State*, PLD 1967 SC 185.

day light and in presence of eyewitness. Appeal of accused was also dismissed and murder reference was confirmed by a division bench of the High Court of West Pakistan at Peshawar. Decision of High Court was assailed by accused / appellant to the apex court contending that in his case extreme penalty under section 302 PPC has no merits. Leave to appeal, however, was allowed by the Supreme Court to consider two points; whether there was improper appraisal of evidence of eye witnesses and were there contradictions between ocular evidence and medico-legal report? The apex court took revenge of murders of father and brother of accused committed by the deceased as a circumstance which was sufficient for sentencing accused with lesser punishment of transportation for life.

6.3.4 Motive of Offence as an Extenuating Circumstance

Motive of offence is considered something which is always in the mind of accused and it can only be known to accused. Motive of offence can be discovered by courts through evidence recorded in trial. As per law settled in Pakistan it is not necessary for a complainant or prosecution to set a motive but if once motive has been mentioned by any party it becomes incumbent for that party to prove the same. If motive alleged by complainant of a murder case is proved through evidence then accused may be sentenced severely. On the other hand, if motive of the offence is alleged and proved by accused; he may be given relaxation in quantum of sentence.

In Pakistan, even after enforcement of *qisas* and *diyat* law in the year 1990, motive was given same weight by courts for determining quantum of sentence in

murder cases. For example, in *Mst. Roheeda's* case³²⁸, husband of appellant lady was murdered and on conclusion of trial accused were acquitted of charge. Trial judge relied on a precedent case³²⁹ wherein a narration of the Prophet (pbuh) was mentioned as "it is better for a judge to err in acquittal rather in conviction". Unfortunately, the first appellate court, i.e. the Peshawar High Court, also dismissed appeal against acquittal filed by the State. The decision of acquittal was further assailed by the State before the apex court on the ground that motive of offence as alleged by the complainant was murder of his father nine or ten years before and the deceased was involved in that offence. The apex court, due to alleged motive, converted the decision of acquittal into conviction of accused under section 302 (b) PPC in a double murder case but he was sentenced with life imprisonment twice. Here the lesser of two punishments under section 302 (b) PPC was awarded by the Supreme Court even motive alleged by complainant was not fully proved. A similar view was adopted in *Muhammad Khan's* case³³⁰ wherein five accused were convicted under section 302 /148/149 PPC by trial court. Three of the accused persons were sentenced to death while life imprisonment was awarded to other two accused persons. The appellate court maintained conviction of three accused under section 302/34 PPC but commuted their death sentence to life imprisonment for injuries sustained by one of the assailants in a close range and multiple fire arm assault were questionable. The decision of High Court, of commuting sentence to life imprisonment, was hopelessly

³²⁸ *Mst. Roheeda vs. Khan Bahadur*, 1992 SCMR 1036.

³²⁹ PLD 1956 (WP) Lahore 300. A division bench of Justice B.Z. Kaikaus and Justice Akhlaque Hussain heard a murder appeal against conviction and sentence wherein a Christian wife was allegedly killed by her Muslim husband. Accused was released by the High Court due to doubts in prosecution evidence. In his judgment Justice Akhlaque Hussain has referred a Narration of Prophet (pbuh) reported by *Tirmizi* wherein the Prophet (pbuh) reportedly has said "Whenever possible, save the Muslims from the sentence (punishment). Do it whenever you find any loophole; because it is better for the Imam (Judge) to err in acquittal than in conviction."

³³⁰ *Muhammad Khan vs. Zakir Hussain and others*, PLD 1995 SC 590.

assailed before the apex court contending that the High Court erroneously taken an extenuating circumstance.

On the other hand, where occurrence of murder could be proved on independent footing by confidence inspiring and manifest ocular evidence, courts usually decline reducing sentence irrespective that motive was not proved. So it is not a universal rule that motive will always be taken as a circumstance for reducing quantum of sentence. For instance, in *Ghuncha Gul's* case,³³¹ the Supreme Court declined to reduce sentence on the ground that requirements of proving motive were not met. As per facts of this case *Ghuncha Gul*, his two brothers and a cousin were charged with the offence of murder of *Abdullah Jan*. Alleged motive of offence was that twenty two years ago *Abdullah Jan* had murdered brother of *Ghuncha Gul* but he was acquitted of charge due to doubts in evidence against him. The Supreme Court repelled the ground of failing to prove motive and dismissed appeal. The decision was subsequently followed by the apex court in *Waris Ali's* case³³² where accused appellants resorted to the apex court by filing leave to appeal on the ground that in murder case non-ascribing of any motive by prosecution, extreme penalty of death could not lawfully be imposed. The Supreme Court allowed leave to appeal to examine the appropriateness of sentence of life imprisonment in the absence of any cause and motive of attack on the deceased. The court after appraising entire evidence refused interfering in sentence of death awarded by both courts below. Again, in a triple murder *Haroon Rasheed* case³³³ three young guys lost their lives due to indiscriminate firing from accused side. On completion of trial, including *Haroon Rasheed*, seven persons were convicted under section 302(b) PPC. Accused *Haroon*

³³¹ *Ghuncha Gul vs. The State*, 1971 SCMR 368.

³³² *Waris Ali alias Dulli and others vs. The State*, 1999 SCMR 1469.

³³³ *Haroon Rasheed and 6 others vs. The State and another*, 2005 SCMR 1568.

Rasheed and two others were sentenced to death and other four accused were punished with life imprisonment. The Lahore High Court dismissed appeal of accused persons and confirmed punishment awarded by trial court. Leave to appeal was granted by the Supreme Court to consider whether appellate court had erred in deciding case according to law? The counsel for appellant before the apex court contended that there was a motive of offence as *Mst. Azmat Bibi* was murdered by accused party some sixteen years ago and in retaliation this occurrence took place so appellants deserve lesser punishment under section 302 (b) PPC. The apex court due to cruel and brutal nature of offence of murder, committed by using dangerous firearms like Kalashnikovs and rifles, did not agree to give accused advantage of motive and observed:

So far the quantum of sentence no mitigating circumstance has been put forward by the learned counsel for the appellants except that the motive was said to be weak or not proved which this Court time and again has held that it cannot be a ground for awarding lesser sentence as the same is always found to be in the mind of assailant, therefore, no evidence could be brought to that effect which could be gathered only from other circumstantial evidence if direct evidence being not available.³³⁴

In the case of *Muhammad Riaz* four persons were booked in a murder case of *Muhammad Akram*.³³⁵ On conclusion of trial, two accused were convicted under section 302 (b) PPC and punished with life imprisonment while other two accused were acquitted. Financial dispute between parties was alleged motive of offence. The decision of conviction was assailed by both accused in appeals while complainant through a criminal revision petition challenged the decision of acquittal of two other accused and also sought enhancement of sentence of two convicts. The High Court dismissed appeals and enhanced punishment of both appellants to death by allowing

³³⁴ See *ibid*, at p. 1581.

³³⁵ *Muhammad Riaz vs. The State*, 2007 SCMR 1413.

revision petition without mentioning any reasons. The Supreme Court, however, did not agree with the decision of the High Court to the extent of quantum of sentence therefore modified death penalty to sentence of life imprisonment and observed:

In the peculiar facts and circumstances of the case as also in absence of determination of specific liability of the appellants as well as their companion (since acquitted), we are firmly of the view that the view taken by the trial Court must be given due consideration and ought to prevail over the view expressed by the High Court which indeed is more academic in nature than logical. No doubt normal penalty for an act of commission of Qatl-i-Amd provided under the law is death but since life imprisonment also being a legal sentence for such offence must be kept in mind wherever the facts and circumstances warrant mitigation of sentence because no hard and fast rule can be applied in each and every case.³³⁶

From the above discussion it becomes evident that motive of offence of murder has been taken by courts as a double edged weapon which has different evidentiary value depending on the facts of each case. Motive may strengthen prosecution case if alleged and proved successfully. On the other hand, if accused justifies murder due to some motive then taking it as an extenuating circumstance court may punish accused with lesser sentence. Hence in cases of *qatl-i-amd* there is no hard and fast rule about the utility of motive.

6.3.5 Partial Compromise as an Extenuating Circumstance

Superior courts in many cases, even before the enforcement of *qisas* and *diyat* law in Pakistan, had been taking lesser view of punishment under section 302 (b) PPC on the basis of partial compromises.³³⁷ There are, nevertheless, contradictory precedents on

³³⁶ See *ibid*, at pp. 1416, 1417.

³³⁷ For detail see *Muhammad Bashir vs. The State*, PLD 1982 SC 139; *Iftikhar Ahmad vs. The State*, PLD 1982 SC 277; *Muzaffar alias Zafar Ali vs. The State*, 1982 SCMR 695; *Javed and another vs. The State*, 1983 SCMR 557; *Nazar Muhammad vs. The State*, 1983 SCMR 631; *Nazar Muhammad vs. The State*, 1983 SCMR 667; *Inayat Ullah and another vs. The State*, 1984 SCMR 488; *Labah and another*

the issue. In many cases like *Muhammad Aslam*³³⁸, *Niaz Ahmad*³³⁹, *Abdul Jabbar*³⁴⁰ and *Zahid Rehman*³⁴¹ it was held and reiterated that partial compromise was not acceptable in cases of *qatl-i-amd* where punishment of death was awarded by way of *ta'zir*. Moreover, partial compromise in these cases did not benefit convicts in reducing their sentence from death to life imprisonment under section 302(b) PPC. It was also not discussed under these cases that partial compromise could not benefit accused in deciding quantum of punishment in his favour. However, in *Muhammad Ali vs. The State*³⁴² the Lahore High Court clarified that in *Shoukat Ali alias Shouka's* case it was held that partial compromise could not be considered for securing acquittal for accused but judgment of the apex court had no concern with deciding the quantum of sentence which is discretion of trial court.

On the other hand, in many cases where death sentence was awarded under section 302 (b) PPC, by way of *ta'zir*, courts on the ground of partial compromise had taken lesser view of punishment. For instance, the Lahore High Court in a murder appeal mere on an application of compromise moved by complainant, even not signed by all legal heirs, altered sentence of death under section 302 (b) PPC to life imprisonment.³⁴³ Similarly, in *Muhammad Anwar vs. The State* accused killed his own father and was convicted and sentenced to death by trial court.³⁴⁴ The High Court confirmed death punishment awarded by trial court in a murder reference and

vs. The State, 1984 SCMR 1514; *Abdul Quddus vs. The State*, 1985 SCMR 172; *Muhammad Hanif vs. The State*, 1985 SCMR 612; *Ejaz Ahmed alias Jhajja vs. The State*, 1985 SCMR 780; *Muhammad Aqeel alias Billa vs. The State*, 1986 SCMR 1420; *Inayat and others vs. The State*, 1988 SCMR 148 and *Abdul Hameed and others vs. The State*, 1988 SCMR 1420.

³³⁸ *Muhammad Aslam and others vs. The State and others*, 2001 SCMR 223.

³³⁹ *Niaz Ahmad vs. The State*, PLD 2003 SC 635.

³⁴⁰ *Abdul Jabbar vs. The State*, 2007 SCMR 1496.

³⁴¹ *Zahid Rehman vs. The State*, PLD 2015 SC 77.

³⁴² *Muhammad Ali vs. The State*, PLD 2004 Lah. 554.

³⁴³ *Manzoor Ahmad alias Shami vs. The State*, 1991 PCr.LJ 1480 Lah.

³⁴⁴ *Muhammad Anwar vs. The State*, 2008 SCMR 987.

dismissed appeal of accused. Leave to appeal was moved to the Supreme Court. Since all legal heirs of deceased did not join compromise so acquittal under section 345 Cr.PC was declined. However, a three member bench of the apex court was pleased to alter punishment from death to life imprisonment. In this regard Justice Ch. Ejaz Yousaf observed:

Since in the instant case, the petitioner has committed murder of his own father and that too, in a brutal manner, without any cause, therefore we are not inclined to allow application for acceptance of the compromise as otherwise its effect would be of acquittal under section 345(6), Cr.P.C. However, since the petitioner has two young sisters, the other male member of the family i.e. his brother is behind the bars in an another case and it has been pleaded that the girls would be exposed to the adversities of life, in case the petitioner is executed, therefore, while taking the compromise as a mitigating circumstances, we order that the sentence of death inflicted on the petitioner be commuted with imprisonment for life.³⁴⁵

Similarly, in *Tariq Mehmood vs. The State*³⁴⁶ a three member bench of the apex court did not allow compromise. In this double murder case trial court convicted accused under section 302 (b) PPC and punished him with death. The Lahore High Court confirmed death punishment. However, during pendency of appeal before the apex court an application of compromise was moved by the accused. The apex court was not inclined to accept compromise for the reasons that accused had committed intentional and pre-planned murder. The apex court also observed that section 311 PPC did not apply as offence was not gruesome and cruel. However, the Supreme Court without referring any precedent case dismissed appeal, maintained conviction but converted death sentence to life imprisonment due to compromise. The question

³⁴⁵ See *ibid*, at p. 990.

³⁴⁶ *Tariq Mehmood vs. The State*, 2011 SCMR 1880.

was again taken up by the apex court in *Abdul Ghaffar and others vs. The State*.³⁴⁷ In this case partial compromise of legal heirs of the deceased with convicts of three different offences of *qatl-i-amd* did not affect their punishment of death awarded by trial courts and confirmed by the concerned High Courts for they committed murders in brutal manner. Consequently, all three appeals were dismissed by respective High Courts. However, a three member bench of the apex court granted leave to appeal in three cases of *qatl-i-amd* to consider whether compromise with one legal heir and not with all legal heirs of deceased has any effect on sentence of death imposed upon each convict by trial court and confirmed by the High Court? Secondly, whether such a compromise merits reduction of sentence to imprisonment of life? During arguments before the apex court the then Additional Prosecutor General of Punjab contended that expression 'facts and circumstances' under section 302 clause (b) PPC only relate to offence and not any subsequent event like compromise. The apex court disagreed with that argument and observed that if it were intention of legislature then it would have used word 'case' but not the word 'offence'. In answer to the question Justice Qazi Faez Isa in his judgment, speaking for two other members including Justice Asif Saeed Khan Khosa and Justice Dost Muhammad Khan, observed:

A compromise with one or more of the heirs of the victim would in our opinion be amongst the facts and circumstances of the case that require to be taken into account in determining the quantum of punishment, but that in itself would not be the conclusive factor as all the facts and circumstances of the case have to be considered. Merely because an heir has compromised with the convict would not automatically result in the imposition of the lesser punishment of imprisonment for life.³⁴⁸

³⁴⁷ *Abdul Ghaffar and others vs. The State*, 2015 SCMR 1064.

³⁴⁸ See *ibid*, at p. 1078.

Subsequently, benefit of principle laid down in the case of *Abdul Ghaffar* was extended to accused in *Muhammad Amin vs. The State*³⁴⁹ by a three member bench of the apex court wherein Justice Asif Saeed Khan Khosa, who was also a member of three member bench in *Abdul Ghaffar's* case, observed that a partial compromise might not have any bearing upon conviction of an accused person in a case of *Ta'zir* but it might have, in the circumstances of a given case, some relevance to the question of sentence. The apex court, therefore, reduced punishment of appellant from death to imprisonment for life.

6.3.6 Amnesty of 1988 to Accused of Offence of Murder and Punishment of Imprisonment for Life

In the year 1988 an Order was promulgated by the then dictator, i.e. General *Zia-ul-Haq*, which extended amnesty to persons who were awarded death penalty. Courts therefore, started awarding lesser sentence under section 302 (b) PPC even finding no extenuating circumstance for awarding lesser punishment. For instance, in the case of *Waqar Ahmad*³⁵⁰ complainant's daughter, namely Sanjida, was found slaughtered in morning outside her home. Motive of offence was that accused was once beaten by complainant before the occurrence but alleged motive was discarded by courts. Accused confessed his guilt during investigation but retracted from admission in his statement under section 342 Cr.PC. Trial court, accepting confession of accused as it was duly corroborated with other circumstantial evidence, convicted him under section 302(b) PPC and sentenced him to death. The High Court, however, did not

³⁴⁹ *Muhammad Amin vs. The State*, 2016 SCMR 116.

³⁵⁰ *The State vs. Waqar Ahmad*, 1992 SCMR 950.

agree with the findings of trial judge and acquitted accused of charge. However, the Supreme Court allowed leave to appeal and found the decision of High Court incorrect. The Supreme Court awarded lesser punishment under section 302(b) PPC to accused not due to involving any mitigating circumstance but for the reason of the Presidential Order of General Amnesty, dated 07-12-1988.

6.4 EXTENUATING PUNISHMENT ON THE PLEA OF (GHAIRAT) FAMILY HONOUR AND GRAVE & SUDDEN PROVOCATION

Family honour or *ghairat* is one of the most debated and highly controversial extenuating circumstance which was not expressly mentioned as a mitigating circumstance under erstwhile law of homicide. But as a trend or as a technique Pakistan judiciary considered family honour / *ghairat* a reason of grave and sudden provocation and dealt it as an extenuating circumstance for awarding of lesser sentence of imprisonment for life under section 302 (b) PPC. It often happens that family honour puts accused under an acute social pressure. Such social pressure persuades or compels victim to restore his family honour by killing accused who is responsible for loss of his family honour. So in cases of murder where accused was not in position to prove defence of family honour or failed to take it as a defence, the higher and superior judiciary in Pakistan at numerous occasions had given accused benefit by awarding lesser punishment under clause (b) of section 302 PPC for had family honour not involved the accused would never commit murder. However, frequent relief of lesser punishment on the pretext of family honour was not

welcomed by Human Rights' activists within and outside Pakistan. On the other hand, such decisions encouraged male relatives to commit *qatl-i-amd* of that female who gets married with a man of her own choice.

6.4.1 Repealed Law & Family Honour

Family honour or *ghairat* had been considered as an extenuating circumstance for awarding lesser punishment in murder cases even before enforcing of *qisas* and *diyat* law in the year 1990. It is pertinent to discuss here few of such important cases which played important role in developing of law on this point. First important case of this category is *Fazal Khan's* case wherein accused *Fazal Khan* along with others, was charged for committing murder of two persons on 21-08-1960.³⁵¹ Motive of offence was that a sister in law of accused was abducted by the deceased and others and during her confinement she developed liaison with Mr. *Akbar* and eventually both got married. After few weeks of abduction of Mst. *Gulab Khatoon*, *Fazal Khan* and four others went to the house of deceased masquerading as policemen and fired on them. On conclusion of trial, *Fazal Khan* was convicted under sections 304/34, 307/34 and 447/34 PPC and was sentenced to imprisonment. Appellate court, on appeal, converted conviction to section 302/34 PPC and sentenced *Fazal Khan* to death. The Supreme Court also upheld the conviction under section 302 PPC but his sentence was altered to transportation of life for it appeared from evidence that *Fazal Khan* repeatedly attempted to restore her abducted sister in law but to no avail. He masquerading himself as a police man tried to get the girl back because lady's honour

³⁵¹ *Fazal Khan vs. The State*, PLD 1964 SC 54.

and family prestige were involved. The apex court observed that since occurrence took place three years ago and offence was committed due to family honour so accused was awarded lesser of the available punishments. Another case of this category is *Muhammad Ramzan's* case.³⁵² In this case decision of the High Court of enhancing sentence of transportation of life to death was assailed before the apex court. The Supreme Court of Pakistan took notice of admission of deceased in his dying declaration that he had illicit connection with the female cousin of one of the accused and for the same reasons he had left that locality. Relying on the case of *Fazal Khan* appeals were allowed by confirming convictions and altering sentences to transportation of life on two points first that male members of family of rural areas feel under an imperative obligation to vindicate family honour even by resorting to honour; Secondly, after the decision of trial court convicts were given a full expectation of life for not less than two years. Similarly, in the case of *Muhammad Din alias Manna*³⁵³ accused, charged in a murder case along with three others, was convicted and sentenced to death for the murder of his two co-villagers. The High Court dismissed appeal of accused and confirmed his conviction and sentence. Motive of offence was that a sister of accused repeatedly eloped with one of the deceased and every time she was restored by the efforts of respectable persons of the vicinity. On the day of occurrence when deceased *Khashi Muhammad* and his brother were seen by accused party they fired at them and they died. A three member bench of the apex court admitted leave to appeal to examine whether or not convictions were consistent with the safe administration of criminal justice? The apex court, after perusing entire evidence on record, held that accused was rightly convicted for double

³⁵² *Muhammad Ramzan vs. The State*, PLD 1966 SC 129.

³⁵³ *Muhammad Din alias Manna vs. The State*, 1976 SCMR 185.

murder. However, the apex court took notice of quantum of sentence as offence was motivated by the sense of family honour. The bench was not willing to accept *ghairat* as a mitigating circumstance in the murder of *Niamet* who was not involved in the matter of eloping sister of accused so on this account sentence of accused was maintained. The bench, relying on many precedent cases³⁵⁴, on the ground of *ghairat* substituted sentence of death of accused in the murder of Khushi Muhammad with whom the girl was eloped.

Plea of family honour or *ghairat* has not always been taken for granted as a circumstance for taking lenient view in awarding sentence in murder cases. In the case of *Mohib Ali*, accused was sentenced to death for a murder.³⁵⁵ In this case accused in his judicial confession revealed that he had committed murder when he lost his self-control due to *ghairat* on seeing deceased and his wife in compromising position in his house. Same plea he reiterated in his statement under section 342 Cr.PC. In a two version case trial court found prosecution case near to truth so rejected defence plea of accused and due to absence of any of extenuating circumstances refused to award lesser sentence under section 302 (b) PPC. Appeal of accused against conviction was dismissed by the High Court but with modification of sentence which was reduced to life imprisonment accepting family honour or *ghairat* as an extenuating circumstance. However, leave to appeal was granted by the Supreme Court in order to examine whether offence fell under the ambit of section 304 PPC and not under section 302 PPC? The apex court appraised entire evidence

³⁵⁴ The bench relied upon many earlier case laws wherein family honour was given weight and honour was taken a valid ground for reconsidering quantum of sentence, e.g. *Fazal Khan vs. The State*, PLD 1964 SC 54; *Ghulam Rasul vs. Ali Akbar*, PLD 1965 SC 363; *Muhammad Ramzan vs. The State*, PLD 1966 SC 129 and *Ajun Shah vs. The State*, PLD 1967 SC 185. In all these cases sentence of transportation for life was considered appropriate punishment.

³⁵⁵ *Mohib Ali vs. The State*, 1985 SCMR 2055.

and found that neither dead body of deceased was recovered from the house of accused nor any defence evidence was produced for proving the plea taken by accused. So decision of trial court was maintained and order of lesser sentence was recalled. In his judgment Mr. Justice *Abdul Kadir Sheikh* quoted the decision of High Court wherein it was observed as “a mere allegation of moral laxity without any unimpeachable evidence to substantiate would not constitute grave and sudden provocation. If such pleas, without any evidence, are accepted it would give a licence to people to kill innocent people”³⁵⁶. In the case since accused could not prove his defence of family honour or *ghairat* so he was not given relief by the apex court. Importantly, the Supreme Court again affirmed *ghairat* as an extenuating circumstance, if proved by accused.

6.4.2 Qisas and Diyat Law of Pakistan and (Ghairat) Family Honour as an Extenuating Circumstance

Under the Criminal Law (Second Amendment) Ordinance, 1990 family honour was nowhere mentioned as a ground or as a reason for justifying lesser punishment under section 302 (b) PPC. Courts, however, as a matter of routine and practice had been granting lesser punishment of murder on the ground of *ghairat* as well. For instance, in the case of *Mst. Mumtaz Begam*³⁵⁷ complainant lady filed leave to appeal from the order of acquittal of accused namely *Ghulam Farid* of a charge under section 302 (b) PPC passed by the Lahore High Court, Rawalpindi Bench. Motive of case as alleged in complaint was that accused had suspicion that the deceased had developed illicit

³⁵⁶ See *ibid*, at p. 2059.

³⁵⁷ *Mst. Mumtaz Begam vs. Ghulam Farid and another*, 2003 SCMR 647.

relations with his wife and on this issue there took place an altercation between both parties few days before the occurrence. On appraisal of entire evidence, the apex court held that there was sufficient material on record for connecting accused / respondent with murder. However, for the reason that there was a prior altercation and family honour, the Supreme Court allowed appeal, awarded conviction under section 302 (b) PPC and sentence of life imprisonment. The Supreme Court also observed as “happening of the incident prior to it can be considered to be a factor for bringing his case under section 302 (b) PPC in the light of a principle laid down by this Court in the case of *Abdul Haq*”.³⁵⁸ In subsequent cases ground of family honour or *ghairat* was considered and accepted by judiciary as an extenuating circumstance or a justification for awarding lesser punishment under section 302 (b) PPC.

6.4.3 Family Honour as an Extenuating Circumstance in Murder Cases after an Amendment Introduced in the Year 2005

Taking family honour as a circumstance of mitigating sentence under section 302 (c) PPC was not appreciated by Human Rights activists and it was vehemently criticised at domestic as well as at international level by writers and lawyers. Ground of family honour was equally considered against women’s rights because in few cases when a woman has exercised her right to get a life partner of her own choice, male members of her family and her relatives had considered it an attack on family honour hence they murdered the person to whom such a lady got married. Therefore, legislators considered it expedient to clarify the law. Ultimately, a proviso was inserted after

³⁵⁸ See *ibid*, at p. 657.

section 302 (c) PPC by the Criminal Law (Amendment) Act, 2005 which reads as “Provided that nothing in this clause shall apply to the offence of Qatl-i-Amd if committed in the name or on the pretext of honour and the same shall fall within the ambit of clause (a) or clause (b), as the case may be”.

Bare text of new proviso indicates two things. First, family honour as a mitigating circumstance under section 302 (c) PPC will not be available to award accused a nominal sentence. Secondly, that legislature left it up to courts to consider or not the pretext of honour as an extenuating circumstance justifying lesser sentence under section 302 (b) PPC. Since in many cases ground of family honour or *ghairat* was considered a backdrop of grave and sudden provocation and offenders were convicted and sentenced under section 302 (c) PPC because family honour was considered a mitigating circumstance. But through the amendment of 2005 family honour was banned to be taken as mitigating circumstance under section 302 (c) PPC. However, it was indirectly given status of extenuating circumstance which can give benefit to accused under section 302 (b) PPC. After the amendment of 2005, courts could only punish accused of murder on the pretext of family honour or *ghairat* either with death as *qisas* under section 302 (a) PPC or with any of sentences under section 302(b) PPC. For instance, in *Sauleen vs. The State*, two accused were booked in the murder of their wives.³⁵⁹ Accused *Sauleen* murdered his wife while his step daughter was killed by her husband, the co-accused. Before trial court, both accused admitted offence of murder in their respective statements under section 342 Cr.PC but took plea that they did so under grave and sudden provocation as they found their wives in compromising position with two persons in their home so they killed their wives on

³⁵⁹ 2006 YLR 2877 Lah.

account of *ghairat*. Trial court convicted them under section 302 (b) PPC and sentenced both of them with lesser punishment of imprisonment for life. On appeal, Justice *Khawja Sharif* did not accept the plea taken by accused persons as the defence of provocation was not proved by them. The High Court observed that since on the basis of *ghairat* trial court already awarded lesser punishment under section 302 (b) so it did not consider it just to interfere. Interestingly, the High Court did not refer the latest amendment into the law whereby a proviso was inserted after clause (c) of section 302 PPC in the year 2005. Similarly, in the case of *Muhammad Akhtar* two accused persons were charged for committing murder.³⁶⁰ Allegation against them was that they committed murder by pouring acid on the body of deceased while he was sleeping in his house. In their statements under section 342 Cr.PC both accused denied charges levelled against them but they disclosed that there was a dispute of possession of agricultural land which is the reason of prosecution against them. On conclusion of trial, one accused was convicted under section 302(b) PPC and was sentenced to death. The co-accused was convicted under section 302 (c) PPC and was sentenced to ten years rigorous imprisonment. Accused who was awarded death penalty assailed the decision of trial court before the Lahore High Court and alleged that motive of offence as given in prosecution version was that he had suspicions of illicit relationship between his wife and the deceased. Though alleged motive could not be proved by accused even then a division bench, constituted of Justice *Zafar Iqbal Chaudhry* and Justice *S. Ali Hassan Rizvi*, mere relying on the version of prosecution case took lenient view and converted death sentence to life imprisonment under section 302 (b) PPC. High Court also acquitted co-accused of charge by giving

³⁶⁰ *Muhammad Akhtar and another vs. The State*, 2009 YLR 1092 Lah. The High Court took departure from a well settled law that motive, if alleged, should be proved by the prosecution and that plea taken by accused must be proved by defence evidence.

him benefit of doubt rather reducing his sentence under section 302 (c) PPC. Similarly, in *Ahmad Nawaz vs. The State*³⁶¹ accused *Ahmad Nawaz* and his son *Naveed Ahmad* were convicted and sentenced to death in double murder case. On appeal, High Court maintained their conviction as well as sentence and dismissed jail appeal of both. The apex court, however, was pleased to grant them leave to appeal to reconsider quantum of sentence as there was a background of occurrence which persuaded accused persons and they under grave and sudden provocation due to family honour and self-defence committed murder of both deceased persons. There was a tension between parties before occurrence that deceased persons have committed some insolence with daughters of *Ahmad Nawaz*. Moreover, when accused had approached the mother of deceased she satisfied convicts about the conduct of both deceased and his daughters. In his statement under section 342 Cr.PC, accused *Ahmad Nawaz* had narrated that his two daughters were on way to home when deceased persons misbehaved with them. Both of accused also rejected prosecution stance and alleged that they were attacked by both deceased and they sustained injuries but police did not produce them before doctor. Appeal to the extent of *Ahmad Nawaz* appellant had become abated due to his death. However, the apex court being persuaded by the facts and circumstances of case substituted death punishment with life imprisonment under section 302 (b) PPC. In a latest case of *Asghar Hussain* appellant challenged his conviction and sentence under section 302 PPC.³⁶² Trial court convicted accused for murder and sentenced him to death as *qisas* and held that he be hanged by his neck till his death. As per prosecution case motive of offence was that accused, few days after giving deceased warning through his

³⁶¹ *Ahmad Nawaz vs. The State*, 2011 SCMR 593.

³⁶² *Asghar Hussain vs. The State*, 2014 PCr.LJ 361 Sindh.

father of dire consequences, caught hold the deceased from his hairs and said, 'You are lover of my sister *Saima*' and immediately fired at him. Back-ground of case was that *Asghar Hussain* and his father were seriously annoyed and infuriated for love affair of the deceased with Ms. *Saima* and eventually they committed his murder under such rage. A division bench, of Justice *Faisal Arab* and Justice *Aqeel Ahmad Abbasi*, was pleased to award accused lesser punishment under section 302(b) PPC for the reason that a man of humble background could be infuriated on teasing his sister by her lover though he could not prove his defence. In another latest case of *Ashfaq Masih*³⁶³ accused was challaned in a triple murder case including his young sister and two boys. Offence was committed in cattle house of accused located far from the houses of both deceased. Dead bodies of girl and a boy were found naked by police officer. Medico-legal report also affirmed the fact that hymen of young unmarried girl was not intact. It was stated in prosecution case that motive of offence was mere suspicion of accused about illicit relations of his sister with two boys. On conclusion of trial, court convicted accused under section 302 (b) PPC and sentenced him to death under three counts. Accused neither during investigation took plea of *ghairat* or sudden provocation nor he did so during trial while recording his statement under section 342 Cr.PC. On appeal, the High Court also did not consider ground of *ghairat* and sudden provocation as a mitigating circumstance because of the addition of a new proviso after clause (c) of section 302 PPC. However, taking family honour or *ghairat* as an extenuating circumstance the High Court was pleased to alter sentence from death to imprisonment for life under section 302 (b) PPC.

³⁶³ *Ashfaq Masih vs. The State*, 2015 MLD 778 Lah.

6.5 NO CIRCUMSTANCE CAN EXTENUATE PUNISHMENT WHEN OFFENCE IS HEINOUS IN NATURE

A rule that in cases of *qatl-i-amd*, some extenuating circumstances justify awarding lesser punishment of section 302 (b) PPC, is not absolute. There are some instances when courts departed from general rule and denied taking lenient view in awarding punishment of offence of *qatl-i-amd* regardless of the fact that offence was committed due to family honour or *ghairat* under grave and sudden provocation. Such limitations and exemptions to the general rule apply when *qatl* is committed with cruelty, inhumanly, callously and mercilessly. In such cases courts refuse taking lenient view of punishment under section 302 (b) PPC. For instance, in *Iqbal alias Bhala vs. The State* due to personal revenge and old enmity both parties had been involved in a series of murder offences.³⁶⁴ In a murder case of this series head of deceased was chopped off by accused persons. On conclusion of trial, judge of Special Court for Speedy Trial, Lahore convicted four offenders under section 302 (b) PPC and sentenced them to death and acquitted two of them. The High Court, on appeal, acquitted one more accused but maintained death sentence of three accused persons. After hearing arguments from both sides in leave to appeal the apex court did not agree with the contention that the decision of both courts below was not just. The Supreme Court was not inclined to take lenient view of punishment on the ground of old enmity so refused leave to appeal. His lordship Justice *Saleem Akhtar* speaking for a three member bench of the apex court observed as “the motive alleged by the prosecution lends credence to the testimony of P.Ws. In the background of

³⁶⁴ *Iqbal alias Bhala and two other vs. The State*, 1994 SCMR 1.

enmity between the parties severance of Eisab's head was by way of revenge in the same manner as Eisab had done earlier.”³⁶⁵

A few years later, the Supreme Court in the case of *Moazam Shah*³⁶⁶ supplied a guideline for those judges who in heinous cases of murder and terrorism often show leniency towards culprits by finding any extenuating circumstance for awarding lesser punishment under section 302 (b) PPC. The Court observed that in cases involving elements of cruelty and terrorism miscreants should not be set at free who were responsible for causing unrest in the society and such menace should be curbed by awarding capital punishment. Same reason was adopted in the case of *Muhammad Yasin*³⁶⁷ wherein four persons committed offence of bank robbery in day light. By firing three persons sustained injuries. One of the injured persons, a constable, succumbed to injuries. On conclusion of trial before the Anti-Terrorism Court, accused were convicted under section 302 (b) PPC and were sentenced to death. The High Court dismissed appeals except the appeal of *Muhammad Yasin* whose conviction was maintained but his sentence was commuted to life imprisonment as he had not fired at deceased. In order to re-evaluate the correctness of decision of the High Court of commuting sentence of *Muhammad Yasin*, the apex court admitted leave to appeal but finally maintained the decision of the High Court relying on the principle settled by the Apex Court in *Moazam Shah's* case. Similarly, in the case of *Ijaz alias Billa*³⁶⁸, a cold blooded murder was committed in a shopping centre causing terror and sense of insecurity in the minds of people of locality. Trial court convicted accused persons under section 302(b) / 149 PPC and they were sentenced to death.

³⁶⁵ See *ibid*, at p. 6.

³⁶⁶ *Moazam Shah vs. Mohsan Shah*, PLD 2001 SC 458 at p. 465.

³⁶⁷ *Muhammad Yasin and two others vs. The State*, 2002 SCMR 391.

³⁶⁸ *Ijaz alias Billa vs. The State*, 2002 SCMR 294.

The Lahore High Court dismissed appeal of accused persons and maintained their conviction and sentence. The Supreme Court did not find any of extenuating circumstances in the evidence. Due to callous, premeditated and brutal nature of offence the apex court was not inclined to award lesser punishment and appeals were eventually dismissed. Similarly, no leniency was shown by the apex court in a cold blooded murder case of *Khurram Malik*.³⁶⁹ In this case accused *Khurram Malik* killed his friend *Ijaz* by firing at him with pistol then he had cut his body into pieces and threw at different paces. Accused was last seen with the deceased so he was investigated by police. He not only admitted his guilt before police but also confessed his offence before Magistrate. In his confessional statement accused took stance that he was in love with *Mst. Nazia* but the deceased involved in visiting terms with her so he killed him in order to get rid of him. After recording evidence Sessions Judge Mansehra convicted him under section 302 (b) PPC as *ta'zir*, sentenced him to death and compensation of Rs. 30,000/-. The Peshawar High Court, Abbottabad Bench, on appeal modified his death sentence to life imprisonment by enhancing the amount of compensation to Rs.100,000/-. The apex court while deciding a petition of complainant for enhancement of sentence observed that the first Court of appeal when opted not to prefer normal punishment of death had failed to give his own reasoning for disagreeing with trial court. The Supreme Court also repelled expectation of life as a ground for lesser sentence under section 302(b) PPC and due to brutality on the part of convict awarded him sentence of death by setting aside the decision of the High Court and restored the decision of trial court. The then Chief Justice of Pakistan, Justice *Iftikhar Muhammad Chaudhry* wrote:

³⁶⁹ *Khurram Malik vs. The State and another*, PLD 2006 SC 354.

It is also to be noted that justice is not for one but is for all and while examining the case of convict, the court owe a duty to the legal heirs / relatives of the convict and also to the society that justice should also be done with them as well, thus the sentence should be such which should serve as deterrent for the likeminded person.³⁷⁰

However, the Supreme Court in appeal case of *Israr Ali*³⁷¹ showed leniency though murder was committed due to an act of terrorism. Decision of the Federal Shariat Court was assailed before the Shariat Appellate Bench of the Supreme Court of Pakistan whereby accused *Israr Ali* was convicted and sentenced to death while occurrence was unseen and was based on circumstantial evidence. The Supreme Court took notice of specific plea taken by appellant that he was involved in the case on account of sectarian terrorism, which both courts below failed to consider. Hence the Supreme Court reduced death sentence to life imprisonment and observed:

This [the plea of sectarian terrorism] brings us to the question of sentence more particularly that appellant / convict to whom death has been awarded, since in criminal cases, the question of sentence demands the utmost care on the part of the court dealing with the life and the liberties of the people and that the accused persons are also entitled to extenuating benefit of doubt on the question of sentence.³⁷²

No leniency was shown by courts in *Zulfiqar Ali's* case where accused was convicted by trial judge under section 302 (b) PPC for killing *Mst. Safia Bibi* along with her unborn child and sentenced him to death.³⁷³ Accused admitted his presence in the house of complainant at the time of occurrence; however, he took defence that since complainant had doubt that he had illicit relationship with deceased lady so it was complainant who killed her. High court dismissed his appeal. In appeal before

³⁷⁰ See *ibid*, at pp. 364, 365.

³⁷¹ *Israr Ali vs. The State*, 2007 SCMR 525.

³⁷² See *ibid*, at p. 532.

³⁷³ *Zulfiqar Ali vs. The State*, 2008 SCMR 796.

the Supreme Court pleas of single fire and having illicit relation was taken as a ground for falling case under extenuating or mitigating circumstance for commuting death sentence to that of life imprisonment but the apex court repelled both grounds.³⁷⁴ In some cases excuse of taking drug or being intoxicated, prior to commission of offence of murder, was also not accepted sufficient reason to extenuate sentence of accused. For instance, in *Abdus Salam's* case,³⁷⁵ as discussed earlier, a killer of his own mother was sentenced to death by way of *qisas* under section 302 (a) PPC by trial court. The High Court maintained conviction and punishment of accused. On leave to appeal a three member bench of the apex court due to the involvement of some questions of law suggested constitution of a larger bench. Before the larger bench, on behalf of appellant, it was argued that as per record accused had been previously taking drugs and on this count sentence of death is liable to be reduced. The bench, however, did not find any substance in the contention of appellate to reduce sentence but unanimously converted conviction of accused from section 302 (a) PPC to that of provided under section 302 (b) PPC.

6.6 PROVISIONS OF CLAUSE (b) OF SECTION 302 PPC - WHETHER ISLAMIC OR UN-ISLAMIC?

Provisions of clause (b) of section 302 PPC were challenged before the Federal Shariat Court by *Dr. Muhammad Aslam Khaki* and it was contended by him that these

³⁷⁴ In cases like, *Syed Hamid Mukhtar Shah vs. Muhammad Azam*, 2005 SCMR 427; *Hameed Khan alias Hameedai vs. Ashraf Shah*, 2002 SCMR 1155 and *Arshad Ali alias Achhu vs. The State*, 2002 SCMR 1806 non-repetition of weapon was not taken as a ground for awarding lesser of the punishments under section 302 (b) PPC.

³⁷⁵ *Abdus Salam vs. The State*, 2000 SCMR 338.

provisions were inconsistent with and derogatory to the injunctions of Islam.³⁷⁶ The petitioner alleged that, as per Islamic principles, punishment of same offence in *ta'zir* should not reach or exceed the quantum of punishment of *qisas* or although this question has earlier been discussed before the apex court in the cases of *Gul Hassan Khan* and *Zahid Rehman*. The petitioner took another ground that for conviction and punishment by way of *qisas* under section 302 (a) PPC a high standard of witnesses is required but offence of *qatl-i-amd* is compoundable. The petitioner also alleged that under section 302(b) PPC standard of witnesses is not required as provided under section 304 PPC and such testimony might be doubtful but offence is non-compoundable unless all legal heirs agreed upon compromise. The Federal Shariat Court invited comments from governments and assistance of jurist consults. In their comments federal as well as provincial governments opposed the contention raised by petitioner. The government of Punjab took stance that the question has already been resolved by the apex court. The bench without giving any analysis of precedent cases relied upon the viewpoint given by the government of Punjab.³⁷⁷ The bench finding no un-Islamic element in the provisions of clause (b) of section 302 PPC, unanimously, dismissed petition and held that under Islamic law a State was empowered to legislate for taking offenders to logical end. Interestingly, the bench, cited but, did not discuss decision of the Supreme Court in *Zahid Rehman* case where two members of the bench gave their different observations on same issue as to whether punishment of *ta'zir* could or could not be more harsh and stringent than the punishment under *qisas*.

³⁷⁶ *Dr. Muhammad Aslam Khaki vs. Federation of Pakistan through President of Pakistan and another*, PLD 2017 FSC 1.

³⁷⁷ *Sheikh Muhammad Aslam & Another vs. Shaukat Ali alias Shouka*, 1997 SCMR 1307; *Bashir Ahmad vs. The State*, 2004 SCMR 236 and *Khan Muhammad vs. The State*, 2005 SCMR 599.

6.7 CONCLUSION

Discretionary power of courts, under Islamized law, of awarding any of two punishments in cases of *qatl-i-amd* under section 302 (b) PPC by way of *ta'zir* is not unqualified. When a judge decides to inflict lesser punishment for offence of *qatl-i-amd* then he, as law requires, will have to extend reasons for doing so. Since statutory law is silent about circumstances which may extenuate severity of punishment under section 302 (b) PPC so courts during adjudication have to discover such circumstances. Case law analysis under this chapter indicates such circumstances which justify punishment of life imprisonment which include expectancy of life, obsession of revenge, traditions, revenge, motive and family honour / *ghairat*. Besides alleging extenuating circumstance, proving the same is a *sine qua none* for granting lesser punishment. The judiciary in Pakistan felt no hesitation in deciding cases of *qatl-i-amd* following the precedent law developed before Islamization of laws relating to the offence of homicide and bodily hurts. Prior to inserting a proviso after clause (c) of section 302 PPC, in the year 2005, family honour / *ghairat* had been taken by courts as part and parcel to circumstance of sudden and grave provocation for justifying conviction under section 302 (c) PPC as well as an extenuating circumstance for awarding lesser of the punishments under section 302 (b) PPC. But by insertion of the proviso, now courts are banned from giving advantage of mitigating circumstance on the ground of family honour or *ghairat*. At present, only concession which courts can extend to offenders of *qatl-i-amd* is lenient view of punishment under section 302 (b) PPC as imprisonment for life.

CHAPTER 7

PUNISHMENT OF *QATL-I-AMD* UNDER SECTION 302

(c) PPC WHERE *QISAS* IS NOT APPLICABLE

7.1 INTRODUCTION

A case of murder which falls under any of exceptions of section 300 of the erstwhile chapter XVI - PPC; its punishment is not death. The five exceptions under section 300 of the repealed law were known as mitigating circumstances including provocation, private defence, exercise of power for the advancement of public justice, sudden fight without premeditation and taking risk of death with consent. This chapter deals with some questions relating to mitigating circumstances of the erstwhile law and their scope under present Islamized law. For instance, why mitigating circumstances are not kept intact under the Criminal Law (Second Amendment) Ordinance, 1990? Secondly, what class of cases of *qatl-i-amd* falls under clause (c) of section 302 PPC? Thirdly, whether mitigating circumstances are equally relevant under amended law? Analysis of precedent case law of higher and superior judiciary of Pakistan, immediately after the promulgation of *qisas* and *diyat* law through the Criminal Law (Second Amendment) Ordinance 1990, is supplied under this chapter. This chapter further explores that how, despite omitting mitigating circumstances from the Penal Code, Pakistan judiciary has revived and restored those circumstances under the amended Islamized law?

7.2 CASES OF *QATL-I-AMD* WHERE ACCORDING TO ISLAM PUNISHMENT OF *QISAS* IS NOT APPLICABLE

Third category of cases of *qatl-i-amd* is provided under clause (c) of section 302 PPC where according to the injunctions of Islam punishment of *qisas* is not applicable and accused is liable to be punished with imprisonment up to twenty-five years. In the year 1990, amendments into the relevant provisions of law of homicide in the light of judgment of the Supreme Court in *Gul Hasan Khan's* case were introduced. In main judgment of the case, authored by Justice Pir Karam Shah, specifically circumstance of provocation is not discussed. However, under minority judgment of Justice Muhammad Taqi Usmani it is observed that grave and sudden provocation can mitigate punishment of murderer only when he successfully proves commission of offence of *zina*, i.e. rape. A probable reason of disappearance of mitigating circumstances under amended law might be that erasure of types of homicide from the Statute left no justification for the legislature to keep intact those mitigating circumstances which were in fact a *raison d'etre* of the classification of offence of homicide.

The Islamised law of *qatl*, enforced through the Ordinance, 1990 though classified but did not specify the cases of *qatl-i-amd* which fall under clause (c) of section 302 PPC. However, there are few precedent cases where even judiciary went through confusion regarding the scope of clause (c) of section 302 PPC. One of such early cases wherein the apex court tried to identify cases which fall under 302 (c) PPC is *Abdul Haque vs. The State*.³⁷⁸ A larger bench of five judges of the apex court

³⁷⁸ *Abdul Haque vs. The State and another*, PLD 1996 SC 1.

was constituted in this case in order to determine the scope of mitigating circumstances under amended law. Two members of the bench, under their separate notes, discussed the scope of clause (c) of section 302 PPC. In his judgment Justice Ajmal Mian said, "It may be pointed out that clause (c) of section 302 is not relevant as the instant case is not covered by amended section 306, P.P.C."³⁷⁹ So as per interpretation of his lordship cases which fall under section 306 PPC offenders thereof would be punished under section 302 (c) PPC. Similarly, Justice Manzoor Hussain Sial, without giving any reasons, uttered on the point as follows:

Clause (c) of section 302, P.P.C. envisage punishment of either description for a term which may extend to 25 year where according to the Injunctions or Islam the punishment of Qisas is no applicable. In the instant case clause (c) is not attracted, as the offence committed by the appellant is not covered by section 306, P.P.C.³⁸⁰

In the opinion of both judges when an offence of *qatl-i-amd* is not liable to *qisas* and accused is a minor or insane under section 306 (a) PPC or when accused causes death of his child or grandchild under section 306 (b) PPC or when a *wali* of deceased is direct descendant of accused under section 306 (c) PPC then accused will be punished under clause (c) of section 302 PPC. Subsequently, in the case of *Ali Muhammad*³⁸¹ a three member bench of the Supreme Court disagreed with the finding of five member bench in *Abdul Haque's* case³⁸² and advanced a different interpretation. The precedent of *Ali Muhammad* case was later on adopted by courts and finally approved by a seven member bench of the apex court in *Abdul Zahir's*

³⁷⁹ See *ibid*, at p. 38.

³⁸⁰ See *ibid*, at p. 41.

³⁸¹ *Ali Muhammad vs. Ali Muhammad and another*, PLD 1996 SC 274.

³⁸² *Abdul Haque vs. The State*, PLD 1996 SC 1.

case.³⁸³ In a recent case of *Zahid Rehman*³⁸⁴ a larger bench of the apex court acknowledged the difficulties involved in understanding and applying the provisions of section 302 (c) PPC. In this regard his lordship Justice Asif Saeed Khan Khosa at page 112 of the judgment observed:

It needs to be mentioned here that the provisions of section 302(c) P.P.C. have also remained problematic in the past and their interpretation has also not been free from controversy.

At this stage of the research a case law study regarding the scope of provisions of section 302 (c) PPC is necessary in order to understand difficulties and problems under clause (c) of section 302 PPC.

7.3 MITIGATING CIRCUMSTANCES AND THE CRIMINAL LAW (SECOND AMENDMENT) ORDINANCE, 1990

Grave and sudden provocation was one of the mitigating circumstances under old law. In other words, if offender successfully proves his defence of grave and sudden provocation caused by some action or words of complainant or victim of offence then he may be punished with any sentence other than death. A common law principle that victim's provocation reduces accused's culpability was made the basis of the Indian Penal Code, 1860. Although, in early common law only action on the part of offender was considered as an act of grave and sudden provocation but not the utterances. However, in latter half of twentieth century infidelity and hurtful words were also

³⁸³ *Abdul Zahir vs. The State*, PLD 2000 SCMR 406.

³⁸⁴ *Zahid Rehman vs. The State*, PLD 2015 SC 77.

considered causes of provocation.³⁸⁵ The first Law Commission for India headed by Lord Macaulay in its report rejected English law bifurcation of provocation and sudden fight. However, later on when the draft was converted into statute provocation was separated from sudden fight. Like all other mitigating circumstances, provocation was considered only a partial defence rather a complete defence. In partial defence offender is convicted but sentenced with possibly lesser punishment. However, for seeking protection of grave and sudden provocation the very act causing provocation had to be proved first as it was observed in *Mohib Ali* case.

Mitigating circumstances were skipped from the penal code when English homicide law was replaced with Islamic *qisas* and *diyat* law, in the year 1990, most probably due to a misconception of unacceptability of such defences under Islamic Law. Though, in *Gul Hasan Khan's* case, as per majority view mitigating circumstances could be reconciled with Islamic injunctions but in the opinion of Justice Muhammad Taqi Usmani grave and sudden provocation was not recognised under Islamic law. According to an argument raised by Justice Usmani a wife who was found in illicit relationship with a man, her husband under grave provocation could murder them and they, on becoming *ghair ma'sum-ud-dam*, could be killed lawfully as they had lost protection of law. Except personal opinion of Justice Usmani, mitigating circumstances had never been held by superior judiciary to be repugnant to the injunctions of Islam as laid down in the Holy *Qur'an* and the *Sunnah* of Prophet (pbuh).

³⁸⁵ Elliott Ian Leader, *Revising the law of Murder in the Indian Penal Code: A Macaulayan Reconstruction of Provocation and Sudden Fight*; The University of Adelaide Law School Research Paper No. 2010-002

7.4 CONFLICTING AND INCONSISTENT DECISIONS ON THE SCOPE OF MITIGATING CIRCUMSTANCES UNDER ISLAMISED LAW

In early cases, after promulgation of *qisas* and *diyat* law, superior judiciary predictably faced difficulties in understanding and applying Islamised law. There are numerous early precedents of High Courts and the Supreme Court wherein unimpeccable, ambiguous, inconsistent and contradictory judgments were passed. In many cases judges, without showing any deference to new law, extended benefit of mitigating circumstances to offenders. For instance, in the case of *Abdul Waheed*³⁸⁶ referring to the minority view in *Gul Hasan Khan's* case trial judge observed that under Islamic law provocation for seeing *zina*, which was itself punishable with death, was a mitigating circumstance so punishment less than *qisas* could be imposed in such circumstances. Appeal was preferred by the State on the ground that case falls under section 302(a) PPC rather under section 302 (c) PPC. Justice Naseem Hassan Shah, Chairman of the Supreme Appellate Court, observed:

We find that the plea of grave and sudden provocation raised by Abdul Waheed could not have been given effect to in this case so as to make his case fall within the ambit of clause (c) of section 302, P.P.C. and to take it out of the mischief of clause (a) of section 302, P.P.C., because the requisite evidence to establish this plea under the Islamic Injunctions was not produced by Abdul Waheed respondent.³⁸⁷

Finding of a three member bench of the Supreme Appellate Court boggles the mind of reader that how accused can be convicted under section 302 (a) PPC for *qisas*

³⁸⁶ *The State vs. Abdul Waheed alias Waheed and another*, 1992 PCr.LJ 1596.

³⁸⁷ See *ibid*, at p. 1601.

in absence his confession or evidence required under section 304 PPC. However, a different view was taken in the case of *Muhammad Hanif* wherein appeal was filed against judgment, dated 01-06-1992, of the Special Court for Speedy Trials.³⁸⁸ On conclusion of trial, court convicted Muhammad Hanif under section 302(c) PPC and sentenced him for ten years' imprisonment as well as with fine as *arsh*. Accused admitted his guilt in his statement under section 342 Cr.PC and disclosed that he had committed offence under grave and sudden provocation as his wife was dragged and disgraced by the deceased. Ironically, trial court despite mentioning that mitigating circumstance had been deleted under new law extended benefit of provocation to accused. The State, relying on *Abdul Waheed's* case preferred an appeal on the ground that offence was punishable under section 302(a)/34 PPC and trial court unjustly took lenient view. A three member bench of the Supreme Appellate Court under the chairmanship of Justice Shafi-ur Rahman, referring a book '*Islami Qawanin - Hudood, Qisas, Diyat wa Ta'ziraat*' of Dr. Tanzil-ur Rahman, and giving an unnecessary and irrelevant details of *Hudood* offences, was very much impressed by the opinion of the writer that offence of *qatl-i-amd* liable to *qisas* takes place only when deceased was not liable to punishment of death or he was '*Masoom-ud Dam*', i.e. innocent. Justice Shafi-ur Rahman also objected the judgment of *Gul Hasan Khan's* case for the reason that the bench failed to add a condition of '*Masoom-ud dam*' for punishment of *qisas*. Distinguishing from *Abdul Waheed's* case appeal was dismissed and it was observed that courts in their judgments had not explored another wide field of exceptions including right of self defence of one's own person and of those whose protection was his duty.³⁸⁹

³⁸⁸ *The State vs. Muhammad Hanif and 5 others*, 1992 SCMR 2047.

³⁸⁹ See *ibid*, at p. 2054.

Interestingly, facts and grounds in both cases were almost similar. Moreover, except chairman other members of both appellate courts were also same even then in first case accused was punished to death as *qisas* under section 302 (a) PPC and in other case punishment of accused of ten years' imprisonment and fine under section 302 (c) PPC awarded by trial court was retained. The *ratio* of *Muhammad Hanif's* case was discussed but not followed by a single member bench of the Lahore High Court in *Ali Muhammad's* case.³⁹⁰ Against the decision of conviction under section 304-I PPC and sentenced to seven years' rigorous imprisonment, appeal was filed before the High Court. Motive of offence was that accused Ali Muhammad suspected the deceased to have immoral liaison with his wife. All accused denied charges except Muhammad Ali who took plea that he had committed murder under grave and sudden provocation when he found deceased in compromising position with his wife. Both courts considered version of accused true and accepted it in totality in the line and guidance given under the case of *Muhammad Hanif*. On a question as to whether or not correct law was applied? Justice Ausaf Ali Khan observed:

The learned trial Court accepted the plea of the accused and acquitted them except the appellant who was convicted and sentenced under section 304-I, P.P.C. The learned trial Court, however, had not cited correct provision of law under which the appellant was convicted and sentenced. And so probably because he was oblivious of Criminal Law (Second Amendment) Ordinance, 1990 (Qisas and Diyat Ordinance), which had come into force on the 12th day of Rabi-ul-Awwal which fell on the 5th of September, 1990. The occurrence had taken place on the night intervening the 23rd/24th of October, 1990. The conviction can be construed to have been recorded under section 302(c), P.P.C. whereunder sentence up to 25 years could be awarded. The misapplication of law does not carry miscarriage of justice or any material bearing on the case.³⁹¹

³⁹⁰ *Ali Muhammad vs. The State*, 1993 PCr.LJ 557 Lah.

³⁹¹ See *ibid*, at pp. 559, 560.

The High Court acquitted accused for the reason that being custodian of honour of his wife he had right to kill the deceased who was engaged in sex act with his wife and accused had not earned liability of *qisas* or *ta'zir* or even *diyat*. Similarly, in *Muhammad Siddique vs. The State*³⁹² two persons were charged for murder. Motive of offence set out by the complainant was that accused Muhammad Siddique desired to marry his daughter to the deceased. The father of deceased was also agreed. Later on, deceased refused to accept the daughter of offender. However, during investigation accused negated version of complainant and disclosed that in fact the deceased had developed illicit relations with his daughter and on the day of occurrence he saw his daughter and deceased coming out from a field of sugarcane. He claimed that since he murdered deceased under grave and sudden provocation so he was not liable to be punishment. On application of accused the girl was medically examined and she found not virgin and swab test was also positive. Justice Khalil-ur-Rehman Ramday, without taking notice of the provisions of the Ordinance, 1990 wherein no mitigating circumstances were provided, relying on a *Hadith* of Prophet (pbuh) reported in *Sahi Bukhari Vol. III*³⁹³, granted bail to accused on the ground of grave and sudden provocation on account of *ghairat*. In another like case of *Mst. Bashiran*³⁹⁴ a lady was convicted and sentenced by trial judge under section 302(c) PPC for six months' rigorous imprisonment and fine vide his judgment dated 07-06-1992. Decision of trial court was challenged by the lady on the ground that murder was committed by her due to grave and sudden provocation so her sentence be

³⁹² *Muhammad Siddique vs. The State*, PLD 1994 Lah. 129.

³⁹³ As per narration of the Prophet (pbuh) when *Saad bin Abaadah*, a companion of the Prophet, mentioned to the Holy Prophet that he would kill the one whom he saw near his wife. In response to it, the Prophet (pbuh) neither forbade him nor raised any objection rather the Prophet said that He, i.e. the Prophet (pbuh), was more conscious of family honour than him.

³⁹⁴ *Mst. Bahiran vs. The State*, 1994 PCr.LJ 908 Lah.

reduced to the period already undergone by her as there was no one else to look after her kids. Astonishingly, Mr. Justice Muhammad Nawaz Abbasi did not bother to take notice of the provisions of law, accepted grave and sudden provocation as a mitigating circumstance, sans any proof of it and allowed appeal. Even the Judge did not follow the observation of the Shariat Appellate Bench given in *Gul Hasan Khan's* case.

In a murder case of *Ghulam Yaseen*³⁹⁵, three accused were convicted under section 302(b)(c)/34 PPC and sentenced by trial court for twenty five years' rigorous imprisonment. All three accused had beaten Ghulam Akbar who died at the spot while an injured lady, namely Mst. Bakho, managed to run away. Motive of offence, as alleged by complainant was suspicion of illicit relation of deceased and Mst. Bakho. A single member bench of the Lahore High Court in his judgment took notice of the provisions of section 338-F PPC, assumed his authority to take notice of injunctions of Islam and then found a relevant injunction from a narration of the Prophet (pbuh) which was mentioned in the case of *Muhammad Siddique* as well. The High Court by accepting appeal partly, convicted accused persons only under section 302(c) of the Pakistan Penal Code, 1860 reduced sentence of all three appellants to five years' imprisonment and dropped relief of payment of compensation to legal heirs of deceased for he was involved in illicit relations. Moreover, Justice Khalil-ur Rahman Ramday also suggested law makers to reconsider the omission of mitigating circumstances of grave and sudden provocation of account of *ghairat* from amended law in the following words:

³⁹⁵ *Ghulam Yaseen and two other vs. The State*, PLD 1994 Lah. 392.

While I am the subject, I may also make mention that there is no dearth of Ahadeeth recognizing the right of an individual to defend himself against any aggression against him or his property or the right to defend other individuals, but our law on the subject makes no specific mention of giving any allowance to persons causing injuries or even Qatls in the exercise of such right. I have no doubt in my mind that by the time the present legislation on the subject, which is presently only in the form of an ordinance, is laid before the legislature, due notice will be taken of these omissions and others in the law presently in force.³⁹⁶

The *ratio decidendi* of *Ghulam Yaseen*'s case was followed by Justice Iftexhar Hussain Chaudhry in *Ghulam Farid vs. The State* where accused killed deceased on the basis of suspicion.³⁹⁷ Motive behind occurrence, as stated in the FIR, was a suspicion that deceased, an inspector in the Cooperative Department, had developed illicit relations with his wife. In his statement u/s 342 Cr.PC accused stated that it was not a matter of suspicion but he saw deceased in compromising position with his wife and due to grave and sudden provocation he gave him knife blow. On completion of trial, accused was convicted under section 302 (b) PPC and sentenced him to life imprisonment. In his appeal before the Lahore High Court accused prayed for acquittal as his case was of grave and sudden provocation and he committed no offence. The question before a single bench of the High Court was as to what sentence should be awarded to accused when amended law had not contained ground of grave and sudden provocation for light punishment? The High Court relying on few of the above discussed cases and following a tradition of a companion of the Prophet (pbuh), i.e. the second caliph, Umar (God be pleased with him),³⁹⁸ who did not punish a person who in defence of honour of his wife killed a man, acquitted accused of case as he had committed no offence. Another case of this category is

³⁹⁶ See *ibid*, at p. 393.

³⁹⁷ *Ghulam Farid vs. The State*, 1997 PCr.LJ 1411 Lah.

³⁹⁸ On enquiry when the second Caliph was satisfied that murder was committed due to honour of wife, the Caliph had let the accused go.

*Manzoor Hussain vs. The State*³⁹⁹ wherein both parties were from same family. Trial court convicted and sentenced accused persons under sections 302 (c) and 337 (d) / 148/149 PPC. The Lahore High Court maintained conviction and sentence by dismissing appeal of accused. Leave to appeal was preferred before the Supreme Court on the ground that courts below failed to consider the fact of waiving of right of *qisas* by one *wali* of deceased. Parties were close relatives to each other and one lady namely Mst. Sakina, widow of Muhammad Siddique was also sister of accused / appellants. She had waived her right of *qisas* under section 309 PPC. Before the apex court, counsel for appellant contended that since one of sisters of complainant, who was widow of deceased, had waived right of *qisas* under section 309 PPC so *qisas* is not possible. So he argued that only punishment of imprisonment not exceeding ten years as *ta'zir* under section 311 PPC could be imposed. On the other hand, counsel for complainant contended that since accused were convicted and sentenced under *ta'zir* not as *qisas* so waiving of *qisas* under section 309 PPC would not be benefitting the complainant. Interestingly, a three member bench of the Supreme Court in its judgment neither discussed applicability of mitigating circumstances under *qisas* and *diyat* law nor mentioned that lenient view was taken due to any mitigating or extenuating circumstance. The bench set aside conviction of three accused under section 302/149 PPC but maintained conviction and punishment of other two accused persons under section 302 (c) PPC. Hence the bench, impliedly, approved application of sudden fight as a mitigating circumstance under new legislation when observed that in their opinion occurrence was not a result of premeditation but it took place on account of sudden flare up. Similarly, in the case of

³⁹⁹ *Manzoor Hussain vs. The State*, 1994 SCMR 1327.

Riaz Ahmad motive of offence was that Mst. Naziran Bibi d/o Bashir Ahmad was first married to Muhammad Ayub but *rukhsati* had not taken place.⁴⁰⁰ Later on, Bashir Ahmad arranged marriage of his daughter with some other person but she had to come back to the house of her father due to strained relations with her husband. She after sometime eloped with Muhammad Ayub. The relatives of girl suspected involvement and facilitation of deceased in the matter of elopement. Accused Riaz Ahmad was booked in the case for he had inflicted knife blows on the chest of deceased when he was caught hold by another co-accused. A co-accused in his statement under section 342 Cr.PC had denied charges and stated that he was not present at the place of occurrence and he was implicated into the case falsely. Appellant also denied occurrence as stated by prosecution witnesses but took a different plea in his statement that deceased attempted to outrage modesty of his wife when she was out in cotton field in order to ease her. He heard cries of his wife from the field, rushed to the spot and grappled with the deceased during which deceased sustained injuries from the knife and passed away. No evidence in his defence accused could produce. Trial court acquitted co-accused for prosecution could not prove case against him but convicted Riaz Ahmad under section 302 PPC and sentenced him to death. In appeal, the Assistant Advocate General supported the impugned decision of trial court and stated that under new amended section of 302 PPC there was no exception regarding murders committed under the impact of grave and sudden provocation. A division of the High Court, relying on the decisions of *Abdul Waheed* and *Muhammad Hanif* cases, did not accept the ground of sudden and grave

⁴⁰⁰ *Riaz Ahmad vs. The State*, 1996 PCr.LJ 43 Lah.

provocation for the reason that accused could not prove it by evidence even his wife did not appear as defence witness. Consequently, appeal was dismissed.

In above discussed inconsistent and contradictory decisions in cases of *qatl-i-amd* courts were confused as to how mitigating circumstances should be utilised under amended law when statute itself was silent about those. So judges when decided murder cases they have no other options except to fill gaps of legislation following the pattern of repealed law. Such decisions of courts added more confusion into already an ambiguous and un-impeccable legislation.

7.5 SUCCESSIVE DECISIONS OF THE SUPREME COURT AND AGGRAVATED CONTROVERSY

After promulgation of *qisas* and *diyat* law a question, as to whether or not mitigating circumstances exist under the Islamized law of murder of Pakistan, was considered a legal quagmire. However, some serious efforts are made by the judiciary to come out of it. First of such efforts is the judgment of *Abdul Haque* case which is important for its fact and question of law involved.

7.5.1 Facts and Background of Abdul Haque Case

Abdul Haque was challaned in a murder case of a person who during a fight with another person fired at that person but unfortunately the bullet hit father of Abdul Haque and he passed away. During trial of the case when killer of father of Abdul Haque was brought before trial court, complainant Abdul Haque was also present

there sitting by the door of court room. Some exchange of words took place between the killer and Abdul Haque on which he opened fired at him by his pistol who later on succumbed to injuries. Abdul Haque in his statement under section 342 Cr.PC stated that while entering court room the deceased used abusive language saying that if acquitted he would commit *zina*, i.e. rape, with his wife and with the wives of other member of his tribe. On listening abusive words he had lost balance of his mind and did not know what he had done. Trial court convicted Abdul Haque under section 302 PPC and punished him with imprisonment for life. The Balochistan High Court heard two appeals one against sentence and other filed by the State for imposition of sentence of death. However, on the quantum of appropriate punishment, a division bench of the High Court was split. Consequently, matter was sent to a third judge, namely Mir Muhammad Nawaz Marri, who, agreeing with the opinion of Justice Iftikhar Muhammad Chaudhry enhanced punishment of accused and imposed death penalty. The High Court Balochistan with majority of 2:1 observed that new legislation did not contain exceptions, i.e. mitigating circumstances, of the repealed section 300 PPC, therefore, concession under old law due to doctrine of diminished liability on the ground of grave and sudden provocation was not available under new law.

7.5.2 Hearing of Abdul Haque Case before a Three Member Bench of the Supreme Court

As a last resort, accused assailed decision of the High Court by filing a petition before the apex court under Article 185(2) of the Constitution of Islamic Republic of

Pakistan, 1973. A three member bench of Justice Saad Saood Jan, Justice Muhammad Munir Khan and Justice Raja Afrasiab Khan allowed leave to appeal of Abdul Haque against majority decision of the High Court.⁴⁰¹ The bench, due to involvement of a question of great importance, considered it just to place the matter before a larger bench to answer as to whether the Criminal Law (Second Amendment) Ordinance, 1990, intended to do away with the preferential treatment that had always been accorded to a person who took another person's life under circumstances where he had lost all self-control?⁴⁰² Interestingly, while placing the matter before the Chief Justice of Pakistan judges exposed their own minds when Justice Saad Saood Jan, speaking for the bench, remarked:

The plea of diminished liability in respect of offences relating to human body committed under grave and sudden provocation has been well-recognized in the sub-continent for more than a hundred years. There is a good reason for that: a person who commits culpable homicide out of compulsions, ethncial or otherwise, not brought about by himself, cannot in the matter of punishment be placed on the same footing as a cold-blooded murderer or a hired, assassin.⁴⁰³

7.5.3 Constitution of a Five Member Bench of the Supreme Court and Hearing of Abdul Haque Case

The then Chief Justice of Pakistan was pleased to constitute a larger bench of five judges for adjudication and decision of the case.⁴⁰⁴ The larger bench, however, rephrased the question in the following words:

⁴⁰¹ *Abdul Haque vs. The State*, 1996 SCMR 1566.

⁴⁰² See *ibid* at, p. 1569.

⁴⁰³ See *ibid*, at p. 1569.

⁴⁰⁴ *Abdul Haque vs. The State and another*, PLD 1996 SC 1. Justice Muhammad Munir Khan was a member of three member bench as well.

Whether the plea of grave and sudden provocation is available to the appellant in this case after amendments to sections 299 to 338 contained in Chapter XVI of the Pakistan Penal Code, which were initially inserted by Criminal Law (Second Amendment) Ordinance, 1990.⁴⁰⁵

Before the larger bench from the side of accused two alternative arguments were extended by his counsel Mr. Yahya Bakhtiar. His first argument was that appellant had a right under Islam to take life of deceased by way of *qisas* as the deceased had committed murder of father of appellant, therefore, he deserves acquittal. He further argued that in the case of Abdul Haque *qisas* was not applicable because accused had exercised and executed his right of *qisas* by killing the deceased who killed his father. He also contended that if his first argument does not find favour with the court even then death as punishment was not justified and case of accused would fall under section 302 (c) PPC because he committed murder under grave and sudden provocation. On behalf of the State Ch. Ejaz Yousaf, learned Additional Advocate General, urged that the instant case was of *qatl-i-amd* punishable with death as *qisas* and it would fall in the ambit of section 302 (a) PPC because appellant had taken law in his own hands and committed murder of deceased who was handcuffed and helpless. He also submitted that after promulgation of the Criminal Law (Second Amendment) Ordinance, 1990 plea of diminished liability on the ground of sudden and grave provocation for use of abusive language was not available. He further argued that appellant also failed to prove his plea of grave and sudden provocation. Similarly, counsel for complainant, namely Mr. M. Zafar Advocate, argued that case of accused fall under section 302 (b) PPC as requirements of section 304 PPC were not fulfilled in order to attract the provisions of section 302

⁴⁰⁵ See *ibid*, at pp. 15, 16.

(a) PPC. After hearing arguments for and against, the Supreme Court analyzed various precedent cases and observed that appellant could not be punished with *qisas* for there was no proof as required under section 304 PPC fulfilling the requirements of article 17 of the *Qanun-e Shahadat* Order, 1984. In his main judgment, pinned by the then Chief Justice Sajjad Ali Shah, the larger bench regarding the correct applicable law observed:

We are aware of the fact that before amendment of section 302, P.P.C., the case in hand would have been covered by section 304, P.P.C. on the plea of grave and sudden provocation in the face of abusive language used by the deceased which provoked the appellant and would have called for lesser penalty than death but now after amendment this plea is not covered in Qatl-i-Khata, hence it is to be read within four corners of Qatl-i-Amd as is now defined under section 302, P.P.C. Now since section 302, P.P.C. in the amended form is substantive law not providing any exception covering plea of grave and sudden provocation on account of abusive language which is distinct and separate from the act of Zina as such, it would be deemed to be the bounden duty of the prosecution to prove positively whether case is covered by Qat-i-Amd, liable to Qisas, not liable to Qisas, or liable to Ta'zir.⁴⁰⁶

Whether any benefit of alleged plea of sudden and grave provocation accused could claim under new amended law? The bench, despite expressing clearly that no such right he could claim, gave him benefit of provocation under section 302 (b) PPC as an extenuating circumstance but not under section 302 (c) PPC when it was held:

We have also considered the fact that the appellant is Pathan and as such traditionally very sensitive about anything derogatory stated about his womenfolk and is expected to react very quickly on account of provocation. In the circumstances, we consider that plea of grave and sudden provocation on account of abusive language can be treated as mitigating circumstance in awarding sentence under Ta'zir even if this plea as such is not available and does not get any protection in the new amended law.⁴⁰⁷

⁴⁰⁶ See *ibid*, at p. 33.

⁴⁰⁷ See *ibid*, at p. 34.

Larger bench of the apex court, therefore, unanimously maintained conviction of accused under section 302 (b) PPC but reduced his sentence from death to life imprisonment giving him advantage of verbal provocation by using filthy language. Reasoning of decision of the apex court was further clarified by Justice Ajmal Mian under his separate note wherein he attached benefit of oral provocation only in deciding quantum of punishment as *ta'zir* under section 302 (b) PPC. He said:

In other words, the loss of the power of self-control on the part of the appellant because of the grave and sudden provocation would be relevant factor in deciding the question, whether the appellant is to be awarded death sentence or imprisonment for life. To put it differently, it can be said that notwithstanding the omission to incorporate above Exception 1 in the amended section 300, P.P.C. grave and sudden provocation remains a relevant factor for deciding the question of sentence under clause (b) of the amended section 302, P.P.C. but it has no relevance under clause (a) thereof.⁴⁰⁸

In his concurring but separate judgment, Justice Manzoor Hussain Sial showed his agreement with majority view of the decision of the High Court Balochistan about non-existence of diminished liability under new amended law, i.e. the *Qisas and Diyat Ordinance, 1990*. His lordship was of the view as follows:

The concept of diminished liability in respect of offences relating to human body committed under grave and sudden provocation as such, in my view, has not been recognised under section 300, P.P.C. as replaced by Criminal Law (Second Amendment) Ordinance, 1990, particularly because as different from the old section it contains no exception.⁴⁰⁹

Justice Manzoor Hussain Sial though did not express his disagreement with majority view of the larger bench but regarding applicability of grave and sudden provocation he remarked differently:

⁴⁰⁸ See *ibid*, at p. 39.

⁴⁰⁹ See *ibid*, at p. 40.

Keeping in view the above provisions introduced in the Penal Code by the Criminal Law (Second Amendment) Ordinance, 1990, it is manifest that if the case falls under clause (a) of amended section 302, P.P.C., then there is hardly any scope for entertaining the concept of diminished liability on the ground of sudden provocation. Nevertheless, if the offence committed punishable under Ta'zir and the case falls under clause (b) or clause (c) thereof, the Court can take into consideration the mitigating circumstances like grave and sudden provocation for award of lesser penalty.⁴¹⁰

Importance of the judgment of larger bench of the apex court cannot be ruled out as a five member bench of the Supreme Court, unanimously, declared that case of accused Abdul Haque fall under clause (b) of section 302 PPC. Indirectly, the bench declared that no advantage of mitigating circumstance of grave and sudden provocation could be given under section 302 (c) PPC to the offender of *qatl-i-amd*. However, regarding application of mitigating circumstances under amended law Justice Manzoor Hussain Sial, in his separate note, took a different stance that a *ta'zir* case which fell under clause (b) or clause (c) of section 302 PPC, court could take into consideration mitigating circumstance of grave and sudden provocation for awarding lesser punishment.

7.6 RESTORATION OF MITIGATING CIRCUMSTANCES INTO THE LAW OF *QATL* THROUGH ADJUDICATION AND INTERPRETATION

Mitigating circumstances were restored by judiciary into the amended law based on the injunctions of Islam. It needs to be mentioned here that there are few milestone

⁴¹⁰ See *ibid*, at p. 41.

cases through which mitigating circumstances mentioned under the erstwhile law were held to be dealt with under clause (c) of section 302 PPC.

7.6.1 *Ali Muhammad vs. Ali Muhammad and Another*

In the case of *Ali Muhammad*⁴¹¹ accused, besides few others, was charged for murder. Motive of offence, as per prosecution version, was accused's suspicion about illicit relationship of the deceased with his wife. Prosecution story was that accused along with his four companions abducted the deceased from fields and brought him to his *dera*, i.e. residence or cattle farm, where caused his death by strangulation. On the other hand, accused in his statement under section 342 Cr.PC disclosed that in the fateful night of occurrence he saw his wife and the deceased lying on the bed of another room of his house in objectionable position. He caught hold of deceased, gave his *danda*, i.e. stick, blows and put a cloth around his neck to carry him towards his *dera* where he died due to strangulation. Trial court rejected version of prosecution and believed narrative of accused correct and accepting defence of grave and sudden provocation and family honour convicted accused under section 304 PPC and sentenced him for seven years' rigorous imprisonment.⁴¹² Nonetheless, for having no evidence of their involvement, four co-accused were acquitted. On appeal, the High Court raised a question as to what offence accused has, in fact, committed? The High Court also accepted version of case taken by accused as correct and relying upon the case of *Muhammad Hanif* took view that conviction awarded by trial court

⁴¹¹ *Ali Muhammad vs. Ali Muhammad and another*, PLD 1996 SC 274.

⁴¹² Ground of grave and sudden provocation was recognized under the first exception to the repealed section 300 PPC. Trial court convicted accused in accordance with old law despite the fact that old law was repealed through the Criminal Law (Second Amendment) Ordinance, 1990 known as the *Qisas* and *Diyat* Ordinance, 1990.

could be construed to have been recorded under new section 302 (c) PPC. The High Court accepted appeal of convict and observed that appellant accused as custodian of honour of his wife had right to kill the deceased who was engaged in sex act with his wife and that accused had not earned liability of *qisas* or *ta'zir* or even *diyat*. The apex court allowed leave to appeal in order to determine correctness of decision of the High Court whereby accused was acquitted. His lordship, as he then was, Justice Fazal Karim after hearing both sides adopted the view of Justice Shafi-ur Rahman given in *Muhammad Hanif's* case that offender has right of self-defence which includes right to defend the honour of wife and such a case falls under 302(c) PPC. The bench also accepted the *ratio* of *Abdul Haque* case to the extent that factor of grave and sudden provocation should be considered to punish offender under section 302 (b) PPC but the apex court distinguished the case from the case of *Abdul Haque* in the sense that in *Abdul Haque* case words to provoke accused were oral while in *Ali Muhammad* case it was the act of sexual activity and such like cases were of a different category. Regarding the category of cases falling under 302(c) PPC, Justice Fazal Karim, speaking for a three member bench, in his judgment observed:

As to what are the cases falling under clause (c) of section 302, the lawmaker has left it to the Courts to decide on a case to case basis. But keeping in mind the majority view in Gul Hassan case PLD 1989 SC 633, there should be no doubt that the cases covered by the Exceptions to the old section 300, P.P.C. read with the old section 304 thereof, are cases which were intended to be dealt with under clause (c) of the new section 302 of the P.P.C.⁴¹³

Justice Fazal Karim also disagreed with the opinion of Justice Manzoor Hussain Sial given in *Abdul Haque* case and remarked:

⁴¹³ See *ibid*, at p. 290.

It seems to me, therefore, that the class of cases to which clause (c) of section 302 applies is different from the cases enumerated in section 306 and punishable under section 308 and that clause (c) of section 302 is not limited to cases enumerated in section 306 and punishable under section 308.⁴¹⁴

In short, the Supreme Court placed all cases of culpable homicide of the erstwhile law which were not murder under 302 (c) PPC. Consequently, impugned judgment of acquittal was recalled and appellant was convicted under section 302(c) PPC and punished for imprisonment he already undergone. In this case a three member bench of the apex court distinguished the decision of a five member bench of the same court in *Abdul Haque* case. By settling law in *Ali Muhammad's* case, judiciary reverted to the pattern of repealed law wherein under some exceptional cases accused, having a defence of mitigating circumstance, could not be sentenced to death. Surprisingly, the precedent settled in *Ali Muhammad's* case was not followed in some subsequent cases and the issue was again taken up by the Supreme Court in the cases of *Muhammad Mumtaz Khan* and *Abdul Zahir Khan*.

7.6.2 *Muhammad Mumtaz Khan vs. The State*

After about two years of the decision of *Ali Muhammad* case another bench of the Supreme Court without referring the *ratio decidendi* of *Ali Muhammad* case passed a different observation in the case of *Muhammad Mumtaz Khan*.⁴¹⁵ Concisely, in this case accused was sentenced to death for committing murder. The Lahore High Court dismissed appeal of accused and confirmed death sentence. The apex court, however, allowed leave to appeal to decide whether or not sentence was just in the

⁴¹⁴ See *ibid*, at p. 290.

⁴¹⁵ *Muhammad Mumtaz Khan vs. The State*, 1999 SCMR 837.

circumstance that half an hour before occurrence the son of deceased had provoked accused by injuring him and accused was of tender age as well? Justice Wajihuddin Ahmed on behalf of three member bench observed:

This case, of course, is specifically covered by section 302(c), P.P.C., the offender being, arguably, a minor, as defined. There, while the maximum of 25 years' punishment is envisaged, no lower ceiling is mandated, leaving the quantum of punishment to judicial discretion, governed by the circumstances of each case. In awarding punishment under clause (c) of section 302, P.P.C; therefore, the Court may legitimately resort to the mitigating and extenuating circumstances, if any. Provocation, even though neither grave nor sudden, but subsisting as a fact, may be one of them.⁴¹⁶

In this case what the apex court actually did with the precedent cases is astonishing. The court, despite quoting *Abdul Haque* case, did not follow the *ratio* of five member bench but distinguished it. On the other hand, the *ratio* of *Ali Muhammad* case was not referred to but was relied upon. Not only this but, intriguingly, two basic characteristics of provocation, i.e. grave and sudden, evolved after centuries of practice of common law, were written off by the bench without giving even a single reason thereof. Moreover, the bench of three judges regarding the application of clauses (a) and (b) of section 302 PPC observed:

The result leaves a discretion with the Court either to opt for death or imprisonment for life in terms of section 302(b), P.P.C. or imprisonment alone, which may extend to 25 years by virtue of 302(c), P.P.C. Because between the alternatives of 302(b) and 302(c), P.P.C. the latter provision visualises a lesser punishment, as also a discretion, such may preferably be resorted to on the basis of the fundamental principles of administration of criminal justice, making it more appropriate for the Court to impose the lesser punishment, where law provides two alternative punishments for the same offence.⁴¹⁷

⁴¹⁶ See *ibid*, at p. 841.

⁴¹⁷ See *ibid*, at p. 840.

The bench, therefore, set aside conviction and death punishment of appellant, convicted him under section 302 (c) PPC and punished him with imprisonment of fourteen years due to involving provocation, a mitigating circumstance.

7.6.3 Approval of Correct Law in *Abdul Zahir and Another vs. The State*

Almost all above discussed cases, after the decision of larger bench in *Abdul Haque* case, were distinguished by a seven member bench of the august Supreme Court in *Abdul Zahir* case while disposing of three connected appeals in a murder case.⁴¹⁸ In this case, accused Abdul Zahir and another were convicted and sentenced under section 302 (c) PPC and under section 324 PPC by trial court. Trial judge avoided awarding severe punishment for the role of accused was not specific in an indiscriminate firing case. The High Court of Balochistan dismissed appeal of accused and maintained the decision of trial judge. Leave to appeal was granted by the apex court to consider whether case would fall within the ambit of section 302 (b) PPC rather under section 302 (c) PPC and that whether accused would be liable to be sentenced for imprisonment of life as *ta'zir*? Before the Supreme Court counsel for appellant / complainant of the case argued that case of accused fell under section 302 (b) PPC as there was no mitigating circumstance to justify conviction and sentence under section 302 (c) PPC. On the other hand, counsel for convicts / accused supported conviction under section 302 (c) PPC. However, the seven member bench of the apex court in order to settle the controversy for good and to endorse the more

⁴¹⁸*Abdul Zahir and another vs. The State*, 2000 SCMR 406. No reason is given under the judgment as to why a bench of seven judges was constituted. Presumably, the bench was constituted purposely to approve one of the conflicting decisions of various benches of the Supreme Court of Pakistan on the scope and application of mitigating circumstances under the law of murder amended through the Criminal Law (Second Amendment) Ordinance, 1990.

correct precedent, distinguished few earlier cases for their facts and finally endorsed the view taken by a three member bench of the apex court in *Ali Muhammad's* case. Justice Muhammad Bashir Jehangiri, on behalf of seven members of the bench, observed:

Clause (c) of section 302, P.P.C. ante applies in case of Qatl-i-Amd where, according to Injunction of Islam, the punishment of Qisas is not applicable. A bare reading of the clause would reveal that section 306, P.P.C. is applicable to cases of Qatl-i-Amd which are not liable to Qisas whereas Qatl-i-Amd not liable to Qisas is indeed punishable under section 308. There is distinction, albeit very slight, between Qatl-i-Amd to which punishment of Qisas is not applicable and that of the Qatl-i-Amd which is not liable to Qisas. A bare reading of section 308, P.P.C. would show that where offender is guilty of Qatl-i-Amd not liable to Qisas under section 306 or the Qisas is not enforceable under clause(c) of section 307, P.P.C., shall be liable to Diyat. We, therefore, endorse the view held by this Court in the case of *Ali Muhammad (supra)* (PLD 1996 SC 274) that class of cases to which clause (c) of section 302, P.P.C. applies is different from class of cases enumerated in section 306 and punishable under section 308, P.P.C.⁴¹⁹

The Supreme Court in the case of *Abdul Zahir* was not willing to consider a previous quarrel, which took place a year before, as a cause of sudden and grave provocation so set aside the decision of two courts below and convicted accused persons under section 302 (b) PPC and sentenced them with imprisonment for life.

7.6.4 *Abdul Karim vs. The State*

In the case of *Abdul Karim* the interpretation advanced in the case of *Ali Muhammad* was followed though nowhere in the judgment any precedent case was referred.⁴²⁰ In this case accused / appellant in his judicial confession admitted his offence but took

⁴¹⁹ See *ibid*, at p. 412.

⁴²⁰ *Abdul Karim vs. The State*, 2007 SCMR 1375.

plea of self defence that when he was attacked by complainant party in private defence he took action without intending death of deceased. On conclusion of trial, he was convicted under section 302 (c) PPC and punished with imprisonment for life while other two co-accused persons were punished with imprisonment for ten years. The Balochistan High Court dismissed appeal of accused but altered his punishment from section 302 (c) PPC to section 302 (b) PPC and acquitted both co-accused persons. Leave to appeal was granted by a three member bench of the apex court to examine the question of exercise of right of private defence. In his judgment, Justice Rana Bhagwandas observed:

It is evident from the evidence on record that the appellant did not act in a pre planned or premeditated manner to take the life of the deceased in order to saddle him with the criminal liability arising under section 302 (b), P.P.C. It appears that in a sudden flare up and in the heat of passion, appellant acted in a manner which cannot totally justified to bring his case with the ambit of section 302(b), P.P.C.⁴²¹

The apex court not only accepted appeal and restored the conviction of appellant under section 302(c) PPC but also altered sentence of imprisonment for life to that of already under gone.

7.6.5 *Azmat Ullah vs. The State*

Precedent of *Ali Muhammad's* case was again followed in *Azmat Ullah vs. The State*.⁴²² In this case murder was result of a sudden fight. According to the version of prosecution case a quarrel instantaneously developed between accused and his

⁴²¹ See *ibid*, at p. 1377.

⁴²² *Azmat Ullah vs. The State*, 2014 SCMR 1178.

brother; accused enraged and caused injuries to his brother who later on succumbed to injuries. In his statement under section 342 Cr.PC, accused admitted that he caused injuries to the deceased but in exercise of his right of private defence. On conclusion of trial, accused was convicted and sentenced under section 302(b) PPC by the Additional Sessions Judge, Daska for alleged murder. Appeal of accused was also dismissed by the Lahore High Court. Leave to appeal was granted by the apex court to consider as to whether case falls within the ambit of section 302 (b) PPC or section 302 (c) of the Pakistan Penal Code, 1860? The Supreme Court observed that there was not a background of any ill-will or bitterness between parties and incident was erupted suddenly without any premeditation. So conviction of appellant under section 302(b) PPC was converted into section 302 (c) PPC and sentence was also reduced to rigorous imprisonment for ten years. Justice Asif Saeed Khan Khosa, relying on the case of *Ali Muhammad's* case, observed:

These factors of the case squarely attract Exception 4 contained in the erstwhile provisions of section 300 P.P.C. It has already been held by this court in the case of *Ali Muhammad v. Ali Muhammad and another* (PLD 1996 SC 274) that the cases falling in the exceptions contained in the erstwhile provisions of section 300 PPC now attract the provisions of section 302 (c) P.P.C.⁴²³

7.6.6 *Zahid Rehman vs. The State*

In *Zahid Rehman's* case Justice Khosa, agreeing with the view adopted in *Ali Muhammad* case, further clarified his view regarding the scope and interpretation of the provisions of section 302 (c) PPC as follows:

⁴²³ See *ibid*, at pp. 1180, 1181.

According to my understanding the provisions of section 302(c), P.P.C. are relevant to those acts of murder which are committed in situations and circumstances which do not attract the sentence of Qisas and I further understand that sections 306 and 307, P.P.C. are person specific whereas section 302(c), P.P.C. relates to certain situations and circumstances wherein a murder is committed and according to the Injunctions of Islam the punishment of Qisas is not applicable to such situations and circumstances.⁴²⁴

The crux of discussion is that a law settled by the Supreme Court in *Ali Muhammad* case, approved and adopted by apex court subsequently till to date is that all exceptions under section 300 PPC of the erstwhile law of murder now fall under clause (c) of section 302 PPC.

7.7 ANALYSIS OF CASES SUBSEQUENT TO THE DECISIONS IN CASES OF *ALI MUHAMMAD* AND *ABDUL ZAHIR*

Precedent cases of *Ali Muhammad* and *Abdul Zahir* were followed in numerous subsequent cases. On the other hand in some case courts deviated from the *ratio* of president cases, however, such deviation was justified by judges in various cases. Such cases can be analysed under different categories. First category is of those cases where protection of precedent cases was prayed for but it was declined for some reasons. Second category is of those cases wherein courts relied upon the precedent cases but unreasonably or excessively. Under third category of cases the precedent was avoided by courts altogether due to change in statutory law. Forth category is of those cases wherein precedent cases were avoided.

⁴²⁴*Zahid Rehman vs. The State*, PLD 2015 SC 77 at p. 113

7.7.1 Cases of Qatl-i-Amd where Punishment under Section 302 (c) PPC was Prayed for, on the Basis of Ratio of Ali Muhammad's Case but Declined

In some case due to involvement of mitigating circumstance punishment under section 302 (c) PPC was prayed but court declined. For instance, in the case of *Muhammad Saleem*⁴²⁵ motive of offence was a suspicion of accused that deceased had illicit relations with his aunt Mst. Manzooran. Previously, a fight also took place between accused and complainant party for same reason. On the fateful day of occurrence accused, allegedly, chased the deceased and fired at him resultantly he succumbed to injuries. Accused did not plead guilty and claimed trial. In his statement under section 342 Cr.PC accused denied charges and alleged that he was falsely implicated in the case on account of enmity of the complainant. On completion of trial, court convicted accused under section 302 (b) PPC and sentenced him to death as *ta'zir*. The High Court confirmed death sentence and dismissed appeal of accused. Leave to appeal was granted by the apex court for examining the quantum of punishment. Before the apex court, on behalf of accused, it was argued that murder was committed to save family honour under grave and sudden provocation. A three member bench of the Supreme Court after assessing precedent cases held that accused had not seen his maternal aunt in compromising position with the deceased nor the lady had been living with him in his house so grave provocation for family honour was out of question. So the court did not find any illegality in the decision of two forums below. In this regard Justice Rana Baghwandas remarked:

⁴²⁵*Muhammad Saleem vs. The State*, PLD 2002 SC 558.

The facts of every case may vary, therefore, no hard and fast rule of universal application can, be laid down but suffice it to say where the accused is able to demonstrate that he was deprived of his capability of self-control or that he was swayed away by circumstances immediately preceding the act of murder or there was an immediate cause leading to serious provocation, Court may be justified in mitigation of sentence. No doubt, wider discretion is conferred upon the Court, under all circumstances it must be exercised in a judicious manner and not at the whims of the Court in an arbitrary manner.⁴²⁶

Similarly the case of *Muhammad Ameer*, the apex court tried to differentiate offence of *qatl* committed due to grave and sudden provocation from that of committed for family honour or *ghairat*.⁴²⁷ In this case accused was convicted under section 302 (b) PPC for committing murder and was sentenced to death by trial court. On appeal, the High Court maintained conviction but converted sentence to life imprisonment. Motive of offence was that one brother of deceased had developed illicit relations with an unmarried daughter of accused and she became pregnant. In a local *jirga* accused demanded the hand of any female of deceased family as compensation and to vindicate his honour. The deceased rejected the offer and used filthy language qua the daughter of accused calling her a prostitute. Not only this but after that *jirga* the deceased again committed *zina* with that lady when she was busy in work near the *dera*, i.e. cattle farm, of deceased. Accused party felt insulted and committed murder of deceased. In his statement under section 342 Cr.PC accused reiterated that he preferred to die as social and moral compulsion did not allow him to pocket his insult. In leave to appeal before the apex court appellant tried to justify his act on the ground of grave and sudden provocation due to family honour and contended that his case fell under section 302 (c) PPC. Justice Muhammad Nawaz

⁴²⁶ See *ibid*, at p. 567.

⁴²⁷ *Muhammad Ameer vs. The State*, PLD 2006 SC 283.

Abbasi, speaking for a three member bench of the apex court, dismissing leave to appeal, observed:

The plea of grave and sudden provocation may not be available to an accused who having taken plea of Ghairat and family honour, committed the crime with premeditation. The petitioner in the present case, with the intention to take revenge of the immoral act of the deceased of outraging the modesty of his daughter having prepared himself to commit the crime, armed with gun, went to the place of occurrence and fired successive shots at the deceased, therefore, his action would not be covered by the provisions of section 302(c), P.P.C., which may attract in a case, in which the essential ingredients of Qatl-i-Amd punishable under section 302(a) and (b), P.P.C. are missing.⁴²⁸

In a, relatively, recent case *Muhammad Asif vs. Muhammad Akhtar*, the High Court on appeal extended benefit of mitigating circumstances of sudden fight and unpremeditated *qatl* and punished accused under section 302 (c) PPC.⁴²⁹ A three member bench of the apex court, however, did not agreed with the decision of the High Court and altered conviction of accused from section 302 (c) PPC to section 302 (b) PPC for the reason that accused with repeated strikes and in a cruel manner had committed murder of deceased.

7.7.2 Cases of Qatl-i-Amd wherein Punishment under Section 302 (c) PPC was Awarded Unreasonably and Unjustifiably

The precedent of *Ali Muhammad* case was followed by courts in some murder cases but unjustly and unreasonably. For instance, in the case of *Allah Ditta*⁴³⁰ accused was sentenced to death by trial court for killing his wife and assailed the decision before

⁴²⁸ See *ibid*, at p. 288.

⁴²⁹ *Muhammad Asif vs. Muhammad Akhtar*, 2016 SCMR 2035.

⁴³⁰ *Allah Ditta vs. The State*, 2007 YLR 2257 Lah.

the Lahore High Court. Motive of offence was a suspicion of accused that his wife had illicit relationship with a man. Prosecution evidence proved the guilt of accused up to the hilt. Appellant too, in his statement under section 342 Cr.PC took plea that when he saw his wife in compromising condition and on his taunt she insisted to keep relationship with that man as he was her real husband. When accused had beaten her she succumbed to injuries. The counsel for appellant submitted for the conversion of conviction and sentence from section 302(b) PPC to section 302(c) PPC. The High Court disbelieved prosecution version, preferred defence plea without any proof and set aside conviction under section 302(b) PPC and convicted appellant under section 302(c) PPC as he alleged the ground of grave and sudden provocation and sentenced him to ten years' rigorous imprisonment following the decision of *Ali Muhammad's* case. Similar misuse of *ratio* of *Ali Muhammad's* case can be witnessed in *Muhammad Akbar's* case.⁴³¹ In this case petitioner was convicted by trial court under sections 12 of the *Zina* Ordinance, 377 PPC and 302(b) PPC. The Federal Shariat Court dismissed appeal and confirmed sentence. Allegation against petitioner was that he committed sodomy with the deceased a week before his death. Post-mortem report also confirmed cause of death. Accused in his statement under section 342 Cr.PC took plea that due to enmity complainant involved him in the case. Accused neither preferred to be examined on oath nor produced evidence in defence. The Shariat Bench of the apex court of five judges, without giving any justification, making reliance on the *ratio* of *Ali Muhammad* case, which was though decided on altogether different reasons, altered conviction from 302(b) PPC to 302(c) PPC and reduced punishment to fourteen years of rigorous imprisonment. Another misuse of

⁴³¹*Muhammad Akbar alias Akku vs. The State*, 2009 SCMR 1192.

section 302 (c) PPC can be seen in the case of *Muhammad Iqbal* wherein neither any precedent case was cited nor any mitigating circumstances for justifying conviction under section 302 (c) PPC was referred.⁴³² Prosecution successfully proved case against accused and accused did not take ground of sudden provocation. On conclusion of trial, two co-accused were acquitted but Muhammad Iqbal was convicted under section 302 (b) PPC and was sentenced to life imprisonment. Trial court already had taken lenient view while recording punishment of accused under section 302 (b) PPC but Justice Shahid Hameed Dar, mere on the basis of his own drawn inference, altered conviction and punishment of accused to section 302 (c) PPC and held:

In the light of the aforementioned facts, it becomes abundantly clear that on 5-10-2005, the deceased went to the Ihata of the father of the appellant as a trespasser, where he showed an unruly behaviour as discussed earlier, which led to an unfortunate incident severing his lifeline. It has been proved that the deceased lost his life due to a fire-shot, made by the appellant but, the circumstances whereunder he did so needed serious consideration. The stories narrated by both the sides are polluted with certain amount of exaggeration, but it does not mean that the court stands precluded from drawing its own independent result, certainly based on the available record.⁴³³

7.7.3 Cases of Qatl-i-Amd wherein Ground of Family Honour or Ghairat was not Considered as a Mitigating Circumstance after an Amendment of 2005

After the decision of *Ali Muhammad's* case, ground of family honour or *ghariat* was treated by judiciary as a mitigating circumstance for justifying conviction and

⁴³² *Muhammad Iqbal vs. The State*, 2015 YLR 450 Lah.

⁴³³ See *ibid*, at p. 455.

punishment under section 302 (c) PPC. The trend was, however, severely objected and criticised by Human Rights' activists in Pakistan and abroad.⁴³⁴ In order to overrule such precedents and exclude family honour or *ghairat* from the mischief of clause (c) of section 302 PPC by the Criminal Law (Amendment) Act (No. 1 of 2005) a proviso was inserted after clause (c) of section 302 PPC whereby offence of *qatl-i-amd* committed in the name of or on the pretext of honour was excluded from the operation of clause (c) of section 302 PPC. Hence, in cases subsequent to the amendment, family honour or *ghairat* is not considered a mitigating circumstance. For instance, in the case of *Muhammad Tahir*, neither any precedent case was cited nor relevant provisions of law were analysed for justifying conviction under section 302 (c) PPC by trial court.⁴³⁵ Accused took plea in his statements under sections 342 and 340(2) Cr.PC that he had committed murder of his wife for *ghairat* as he saw her in compromising position with her brother in law in the house of her parents. At that time he controlled his rage but in the fateful night of occurrence when his wife admitted sexual relationship in presence of her brother in law he could not control himself and killed her. On completion of trial, accused was convicted under section 302 (b) PPC and was sentenced to death. In High Court plea of *ghairat* taken by appellant was not found convincing for when he saw his wife in objectionable condition he had not taken any action at that time. On the point of lenient view, the High Court took notice of newly added proviso through an amendment on 10-01-2005 under section 302(c) PPC which excluded pretext of *ghairat* from the ambit of provisions of section 302(c) PPC. Consequently, appeal was dismissed for not finding

⁴³⁴ Lari Maliha Zia, '*Honour Killing in Pakistan and Compliance of Law*'; Aurat Foundation Islamabad, p.38 retrieved online on 13-1-2019 from www.af.org.pk.

⁴³⁵ *Muhammad Tahir vs. The State*, 2014 YLR 15 Lah.

any mitigating circumstance in favour of appellant as he committed shocking, callous and cold blooded murder of his wife so he did not deserve any leniency.

7.7.4 Cases of Qatl-i-Amd wherein Precedent Case of Ali Muhammad was Avoided

There are also some instances wherein, despite settled law, *ratio* of *Ali Muhammad* case was avoided. Generally, a precedent is avoided by three ways, i.e. by overruling, distinguishing or reversing. In few cases of *qatl-i-amd* higher and superior judiciary avoided precedent of *Ali Muhammad* case by two ways; either by deciding a case under the general exceptions of the Pakistan Penal Code, 1860 or where accused did not opt to forward his defence or if forwarded but had failed to prove the same by bringing a case under the ambit of section 302 (b) PPC for awarding lesser punishment of life imprisonment. The technique coined by Pakistan Judiciary in the cases of *qatl-i-amd*, instead opting general ways to avoid precedent, can be found in *Sardar Muhammad vs. The State*.⁴³⁶ In this case accused was charged for committing murders of his unmarried daughter and a man. In his statement, under section 342 Cr.PC, accused stated that when he found her daughter and the other deceased in compromising position in a sugarcane field, he lost control over senses and killed both under grave and sudden provocation. Trial court convicted accused under section 302 (c) PPC for committing murder on account of *ghairat* and sentenced him to five years' rigorous imprisonment on two counts. Appeal was filed by accused convict before the Lahore High Court and it was argued on his behalf that he should

⁴³⁶*Sardar Muhammad vs. The State*, 1997 MLD 3045 Lah.

have been acquitted by trial court as murder was committed due to *ghairat*. There was no defence evidence to prove version of accused. However, a single member bench of Justice Dr. Munir Ahmad Mughal did not discuss that how case of appellant had not fallen under mitigating circumstances rather he had taken the case under General Exceptions of the PPC, acquitted appellant and ordered for his release forthwith. His Lordship neither relied nor did he mention any precedent and observed:

The statements of Bashir Ahmad P.W.2 and Muhammad Shaft P.W.3 coupled with the report of the Chemical Examiner Exh.PC which says that the vaginal swabs of Mst. Naseem Bibi were stained with semen leave no room for doubt that at the relevant time Suleman Khan deceased was committing Zina with Mst. Naseem Bibi deceased who was the real daughter of the accused-appellant. In such a situation the appellant being father of Mst. Naseem Bibi one of the deceased was overpowered by the wave of his family honour and "Ghairat" and killed both the deceased at the spot. In my opinion he has committed no offence liable to punishment.⁴³⁷

When accused neither proved his defence version nor he himself preferred to be examined on oath under section 340 (2) Cr.PC, the High Court was not justified in its decision of acquittal.

7.8 CONCLUSION

Analysis of discussion under this chapter may be summarised in conclusion. New legislation relating to the offence of murder has provided an opportunity to courts to fill gaps of legislation. It is evident from case law analysis that after promulgation of new law in the year 1990 trend of courts in early decisions was to follow same line as provided under the erstwhile law. For both - the Bar and the Bench, main problem

⁴³⁷ See *ibid*, at p. 3049.

was to deal with offence of *qatl-i-amd* in its different categories under clauses (a), (b) and (c) of section 302 PPC. Having knowledge and experience under common law system, judges tried to rely on precedent cases under repealed law. Moreover, the Supreme Court's contradictory decisions in cases of *Abdul Haque*, *Muhammad Mumtaz Khan* and *Ali Muhammad* aggravated the situation. In *Abdul Haque* case, considered view of the bench was that mitigating circumstances have no scope under amended law. On the other hand, a diametrical opposite view was adopted by another bench of the apex court in *Ali Muhammad case*. In *Ali Muhammad case*, the apex court categorised offence of murder into two classes. First, murder case where defence was of any of the exceptions given under section 300 PPC to be read with section 304 PPC of repealed law would fall under new law under section 302 (c) PPC. Secondly, any other type of defence for seeking lenient view of court would fall under section 302(b) PPC. Till the decision of *Abdul Zahir* case there was no harmony in the decisions of constitutional courts that what sort of cases of *qatl-i-amd* would fall under section 302 (c) PPC. However, the query that whether cases of *qatl-i-amd* involving any of mitigating circumstances fall under clause (c) of section 302 PPC was finally settled by a larger bench of seven judges of the Supreme Court in *Abdul Zahir* case. The larger bench approved the decision of three member bench in *Ali Muhammad* case and disapproved the decision of five member bench in *Abdul Haque* case.

CHAPTER 8

POWER OF INTERPRETATION UNDER SECTION 338-F PPC AND CONFLICTING JUDGMENTS

8.1 INTRODUCTION

Legislature reposed on criminal courts, under section 338-F PPC, an unlimited power of interpreting and applying the provisions of Chapter XVI of the Pakistan Penal Code, 1860 by seeking guidance from injunctions of Islam.⁴³⁸ Language of section 338-F PPC, however, does not indicate that which tier under the hierarchy of criminal courts in Pakistan has power to interpret and to seek guidance relating to offences of *qatl* and hurts under Chapter XVI of the Penal Code. Relating to courts' power of interpretation few important questions, under this chapter, are dealt with. For instance, which courts, under the hierarchy of criminal courts in Pakistan, have power to interpret the provisions of Chapter XVI-PPC? Second, whether judges having no formal religious education relating to the injunctions of Islam can interpret the law? Third, how courts have exercised their power under section 338-F PPC? Fourth, whether or not judges have opined unanimously about the application of concessions or impunities given under the provisions of sections 306 & 307 (c) PPC to punishment of death awarded as *ta'zir*? Fifth, can punishment of *qatl-i-amd* as *ta'zir* be more severe than that of awarded as *qisas*? In the last, the way Pakistan judiciary

⁴³⁸ Text of section 338-F PPC reads as; "*Interpretation*. In the interpretation and application of the provisions of this chapter, and in respect of matters ancillary or akin thereto, the Court shall be guided by the injunctions of Islam as laid down in the holy *Quran* and *Sunnah*".

interpreted and applied the provisions of Chapter XVI of the Pakistan Penal Code, 1860 is discussed under this chapter.

8.2 INTERPRETATION OF LAW RELATING TO THE OFFENCE OF *QATL-I-AMD* WHILE EXERCISING POWER UNDER SECTION 338-F PPC

Unlimited power of criminal courts under section 338-F PPC was objected by a full bench of the Lahore High Court for likelihood of unjust and arbitrary decisions.⁴³⁹ Jurisdiction of courts under section 338-F PPC of interpreting the provisions of criminal general substantive law relating to the offence of *qatl* and hurts or any ancillary matter, was exercised by judges subjectively and haphazardly. The *qisas* and *diyat* law turned to be highly unpredictable when unbridled power under section 338-F PPC was exercised because it opened a door for judges to add anything they think just into the law. How judges interpreted provisions of the law can be understood by going through few milestone cases on the subject. In *Ali Muhammad vs. The State*⁴⁴⁰, as discussed earlier, Justice Ausaf Ali Khan while seeking guidance from injunctions of Islam as required under the provisions of section 338-F PPC, observed:

Although the consequences arising out of exercise of the right of defence to the extent of causing death have not been incorporated in sections 300 and 302, P.P.C. as amended by Criminal Law (Second Amendment) Ordinance, 1990, but still the Courts have to be guided by the Injunctions of Islam as laid down in Holy Qur'an and Sunnah. Section 338-F, P.P.C. expressly permits the Court to assess the culpability of the guilt of the accused not only under the statutory provisions of law but also under the Injunctions of Qur'an and Sunnah.⁴⁴¹

⁴³⁹ *Muhammad Ashraf vs. The State*, PLD 1991 Lah. 347.

⁴⁴⁰ 1993 PCr.LJ 557 Lah.

⁴⁴¹ See *ibid*, at p. 564.

Similarly, in *Ghulam Yaseen's case*⁴⁴² a single member bench of Mr. Justice Khalil-ur-Rehman Ramday, regarding the power of court to interpret the provisions of law, remarked:

The newly added section 338-F in Chapter XVI of the Pakistan Penal Code provides that in the interpretation and application of the provisions of the said Chapter, which Chapter includes Qatl and Hurt etc., the Courts were to be guided by the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah. It is true that the provisions of this Chapter relating to Qatl do not make any allowance for Qatl committed under Ghairat, nevertheless, in view of the abovementioned provisions of section 338-F of the P.P.C., the Courts are bound to apply the provisions of law in accordance with the Injunctions of Islam.⁴⁴³

Justice Ramday while exercising his authority under section 338-F PPC sought aid of a narration of the Prophet (pbuh) reported in volume III of *Sahih Al-Bhukhari* wherein a companion of the Prophet (pbuh) namely *Saad bin Abaadah* disclosed his intention before the Prophet (pbuh) that he would kill the person whom he saw near his wife. On hearing the same the Prophet (pbuh) neither forbade him from taking such action nor allowed him to do it rather declared that the Prophet (pbuh) himself was more *ghairat-wala*, i.e. family-honour conscious, than him. Justice Ramday while taking guidance from the narration further said:

This Injunction of Islam in the form of "AHADEETH" does not find any reflection in the specific provisions relating to Qatl which now stands incorporated in the Pakistan Penal Code. The omission is understandable as the process of bringing the old provisions of the law on the subject in conformity with the Injunctions of Islam, is still in its infancy and attaining expertise about the law which has now been put into practice is likely to take some time.⁴⁴⁴

⁴⁴² *Ghulam Yaseen and 2 others vs. The State*, PLD 1994 Lah. 392.

⁴⁴³ See *ibid*, at p. 396.

⁴⁴⁴ See *ibid*, at p. 398.

Notably, while exercising its power under section 338-F PPC, court held that since accused committed *qatl* on account of *ghairat* so he deserves concession and he could not be punished with death as *qisas*. Hence, punishment of three accused persons under section 302 (c) PPC was reduced to five years' rigorous imprisonment. Similarly, in *Liaqat Ali's* case⁴⁴⁵ accused allegedly murdered the deceased and injured his sister on 04-07-1993. Accused took defence that he saw the deceased with his sister in *pari delicto* so he murdered him in *ghairat* under grave and sudden provocation. A single member bench of Justice Iftexhar Hussain Chaudhry allowed bail petition relying on the decision of *Ghulam Yaseen* case and observed that a Muslim on seeing a person committing *zina* with a woman and that too in his own house, under Islamic law, is justified to do away both. The court further observed:

Chapter IV (General Exceptions) of the Code is to be read in conjunction with substituted Chapter XVI. Section 76 provides that nothing is an offence which is done by a person in good faith believing himself to be bound by law to do it. Extending the analogy to the facts of the case in hand, one can prima facie say that the act of the petitioner in finishing Abdul Hameed deceased was rather in furtherance of the pure moral and ethical Islamic atmosphere in society when he proceeded to do away with the life of a Zani.⁴⁴⁶

Similarly, in *Ghulam Farid's* case⁴⁴⁷ accused was convicted under section 302 PPC and sentenced to life imprisonment by trial court. Motive of *qatl*, as disclosed by accused in his statement under section 342 Cr.PC, was suspicion that accused was carrying on with complainant's wife and he had seen them in compromising position. On appeal, the Lahore High Court after appreciating evidence from both sides had

⁴⁴⁵ *Liaqat Ali vs. The State*, 1994 PCr.LJ 2012 Lah.

⁴⁴⁶ See *ibid*, at pp. 2014, 2015.

⁴⁴⁷ *Ghulam Farid vs. The State*, 1997 PCr.LJ 1411 Lah.

found defence version more plausible so held it correct. The court relying on few earlier cases⁴⁴⁸ and referring a tradition of Hazrat Umar, the second caliph (God be pleased upon him), held that appellant had committed no offence and resultantly he was acquitted of charge.⁴⁴⁹ The aid of power under section 338-F was again sought by the Lahore High Court in the case of *Niamat Ali* who stood surety for accused when he was taken on bail in a murder case.⁴⁵⁰ On failure to produce accused before the court each of them was ordered to pay Rs. 250,000/- as penalty and the amount was to be deposited before trial court on a specified day. On non-compliance of order, the court's order was to attach their moveable properties. The order was challenged before the High Court by sureties through revision petition. The High Court sought assistance from learned counsels for parties and Advocate General Punjab. During arguments the judge of High Court called upon learned counsels to assist the court on as to whether under Islamic law sureties are liable to be imprisoned on behalf of absconding accused or not? The High Court for took aid of the provisions of section 338-F PPC and observed:

It is obvious, by these provisions, that not only in cases relating to offences enumerated in Chapter XVI of the Pakistan Penal Code, but also in all matters ancillary or akin thereto, the Islamic Law on the subject would be applicable. The law of bail is a necessary adjunct of the substantive law and the Islamic law is applicable to it and while considering or interpreting the law of bail and other matters relating to it in cases of hurt and homicide, the Islamic law would be followed and it would come into play while considering the questions relating to grant and/or cancellation of bail, the terms of bail, the qualifications and liabilities of sureties and consequences which follow due to non-surrender of the accused into judicial custody.⁴⁵¹

⁴⁴⁸ For instance; *Mst. Bashiran vs. The State*, 1994 PCr.LJ 908; *Ghulam Yaseen and two others vs. The State*, PLD 1994 Lah. 392 and *Ali Muhammad vs. The State*, 1993 PCr.LJ 557.

⁴⁴⁹ See *ibid* at p. 1416.

⁴⁵⁰ *Niamat Ali vs. The State*, PLD 2001 Lah. 105.

⁴⁵¹ See *ibid*, at p. 110.

While interpreting the law of bail High Court tried to seek guidance from the provisions of section 338-F PPC and observed that in matters where after bail accused did not appear before court the Islamic law regarding bail and other ancillary matters had given a perfect solution.⁴⁵² The High Court referring to few books, like *Fatawa-e Alamgiri* and *Al- Hedaya*, held it just and lawful to take action against a *kafil*, i.e. surety, under Islamic law. Consequently, revision petition was dismissed with a direction to trial court to give last opportunity to the sureties to produce accused before court within a month. Another important case of this category is the case of *Muhammad Sharif*⁴⁵³ wherein a criminal revision was moved before the Sindh High Court challenging an order of trial court about payment of *diyat* amount. In the murder case compromise was affected between parties. One of the legal heirs of deceased, i.e. the widow, waived her right of *qisas* while his daughter was a minor. Four accused were to pay the amount of *diyat* to the extent of minor's share but trial court had ordered the payment of full *diyat* in court for one of the legal heirs was minor. The order was assailed before the High Court where learned counsels for applicant submitted that under section 338-F PPC court, in absence of any specific provision in PPC for payment of *diyat* when more than one offenders committed murder, can apply law as provided in the Holy *Quran* and the *Sunnah*. The High Court, after hearing arguments, allowed application with a direction to trial court that after ascertaining school of thought, i.e. *Hanfi* or *Shia*, of the heirs of deceased, *diyat* to remaining legal heirs as per their shares be disbursed. In *Qaiser Khan vs. The State*⁴⁵⁴ trial court convicted accused persons under section 7 (c) of the Anti-Terrorism Act, 1997 and punished them to suffer rigorous imprisonment for seven

⁴⁵² See *ibid*, at p. 111.

⁴⁵³ *Muhammad Sharif vs. The State*, PLD 2003 Kar. 277.

⁴⁵⁴ PLD 2003 Quetta 122.

years. The convict assailed decision of trial court on the ground that it had no jurisdiction to adjudicate upon the matter. The High Court was expected to decide legality or illegality of impugned decision but it, without any context, discussed powers of a court by virtue of section 338-F PPC and concluded that conviction awarded by learned judge, Anti-Terrorism Court, was not in accordance with principles of Islamic dispensation of criminal justice.⁴⁵⁵ The High Court while elaborating powers of courts under section 338-F PPC extended such power towards criminal law generally when observed as follows:

In other words, by virtue of the provisions of section 338-F, P.P.C. in the matter of interpretation and application of the law relating to Qisas and Diyat, the Court is to be guided by the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah. It may further be stated that according to the provisions of section 4(a) of the Enforcement of Shariah Act, 1991, all the conflicts or doubts in the provisions of all the statutes are to be resolved in accordance with the Injunctions of Islam. The Criminal law, thus has to be interpreted, applied and enforced in a manner so as to achieve the objectives for which, the amendments were brought about while considering or interpreting the law relating to hurt, the Islamic Law would be followed.⁴⁵⁶

Similarly, in the case of *Ibrahim*⁴⁵⁷, trial court convicted accused under section 302 PPC and sentenced him to undergo life imprisonment. The court also convicted him under section 324 PPC for an attempted murder and sentenced him to ten years' rigorous imprisonment. The injured passed away after about six months of occurrence due to same injuries. Before the High Court, appellant took plea that death of injured was not direct result of injury he suffered from few months ago.

⁴⁵⁵ Ironically, Mr. Justice Fazal-ur-Rehman while taunting the subordinate judge of Anti-Terrorism Court for assuming jurisdiction in a case having no nexus with terrorism himself enunciated and discussed section 338-F PPC sans any nexus with the facts and merits of the case.

⁴⁵⁶ *Qaiser Khan vs. The State*, PLD 2003 Quetta 122 at pp. 126, 127.

⁴⁵⁷ *Ibrahim vs. The State and 2 others*, PLD 2007 Pesh. 31. The division bench in support of its ruling referred two books; First, 'A book on *Qisas and Diyat*', published by *Idara-e Tehqeeqat-e-Islami*, Islamabad and another book, Vol. V on the topic by Abdur Rehman *Al-Jazeera*, translated by Manzoor Ahsan Abbasi and published by *Auqaf* Department, Government of Punjab, Lahore in 1979.

The High Court, without referring any precedent case, mere referring its power under section 338-F, PPC observed:

Not only from the principles of medical jurisprudence but also from the Injunctions of Islam, as reproduced earlier, it is quite clear that if death of the victim is the indirect result of the injury caused to him, the accused would be liable to punishment of Qisas for Qatl-e-Amd.⁴⁵⁸

On the other hand, a three member bench of the apex court in *Ghulam Farid's* case refused to extend its power under section 338-F PPC by going beyond the wisdom of legislation.⁴⁵⁹ In this case through a constitutional petition an order of dismissal passed by the Lahore High Court in a criminal revision petition for seeking acquittal of accused was impugned. The convict challenged the very legality of section 345 Cr.PC to the extent of non-compoundability of offence under section 396 PPC. Before the apex court it was argued that giving stretch to the provisions of sections 309, 310 and 338-F PPC offence under section 396 PPC becomes compoundable notwithstanding the provisions of section 345 Cr.PC. The Supreme Court dismissed the petition and held that a non-compoundable offence under section 345 Cr.PC could not be made compoundable by virtue of section 338-F PPC.

The above case law analysis makes it evident that unrestricted power of court under section 338-F PPC, of seeking guidance of Islamic injunction while interpreting and applying the provisions of *qisas* and *diyat* law, was usually exercised in the benefit of accused rather in favour of prosecution case. When judges, by taking

⁴⁵⁸ See *ibid*, at p. 38.

⁴⁵⁹ *Ghulam Farid alias Farida vs. The State*, PLD 2006 SC 53. As per facts of the case the appellant along with four others was convicted and sentenced to death under section 396 PPC. On merits of the case, not only criminal appeal of the convict was dismissed by the division bench of the Lahore High Court but the Supreme Court of Pakistan also dismissed the petition for leave to appeal. Subsequently, when compromise was affected between the convict and legal heirs of deceased an application, moved before the trial court for compounding the offence on the basis of compromise, was also dismissed. A review petition against the order of trial court on application also met with the same fate.

it for granted, exercised such power according to their own knowledge and understanding which made law of *qatl-i-amd* more flexible and unpredictable.

8.3 QATL-I-AMD EITHER NOT LIABLE TO QISAS OR WHEREIN QISAS CANNOT BE ENFORCED

Under the Pakistan Penal Code, 1860 sometimes offence of *qatl-i-amd* is not liable to *qisas* despite availability of proof of offence as required under the provisions of section 304 PPC. There are three scenarios under section 306 PPC when accused is not liable to punishment of *qisas*. First, when offender is minor or insane; second, when offender is father or grandfather of deceased and third when any *wali* of victim is a direct descendant of offender. Similarly, as mentioned under section 307 (c) PPC, punishment of *qisas* cannot be enforced when right of *qisas* devolves on offender when a *wali* dies or right of *qisas* devolves on a person who has no right of *qisas*. In the above situations punishment, in cases of *qatl-i-amd* not liable to *qisas* under section 306 PPC or where *qisas* is not enforceable under section 307 (c) PPC, is provided under section 308 PPC in the form of payment of *diyat* to legal heirs of deceased. Moreover, under a proviso of section 308 PPC it was further clarified by legislature that where offender is minor or insane, *diyat* amount will be paid from his property or from such a person as determined by court.

Islamicity of the provisions of section 306 (c) PPC was questioned in *Faqir Ullah* case before a larger bench of the Supreme Court of Pakistan.⁴⁶⁰ However, the objection raised at bar that provisions of section 306 (c) PPC were not based upon

⁴⁶⁰*Faqir Ullah vs. Khalil-uz-Zaman and others*, 1999 SCMR 2203.

any of the injunctions Islam was not adequately answered by the bench instead the bench took excuse of lack of time and remarked:

Due to paucity of time we have not been able to make further research in the matter ourselves. The opposite side had also not assisted us on the subject. Nonetheless, the amendments were introduced in the year 1990 in the Pakistan Penal Code including the provisions of clause (c) of section 306 and clauses (a) and (b) of section 304 of the P.P.C. with a view to bringing those provisions in conformity with the Injunctions of Islam as laid down in the Quran and Sunnah. The presumption, therefore, is that aforementioned provisions are not violative of any Qur'anic text or the Sunnah of the Prophet (p.b.u.h.).⁴⁶¹

There are many lacunae under these sections. For instance, clause (a) of Section 306 PPC is silent about the nature of minority or insanity which can exempt accused from payment of *diyat*. Secondly, to get protection of clause (a) accused could produce fake medical reports in proof of minority or insanity and third that whether a court was to appoint an *aqilah* of minor for payment of *diyat*? Nonetheless, first mentioned ambiguity was further tried to be addressed by the legislature under second proviso of section 308 PPC wherein it was provided that in case of sufficient maturity of accused who is a minor and where a lucid accused realises consequences of his act of *qatl*, they might be punished with fourteen years' imprisonment as *ta'zir*. Punishment of *ta'zir* under the proviso was further enhanced to twenty five years' imprisonment in the year 2005 through an amendment.

One of the most crucial debates, which emerged subsequent to the promulgation of Islamised law, in the year 1990, relates to the application of provisions of sections 306, 307 (c) and 308 PPC. Under these sections it is nowhere mentioned that immunities or exceptions, provided therein, could only be availed by offenders punished with death as *qisas*. It is also not provided anywhere under these

⁴⁶¹ See *ibid*, at p. 2216.

sections that provisions thereof are not applicable to punishment of death awarded under section 302 (b) as *ta'zir*. Consequently, ambiguity in law resulted into inconsistent and contradictory decisions of courts. Therefore, at this stage it becomes expedient to see that how Pakistan judiciary in the exercise of its interpretative jurisdiction has construed the above provisions. Case law on the topic can be categorized into two ways. First category is of those cases wherein courts held that benefit of exceptions under these sections could be availed and given to all offenders punished with death regardless whether they are convicted under section 302 (a) PPC and punished with death as *qisas* or convicted under section 302 (b) PPC and punished with death as *ta'zir*. Second category is of those cases wherein exemption from death punishment under the provisions of sections 306 and 307(c) PPC are extended only to those accused who were convicted under section 302(a) PPC and punished with death by way of *qisas*. A chronological study of case law of both categories will further make law and involved issues clear.

8.3.1 Cases of Qatl-i-Amd where Exceptions under Sections 306 and 307 (c) PPC are Applied to Death Punishment whether Awarded as Qisas or Ta'zir

In many cases, concessions provided under sections 306 and 307 (c) PPC were extended to all offenders sentenced to death whether as *qisas* under section 302 (a) PPC or as *ta'zir* under section 302 (b) PPC. First case of this category is *Khalil-uz Zaman* case.⁴⁶² In this case a constitutional petition under Article 184 (3) of the

⁴⁶² *Khalil uz Zaman vs. Supreme Appellate Court, Lahore and four others*, PLD 1994 SC 885.

Constitution of Islamic Republic of Pakistan, 1973 was filed before the apex court against the decision of the Supreme Appellate Court, Lahore whereby conviction and sentence of death under section 302 PPC of accused husband for killing his wife was upheld but under section 302 (a) PPC as *qisas*.⁴⁶³ Petitioner before a two member bench of the apex court contended that his conviction and punishment did not fall under section 302 PPC so he should have been punished under section 308 PPC for a daughter of petitioner, i.e. his descendent, is also a *wali* of deceased so he is not liable to the punishment of *qisas*. The apex court allowed the petition and remitted the case to the Supreme Appellate Court, Lahore for decision according to the observation of the apex court that case of petitioner fell under section 308 PPC.⁴⁶⁴ Interestingly, observation made by the apex court is a bit harsh which reads as follows:

Had the Courts taken the trouble of reading three sections of the Pakistan Penal Code, section 306, section 307 and section 308, we are sure that they would not have sentenced the accused/petitioner to death under section 302, P.P.C. The error committed by the Courts in convicting the accused/petitioner under section 302, P.P.C. and sentencing him to death, is so serious that had the petitioner eventually been hanged to death, we are afraid it would have amounted to murder through judicial process.⁴⁶⁵

⁴⁶³ Trial court convicted and punished accused with death as *ta'zir* w/s 302(b) PPC. But the Supreme Appellate Court held that the appellant was liable for *qatl-i-amd* under section 302 (a) PPC punishable with death as *qisas*. Both these decisions were unsuccessfully challenged by filing a review petition before the Supreme Appellate Court. Again, a Writ Petition before the Lahore High Court was filed challenging both earlier decisions but the same was dismissed as withdrawn.

⁴⁶⁴ For the purposes of speedy trial and early disposal, special courts were created by the Special Court For speedy Trials Ordinance, 1992 (II of 1992). The Ordinance was, however, repealed by and replaced with the Special Courts for Speedy Trials Act (IX of 1992). Under the provisions of section 8 of the Act, the Special Court was to proceed with criminal trials speedily on day to day basis and it was to decide a case within thirty days. In case of delay in deciding a case, the court was to justify the same. Appeal against the final judgment of the Special Court was to lie before the Supreme Appellate Court consisting of three members' bench consisting of a Chairman who must be a judge of the Supreme Court and two other members each must be a judge of the High Court. The Act was for limited time and on its expiry, all appeals pending before the Supreme Appellate Court were transferred to the concerned High Courts.

⁴⁶⁵ *Khalil uz Zaman vs. The Supreme Appellate Court, Lahore and others*, PLD 1994 SC 885.

Precedent of *Khalil-uz-Zaman* case was subsequently followed in the case of *Shabbir Ahmad vs. The State*.⁴⁶⁶ In this case accused who murdered his wife and pleaded guilty was convicted under section 302(b) PPC and was sentenced to life imprisonment as *ta'zir* by trial court. On the strength of decision of *Khalil-uz-Zaman* case it was argued before the High Court that trial court could not award punishment under section 302 (a)(b)(c) PPC even accused found guilty of *qatl-i-amd* because the deceased left behind five minor children who are his direct descendants so he deserves to be punished with *diyat* under section 308 PPC. The Assistant Advocate General and a private counsel for complainant conceded to the contention of accused. The High Court without discussing or differentiating the application of provisions of sections 307 and 308 PPC to *qisas* and *ta'zir* cases allowed appeal and awarded accused punishment of *diyat* under section 308(2) PPC. In his judgment Justice Shah Jehan Khan Yousafzai observed:

There seems great wisdom in not providing *qisas* in case where the Wali or Walis of the victim are the descendants of the offender, because in such a situation the heirs would suffer for no wrong. The courts in such a situation shall look after the interest of minors and shall award them *diyat* from their father, found guilty of *qatl-e amd* of their mother.⁴⁶⁷

Similarly, in *Muhammad Iqbal's* case, accused was booked for committing murder of his wife.⁴⁶⁸ Trial court convicted and punished him with death under section 302 PPC. The High Court confirmed murder reference and dismissed appeal of accused. An application was also moved by a minor daughter of accused, from his deceased wife, about pardoning him. The apex court referring *Khalil-uz Zaman* case observed that trial court as well as appellate court had lost sight of the provisions of

⁴⁶⁶ 1997 PCr.LJ 1920 Pesh.

⁴⁶⁷ See *ibid*, at p. 1925.

⁴⁶⁸ *Muhammad Iqbal vs. The State*, 1999 SCMR 403.

sections 306 and 308 PPC and imposed death penalty. A three member bench of the Supreme Court due to brutal nature of offence besides payment of *diyat* u/s 308 (2) PPC held accused liable to suffer rigorous imprisonment of fourteen years as *ta'zir*. The verdict of *Khalil-uz-Zaman* case given by a two member bench of the Supreme Court was challenged by filing a review petition. Review petitioner was heard by a five member bench of the apex court and allowed. The bench held that protection to accused under sections 306 and 307 (c) PPC could only be extended to offenders punished with death as *qisas* under section 302 (a) PPC.⁴⁶⁹

Despite the decision of a larger bench of the Supreme Court of Pakistan in *Faqir Ullah* case in many subsequent cases the *ratio* thereof was not followed even by numerically smaller benches of the same court. For instance, the ratio of *Khalil uz Zaman* case was followed, though not referred to, in *Sarfraz alias Sappi* case⁴⁷⁰ wherein a sixteen years' old lad committed murder of the killer of his father but in that case compromise was affected between parties and the killer was acquitted of charge. On completion of trial, court convicted Sarfraz under section 302 PPC and punished him with death. His appeal was also dismissed by the Lahore High Court. Leave to appeal before the Apex Court was filed on the ground that accused was not adult at the time of alleged occurrence. A three member bench of the apex court, without referring the case of *Khalil-uz Zaman*, on the ground of tender age altered his conviction from section 302 PPC to conviction under section 308 PPC and awarded him punishment of fourteen years' rigorous imprisonment along with *diyat* at the rate which was prevailing at the time of commission of offence. Similarly, in the case of *Naseer Ahmad* accused was convicted for an offence of murder under section 302

⁴⁶⁹ *Faqir Ullah vs. Khalil-uz Zaman and others*, 1999 SCMR 2203.

⁴⁷⁰ *Sarfraz alias Sappi and 2 others vs. The State*, 2000 SCMR 1758.

PPC and was punished with imprisonment for life and fine.⁴⁷¹ On appeal before the Lahore High Court his conviction was maintained but punishment was altered to the payment of *diyat* under section 308 PPC to legal heirs of deceased. The decision of the High Court was assailed to the Supreme Court where a three member bench of the apex court had taken up the point of attainment of sufficient maturity of accused at the time of commission of offence for considering his sentence under second proviso of section 308 PPC. The apex court, without having made reliance on any precedent case, accepted appeal by setting aside the punishment of convict and remanded case to trial judge for determination of his age and point of sufficient maturity so that he could be awarded proper and legal sentence. The verdict of *Khalil-uz Zaman* was again followed in *Dil Bagh Hussain's case*.⁴⁷² In this case accused was charged under section 302 PPC for committing offence of murder of his own son in law and he was convicted under section 302 PPC and punished with death by trial court. On appeal decision of trial court was maintained by the High Court. Leave to appeal was allowed by the Supreme Court to consider as to whether case of accused falls under section 308 PPC because appellant's daughter was becoming *wali* of deceased as his widow. The question was answered in affirmative by the apex court, appeal was allowed and it was held that death punishment awarded by trial court was not sustainable and the same was altered to punishment provided under section 308(2) PPC. Hence, an amount of *diyat* to the tune of Rs. 236, 687, 50/- was ordered by the apex court to be remitted in the name of son of deceased. Similarly, in the case of *Muhammad Abdullah Khan* the killer of his own wife was convicted by trial court

⁴⁷¹ *Naseer Ahmad vs. The State*, PLD 2000 SC 813.

⁴⁷² *Dil Bagh Hussain vs. The State*, 2001 SCMR 232.

under section 302 PPC and was awarded death punishment.⁴⁷³ The Lahore High Court, on appeal, maintained conviction but altered death punishment to life imprisonment. Before the Supreme Court, it was contended on behalf of appellant that his daughter was *wali* of deceased so he was not liable to punishment of *qisas* by virtue of section 306 PPC. Therefore, he could only be punished under section 308 (2) PPC with imprisonment up to fourteen years as *ta'zir*. Justice Javed Iqbal speaking for a three member bench and relying on *Khalil-uz Zaman* case observed:

A bare perusal of the provisions as contained in sections 306 and 308, P.P.C. would reveal that the same are free from any ambiguity and capable enough to meet all sort of eventualities and thus, no scholarly interpretation is called for. As mentioned hereinabove the deceased was survived by Gulnaz Bibi who is admittedly the *Wali* of the deceased and descendant of the appellant and therefore, the appellant is not liable to Qisas in view of the provisions as enumerated in section 306, P.P.C. and conviction could only be awarded under section 308(2), P.P.C.⁴⁷⁴

The apex court also observed that courts derive their power to penalise accused from statute and when statute does not provide death punishment then courts lack jurisdiction to award death punishment. Hence, it was held that conviction and sentence recorded under section 302 PPC was *corum non judice*. Resultantly, the apex court modified the impugned judgment and appellant was convicted under section 308 (2) PPC and his punishment was altered to rigorous imprisonment of fourteen years along with payment of *diyat* to the legal heirs of deceased. Similarly, a three member bench of the Supreme Court in the case of *Amanat Ali*⁴⁷⁵ including a judge who wrote the judgment in *Sarfraz* alias *Sappi* case, i.e. Justice Iftexhar Muhammad Chaudhry, had declined to accept leave to appeal against a judgment of

⁴⁷³ *Muhammad Abdullah Khan vs. The State*, 2001 SCMR 1775.

⁴⁷⁴ See *ibid*, at p. 1778.

⁴⁷⁵ *Amanat Ali vs. Nazim Ali*, 2003 SCMR 608.

the Lahore High Court wherein appellate court converted sentence of life imprisonment under section 302 (b) PPC to fourteen years' rigorous imprisonment by virtue of the provisions of sections 306 (a) and 308 PPC. In this case too, the *ratio* of a larger bench of the Supreme Court in *Faqir Ullah* case was ignored. Same approach of *Khalil-uz Zaman* case can be witnessed in the judgment of a three member bench of the Supreme Court in *Muhammad Ilyas* case where no precedent case was even referred to.⁴⁷⁶ In this case accused was charged for murder of his own daughter. Trial court convicted him under section 302(b) PPC and punished him with death as *ta'zir*. Appeal of accused was also dismissed by High Court. Meanwhile, parties compromised the matter outside the court. In this regard an application was moved by accused before the Supreme Court for granting permission to compound offence as the mother of deceased, an ex-wife of applicant, had entered into a compromise with applicant and forgave him without receiving any compensation or *Badl-e Sulh*. The apex court allowed application but ruled:

We have considered the arguments and have also examined the relevant provisions of law. From perusal of the provisions of section 306, P.P.C. it transpires that as the case of the petitioner falls within clause (c) of section 306, P.P.C. he was not liable to Qisas but the punishment provided under section 308, P.P.C. will be attracted.⁴⁷⁷

The approach was also adopted by appellate court of Gilgit in *Syed Ahmad Ali Shah's* case.⁴⁷⁸ In this case a minor accused was convicted in a murder case under section 302 (b) PPC and sentenced to life imprisonment by trial court. Trial court refused to give benefit of minority to accused under section 306 PPC for his conviction was recorded under section 302 (b) PPC as *ta'zir* instead *qisas* under

⁴⁷⁶ *Muhammad Ilyas vs. The State*, 2008 SCMR 396.

⁴⁷⁷ See *ibid*, at p. 397.

⁴⁷⁸ *Syed Ahmad Ali Shah vs. The State*, 2010 YLR 1776 Gilgit.

section 302 (a) PPC. The convict assailed the decision of trial court to the court of appeal of Gilgit. Justice Sahib Khan relying on the decisions of *Khalil-uz-Zaman* and *Amanat Ali* cases sentenced accused under section 308 PPC to undergo simple imprisonment of fourteen years and observed:

However, the trial Judge had failed to appreciate and apply the proper provision of law while convicting and sentencing the appellant. In fact appellant being a minor was liable to be convicted under section 308, P.P.C., instead of section 302(b) of P.P.C., as the learned trial Judge himself has held there the proof was available to convict the accused.⁴⁷⁹

The above analysis of case law transpires that in many cases the *ratio decidendi* settled in *Khalil-uz-Zaman* case by a division bench of the Supreme Court was followed subsequently. Courts while following a precedent of two member bench of the apex court altogether ignored the verdict of a larger bench of same court in *Faqir Ullah's* case wherein the apex court had reviewed and reversed the decision of *Khalil-uz Zaman's* case. In the above discussed cases, judges did not indulge themselves into discerning the correct application of sections 306, 307 and 308 PPC either to *qisas* cases or *ta'zir* cases or to both.

8.3.2 Cases of Qatl-i-Amd where Exceptions under Sections 306 and 307 (c) PPC are Applied only to Death Punishment Awarded as Qisas

A diametrically opposite opinion, to the above discussed case law, is given in few other decisions. In this category of cases it was held that exception from liability or

⁴⁷⁹ See *ibid*, at pp. 1779, 1780.

application of punishment of *qisas* under the provisions of sections 306 and 307 (c) PPC is only for punishment of death if awarded as *qisas* and such favour or immunity cannot be extended to cases of *qatl-i-amd* wherein punishment of death is awarded by way of *ta'zir*. First leading case of this category is the case of *Muddassar alias Jimmi* wherein accused along with other four persons was charged in a double murder case.⁴⁸⁰ On conclusion of trial, accused were sentenced to death on each count. The High Court confirmed murder reference by dismissing appeals and two connected revision petitions. Accused impugned the decision of appeal before the apex court by way of leave to appeal. No infirmity was found by the apex court in the decision of appellate court. However, the court noticed that neither any clause of section 302 PPC was mentioned by trial judge when he convicted and sentenced accused persons nor reasons for not convicting by way of *qisas* were given by him. The Supreme Court, therefore, refused leave to appeal and did not consider ground of minority for taking any leniency in conviction and sentence under section 306 PPC when death was awarded other than *qisas*. Second leading case of this category, as discussed above, is *Faqir Ullah's case*⁴⁸¹ whereby the decision of a two member bench of the case of *Khalil-uz Zaman* was altered and it was observed that the Supreme Appellate Court converted conviction of accused from *ta'zir* under section 302 (b) PPC to *qisas* under section 302 (a) PPC without furnishing any reasons and thereby committed a sheer inadvertence. It was further observed that a division bench of the Supreme Court also inadvertently upheld the conviction and punishment of accused by way of *qisas* and gave benefit of section 306 (c) PPC to accused. The larger bench, therefore, annulled the decision of two member bench of awarding punishment by way of *qisas* and

⁴⁸⁰ *Muddassar alias Jimmi vs. The State*, 1996 SCMR 3.

⁴⁸¹ *Faqir Ullah vs. Khalil-uz-Zaman and others*, 1999 SCMR 2203.

declared it as a *coram non judice*. The larger bench of the apex court, on the pretext of paucity of time and lack of assistance from the side of the Bar, without discussing or referring to any doctrine of *Sha'riah* observed that in cases where *qisas* cannot be awarded as sentence, the State has authority under *Sha'riah* to award either punishment of death or life imprisonment to offender by way of *ta'zir* and jurists are also agreed on such sentence under special circumstances. The larger bench of the Supreme Court, finally, allowing review petition set aside the impugned order of a two members bench and restored the decision of special trial court wherein accused was convicted under section 302 (b) PPC and was punished to death as *ta'zir*. Similarly, in *Muhammad Afzal's case*⁴⁸² four accused persons were charged for offence of murder. Two of them were acquitted but Muhammad Afzal and Bashir Ahmad were held responsible for murder. One of convicted persons namely Muhammad Afzal took defence of minority as he was thirteen years of age at the time of occurrence. On conclusion of trial, minor accused namely Muhammad Afzal was awarded punishment of seven years' simple imprisonment as *ta'zir* extending protection under sections 306 and 308 PPC and of payment of *diyat* to the tune of Rs. 1,75,000/-. The High Court, on appeal, maintained the decision of trial court. However, a three member bench of the Supreme Court of Pakistan allowed leave to appeal to consider a question as to whether a convict can be put in incarceration for an indefinite period till payment of *diyat* under section 331 PPC? The apex court observed that since appellant had shared common intention with co-accused so his conviction falls under section 302 (b) PPC and no question arises of applying sections 306 or 308 PPC. In its decision the court tried to create a distinction between clauses

⁴⁸²*Muhammad Afzal alias Seema vs. The State*, 1999 SCMR 2652

302 (a) and 302 (b) PPC but did not discuss the most ambiguous clause 302 (c) PPC. Moreover, the apex court held that a co-accused was rightly convicted and punished under section 302 (b) PPC but the minor was wrongly charged under section 34 PPC for sharing common intention with co-accused. So the minor was sentenced to imprisonment already undergone, released and order of payment of *diyat* amount under section 308 PPC was also set aside. Similarly, in the case of *Abdus Salam*, as discussed earlier, accused admitted murder of his mother and against him his own family members deposed.⁴⁸³ Trial court convicted accused under section 302 (a) PPC and sentenced him to death also directed that he be hanged by neck till he be dead. Trial judge was not inclined to extend benefits of provisions of sections 306, 307 and 308 PPC and observed that these sections only attract where punishment of *qisas* is enforced. The High Court of Balochistan dismissed appeal of accused and confirmed his punishment. Consequently, accused filed leave to appeal before the Supreme Court. A three member bench of the Supreme Court, besides question of application of sections 306, 307 and 308 PPC in cases of death awarded as *qisas* or *ta'zir*, granted leave to appeal to consider three other important questions. Ironically, the larger bench of five members of the apex court did not touch main query about the application of sections 306, 307 and 308 PPC in *qisas* and *ta'zir* punishments rather the bench preferred to keep it mum.⁴⁸⁴ However, the bench dismissed appeal by converting conviction from section 302 (a) PPC to section 302 (b) PPC while maintaining punishment of death which transpires that larger bench did not consider it just to extend benefits of sections 306, 307 and 308 PPC to cases of *qatl-i-amd*

⁴⁸³ *Abdus Salam vs. The State*, 1997 SCMR 29.

⁴⁸⁴ *Abdus Salam vs. The State*, 2000 SCMR 338. Interestingly, the larger bench was of Justice Said-uz-Zaman Siddiqui, Justice Irshad Hassan Khan, Justice Muhammad Bashir Jehangiri, Justice Nasir Aslam Zahid and Justice Ch. Muhammad Arif but none of the three members of the earlier three member bench was part of it.

where death punishment was awarded by way of *ta'zir* under section 302 (b) PPC. In *Muhammad Saleem's case*⁴⁸⁵ accused, a student of fourth class, was convicted and punished with death under section 302 (b) PPC by trial court. The High Court answered murder reference in affirmation, hence confirmed conviction and dismissed appeal. Leave to appeal was granted by the Supreme Court on the ground that a child cannot be punished with death. Appeal was dismissed by the Supreme Court as well and it was held that since punishment of death was not awarded to appellant in *qisas* hence provisions of section 308 PPC could not apply. In another murder case of *Umar Hayat vs. Jahangir etc.*⁴⁸⁶ the Supreme Court granted leave to appeal for reappraisal of entire evidence and for determining legality of decision of the High Court whereby the respondent accused was acquitted of charge due to benefit of doubt. On completion of trial, accused was convicted under section 302 (b) PPC and punished with death as *ta'zir*. The Supreme Court, without discussing the application of the provisions relating to *qisas*, convicted accused under section 302 (b) PPC and punished him with imprisonment for life by extending benefit of section 306 to him as he was not adult at the time of occurrence. In other words, accused was not adult at the time of occurrence so he was not convicted and punished with *diyat* under section 308 PPC because his conviction was recorded under section 302 (b) PPC as *ta'zir*.

In *Jahanzeb vs. The State*, a criminal case was registered against Jahanzeb on the complaint of his mother in law that her daughter Mst. Siddiqa was killed by Jahanzeb and she saw him running away after firing four to five shorts of pistol at her daughter.⁴⁸⁷ Accused denied charges and claimed trial. In his statement under section 342 Cr.PC and deposition under section 340(2) Cr.PC accused took plea of *alibi* and

⁴⁸⁵ *Muhammad Saleem vs. The State*, 2001 SCMR 536.

⁴⁸⁶ *Umar Hayat vs. Jahangir and another*, 2002 SCMR 629.

⁴⁸⁷ *Jahanzeb and another vs. The State and others*, 2003 SCMR 98.

produced his physician and a servant as witnesses in his defence evidence. On conclusion of trial, he was acquitted by trial court. Complainant preferred an appeal before the High Court Balochistan, Quetta against acquittal. A division bench of the High Court found evidence against accused sufficient for his conviction so the Court convicted him under section 308 PPC and sentenced him to rigorous imprisonment of fourteen years for there was a daughter of spouses, his descendent. Decision of the High Court was assailed from both sides through filing two separate petitioners before the apex court through leaves to appeal. A three member bench of the apex court allowed leaves but was not convinced to give accused / appellant benefit of section 308 PPC as he was not convicted under section 302 (a) PPC by way of *qisas*. Hence, the apex court dismissed appeal of accused but allowed complainant's appeal partly. Referring and relying on the precedent of *Faqir Ullah's* case, Justice Mian Muhammad Ajmal on behalf of the bench altered conviction of accused to section 302 (b) PPC and enhanced his punishment to life imprisonment and compensation.⁴⁸⁸

Similarly, in the case of *Muhammad Akram*⁴⁸⁹ accused murdered his wife on a trivial family matter. The High Court confirmed his conviction and punishment under section 302 (b) PPC awarded by trial court. Appellant before the apex court took two grounds for his acquittal. First that he was provoked and lost self-control so his case fell within the purview of section 302 (c) PPC rather under section 302 (b) PPC. Secondly, since accused was *wali* of deceased, therefore, he was entitled for benefits available under the provisions of section 308 PPC. The apex court repelled both contentions and held that exceptions mentioned under sections 306 and 307 PPC were applicable in *qisas* cases only and not available in cases of *ta'zir*. It was further

⁴⁸⁸ See *ibid* at pp. 103, 104.

⁴⁸⁹ *Muhammad Akram vs. The State*, 2003 SCMR 855.

observed that extending benefit of provisions of section 308 PPC to cases of *qatl-i-amd*, punishable under section 302(b) and 302(c) PPC as *ta'zir*, was not permissible and giving such benefit would amount to grant licence of killing innocent persons by their *walis*. A division bench of the Peshawar High Court followed the principle laid down in *Faqir Ullah's case in Bakhti Rehman vs. The State*.⁴⁹⁰ In this case accused was convicted under section 302 (b) PPC for murder of his wife and was sentenced to death as *ta'zir*. On appeal, the Peshawar High Court held that provisions of section 308 PPC attract only where punishment of death was awarded by way of *qisas* under section 302(a) PPC.

Similarly, in *Ghulam Murtaza's case*⁴⁹¹ a three member bench of the apex court refused to interfere into concurrent decisions of both courts below wherein a minor, aged about fifteen or sixteen years, was convicted under section 302 (b) PPC and was sentenced to death as *ta'zir*. Another case of this category is *Nasir Mehmood and Another vs. The State*⁴⁹² wherein accused was charged for committing murder of two persons. He was convicted under section 302 (b) PPC and sentenced to death as *ta'zir* by trial court. The decision of trial court was assailed by convict to the High Court by filing appeal. The High Court after hearing both sides maintained conviction of accused by answering murder reference, under section 374 Cr.PC, in affirmative and dismissing appeal. On behalf of accused leave to appeal was filed before the Supreme Court on the ground that since culprit, namely Nasir Mehmood, and the deceased were spouses and they had two daughters who were legal heirs of their deceased mother and direct descendants of offender. His lordship Mr. Justice Khalil-ur Rahman Ramday in his judgment remarked:

⁴⁹⁰ *Bakhti Rehman vs. The State*, PLD 2004 Pesh. 126.

⁴⁹¹ *Ghulam Murtaza vs. The State*, 2004 SCMR 4.

⁴⁹² *Nasir Mehmood and another vs. The State*, 2006 SCMR 204.

Nasir Mehmood appellant had not been punished with death by way of Qisas under section 302(a) of the P.P.C. but had been directed to suffer death by way of Tazir under section 302(b)/34, P.P.C. The provisions of section 306, P.P.C. provide on that Qisas shall not be enforced on an offender whose descendants were Wali of the deceased person. As has been noticed above Nasir Mehmood appellant had not been punished by way of Qisas, therefore, the question, to resolve which, the leave had been granted did not require determination in this case.⁴⁹³

Decision of *Faqir Ullah's* case was also followed by a single member bench of the Lahore High Court in the case of *Tariq Mahmood*.⁴⁹⁴ In this case trial court convicted accused under section 308 PPC for murder of his wife and punished him with fourteen years' rigorous imprisonment because three sons of deceased were direct descendants of accused as provided under section 307 PPC. Counsel for accused on his behalf challenged conviction of accused before the High Court and contended that without sufficient incriminating evidence appellant was convicted. On the other hand, counsel for the State argued that offence of murder was fully proved by prosecution evidence. Justice Sardar Muhammad Aslam was of the opinion that view taken by trial court was against the principle laid down in *Muhammad Akram vs. The State*⁴⁹⁵ wherein it was held that sections 306, 307 and 308 PPC would only attract in cases of *qatl-i-amd* liable to *qisas* under section 302(a) PPC but not in cases in which sentence of *qatl-i-amd* was awarded as *ta'zir* under section 302(b) and (c) PPC. The High Court also made reliance on the case of *Faqir Ullah* and remitted the matter to trial court for deciding it afresh in accordance with settled law. Similarly, in the case of *Samiullah and another*⁴⁹⁶ trial court convicted accused under section 308 PPC and sentenced him to nine years' rigorous imprisonment with payment of *diyat*

⁴⁹³ See *ibid*, at pp. 206, 207.

⁴⁹⁴ *Tariq Mahmood vs. The State*, 2006 MLD 1723 Lah.

⁴⁹⁵ 2003 SCMR 855.

⁴⁹⁶ *Samiullah and another vs. Jamil Ahmed and another*, 2008 SCMR 1623.

as he was juvenile. The Balochistan High Court, on appeal, altered conviction to section 302 (c) PPC and sentenced him to fourteen years' rigorous imprisonment with compensation to the tune of Rs. 200,000/- under section 544-A Cr.PC to legal heirs of deceased. Leave to appeal was preferred before the apex court but it maintained conviction and sentence awarded by the High Court and said:

A minute study of the said section would show that it is attracted only in the cases liable to "Qisas" in which by virtue of provisions of sections 306 and 307, P.P.C., the punishment of "Qisas" cannot be imposed or enforced and not in the cases in which punishment is awarded as "Ta'zir".⁴⁹⁷

Again, in the case of *Zaheer Ahmad*⁴⁹⁸ accused was booked in a murder case and on conclusion of trial he was convicted under section 302 (b) PPC and was punished with life imprisonment. The Lahore High Court, on appeal, reduced sentence to seven years' rigorous imprisonment as *ta'zir*, by giving accused benefit of section 308 PPC because his age was less than eighteen years. A three member bench of the apex court set aside the decision of Lahore High Court, Rawalpindi Bench, restored the decision of trial court and observed:

In the light of law laid down by this Court, we are of the view that in the facts of the present case, section 308, P.P.C. is not attracted as respondent has not been able to bring on record any legal evidence to the satisfaction of the law that at the time of occurrence, he was minor and liable to punish provided under section 308, P.P.C., rather the true concept is that section 308, P.P.C. will operate only in the cases which fall within the ambit of sections 306 and 307, P.P.C. in which either offender is not liable to "Qisas" is not enforceable.⁴⁹⁹

⁴⁹⁷ See *ibid*, at p. 1630.

⁴⁹⁸ *Tauqeer Ahmad Khan vs. Zaheer Ahmad and others*, 2009 SCMR 420.

⁴⁹⁹ See *ibid*, at p. 424.

Another important case on the subject matter is *Ahmad Nawaz* case⁵⁰⁰ wherein two persons were killed. On conclusion of trial, both offenders were convicted under section 302 (b) PPC and were sentenced to death. Conviction and punishment was also confirmed by the Lahore High Court in murder reference. The apex court, while dealing with a question of application of provisions of sections 306 and 307 PPC, adopted the view given by the apex court in many earlier cases that punishment u/s 308 PPC can only be awarded when *qisas* is not applicable or cannot be enforced. Similarly, in *Iftikhar-ul Hassan's* case⁵⁰¹ trial judge convicted accused Israr Bashir under section 302 (b) PPC and awarded him punishment of death for killing Sohail Ahsan. The Lahore High Court, on appeal, converted sentence of death to sentence of payment of *diyat* and also awarded him punishment of imprisonment of fourteen years under section 308 PPC on the ground that at the time of commission of offence accused was minor so was not liable to *qisas*. The apex court allowed leave to appeal and relying on many of its earlier cases clarified the ambiguity under new scheme of *qisas* and *diyat* law and said:

The ambiguity regarding the application of section 308, P.P.C. in all cases of Qatl-i-Amd in which the offender cannot be awarded the punishment under section 302(a), P.P.C. is removed in the light of above discussion as careful examination of the different provisions of law referred hereinbefore, would clearly show that in the cases in which the offender is not liable to *qisas* for the reasons given in section 306, P.P.C. or the punishment of *qisas* cannot be enforced under section 307(c) P.P.C. section 308, P.P.C. is attracted but in the cases in which the punishment of death is awarded under section 302(b), P.P.C. as *tazir* this section is not applicable.⁵⁰²

The apex court, maintaining conviction of accused under section 302 (b) PPC as awarded by trial judge, set aside the judgment of High Court and punished accused

⁵⁰⁰ *Ahmad Nawaz vs. The State*, 2011 SCMR 593.

⁵⁰¹ *Iftikhar-ul Hassan vs. Israr Bashir*, PLD 2007 SC 111.

⁵⁰² See *ibid*, at p. 119.

for life imprisonment as *ta'zir* without mentioning that whether lesser punishment was awarded due to minority or some other extenuating circumstance. In another case, accused Muhammad Akram was charged for five murders i.e. of his wife, three daughters and a son.⁵⁰³ In his statement under section 342 Cr.PC, accused did not admit his guilt rather he took plea of *alibi*. On completion of trial, he was convicted under section 302 (a) PPC and was punished to death as *qisas* for the murder of his wife though there was neither any confession nor prosecution witnesses were tested for *Tazkiyah-al-Shahood*. He was further convicted under section 308(2) PPC for murders of his three daughters and a son and punished with fourteen years' rigorous imprisonment. In appeal, accused took stance that since his wife was his *wali* so *qisas* cannot be enforced against him. The appellate court altered conviction from section 302(a) PPC to conviction under section 308 PPC, awarded him punishment of fourteen years' rigorous imprisonment and *diyat* like sentence of other accused and held that all sentences would run concurrently. In *Zafar Hussain vs. Ayyaz Ahmed*, a minor Ayyaz Ahmed was convicted by trial court under section 308 PPC and sentenced to *diyat* and rigorous imprisonment of fourteen years as *ta'zir*.⁵⁰⁴ On the controversy of application of section 308 PPC both categories of cases were referred to by opponent parties before the division bench of the Lahore High Court. Nonetheless, Justice Syed Iftikhar Hussain Shah in his judgment took guidance from the case of *Iftikhar-ul Hassan vs. Israr Bashir and another* wherein it was held that

⁵⁰³ *Muhammad Akram vs. The State*, 1995 PCr.LJ 110 SAC.

⁵⁰⁴ *Zafar Hussain vs. Ayyaz Ahmed alias Kaka and 2 others*, 2012 YLR 2865 Lah. Counsel for complainant / appellant relied upon many cases including *Iftikhar-ul Hassan vs. Israr Bashir and another* PLD 2007 SC 111; *Muhammad Akram vs. The State*, 2003 SCMR 855; *Samiullah vs. Jamil Ahmad and another*, 2008 SCMR 1623 and *Ghulam Murtaza vs. The State*, 2004 SCMR 4 wherein the apex court clearly held that provisions of sections 306, 307 PPC would only attract in the cases of *qatl-i-amd* liable to *qisas* under section 302 (a) PPC. On the other hand, counsel for accused / respondent No. 1 referred the case of *Sarfraz alias Sappi and 2 others vs. The State*, 2000 SCMR 1758 and contended that matter could not be reopened at this stage.

minor offender of *qatl-i-amd* in case of punishment of *ta'zir* under section 302(b) PPC could avail benefit of minority but could not claim benefit of section 308 PPC. The High Court, however, did not try to discern both types of precedent cases in detail. A division bench of the Lahore High Court of Justice Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan in the case of *Muhammad Tahir*⁵⁰⁵ followed the precedent of larger bench of the apex court in *Faqir Ullah's* case. In this case trial court convicted accused for the murder of his wife under section 302 (b) PPC and punished him with death. On appeal counsel for accused, relying on *Khalil-uz-Zaman's* case contended that being a legal heir of deceased accused deserves to be sentenced under section 308 PPC. The High Court, however, observed that judgment of *Khalil-uz-Zaman's* case had been reviewed by the Supreme Court in the case of *Faqir Ullah*. The High Court turned down the contention of accused, confirmed death punishment and dismissed appeal.

8.4 CONFLICTING JUDGMENTS IN CASES OF *QATL-I-AMD* ON THE POINT OF CONVICTION AND PUNISHMENT UNDER SECTION 308 PPC

A related, though not a core, issue is as to whether for extending relaxation of provisions of section 308 PPC trial court will have to convict accused under section 308 PPC or only punishment can be awarded under this section while convicting accused under section 302 (b) PPC? The query came along first time in *Abdur Rauf*

⁵⁰⁵*Muhammad Tahir vs. The State*, 2014 YLR 15 Lah.

vs. *The State and 2 others*.⁵⁰⁶ In this case husband of deceased lady lodged an FIR against mother and sister of deceased for committing murder of his wife. On conclusion of trial, mother and sister as *walis*, i.e. legal heirs, of deceased relinquished their right of *qisas* in their own favour. Through an application filed before trial court, both accused ladies sought protection of section 308 PPC which was accordingly allowed by altering charge from section 302 PPC under section 308 PPC. They were, accordingly, punished under section 308 PPC. Order of trial court was unsuccessfully assailed by the husband before the High Court. However, the apex court granted leave to appeal to husband for considering as to whether charge against accused ladies could be altered from section 302 PPC to section 308 PPC? The apex court while answering the question observed that substituting charge under section 308 PPC was not warranted by law and that provisions of section 308 PPC automatically attracted in a case where accused was found guilty of *qatl-i-amd* not liable to *qisas* under section 306 PPC or where *qisas* is not enforceable under section 307 PPC. His lordship Justice Mamoon Kazi, speaking for a division bench of the apex court, without mentioning proper clause of section 302 PPC regarding the application of sections 306 and 307 (c) PPC observed:

There appears to be no controversy in regard to the fact that section 308, P.P.C., can only be invoked where a person is found to be guilty of Qatl-e-Amd, but he is not liable to Qisas under section 306 or the Qisas is not enforceable under clause (c) of section 307. Therefore, even if section 308, P.P.C., is applicable, it cannot be applied until first the offender is found guilty of Qatl-e-Amd under section 302, P.P.C. Consequently, it is imperative that the accused is first charged for Qatl-e-Amd under section 302, P.P.C. and only when such charge has been established, that the provisions of section 308, P.P.C. can be applied to the case.⁵⁰⁷

⁵⁰⁶ 1998 SCMR 1771.

⁵⁰⁷ See *ibid*, at p. 1774.

Similarly, in the case of *Pehlwan*⁵⁰⁸, accused was found guilty of two murders and he was convicted under section 302(a) PPC and sentenced to death on each count. The decision of trial court was assailed through filing an appeal. Since one of the deceased, namely Gul Hira, was the wife of accused so before the court of appeal it was argued that since accused was legal heir of Gul Hira so he could not be convicted under section 302 (a) PPC rather he could be punished under section 308 PPC. A division bench of the Balochistan High Court accepted appeal, converting conviction to section 308 PPC and punished him with fourteen years' rigorous imprisonment as *ta'zir* under section 308 PPC and *diyat*.⁵⁰⁹ Same issue of conviction and punishment under section 308 PPC can be witnessed in a decision of Gilgit court in *Syed Ahmad Ali Shah's* case.⁵¹⁰ In this case a minor accused was convicted in a murder case under section 302(b) PPC and was sentenced to life imprisonment by trial court. On appeal, the court set aside the decision of trial court and observed:

We are of the considered opinion that appellant Syed Ahmad Ali Shah committed Qatl-e-amd of Mst. Shabnum Bibi to that extent findings of trial Judge up-held. However, as discussed above appellant is convicted and sentenced under section 308, P.P.C. to undergo simple imprisonment for 14 years with the benefits of 382(b), Cr.P.C.⁵¹¹

Courts while convicting and sentencing accused, in cases of *qatl-i-amd*, who claim lenient view of punishment under section 308 PPC faced another confusion of conviction and sentence under section 308 PPC. Despite a clear precedent settled in *Abdur Rauf vs. The State*, later decisions contain same error.

⁵⁰⁸ *Pehlwan and another vs. The State and another*, PLD 2001 Quetta 88.

⁵⁰⁹ See *ibid*, at p. 103.

⁵¹⁰ *Syed Ahmad Ali Shah vs. The State*, 2010 YLR 1776 Gilgit.

⁵¹¹ See *ibid*, at p. 1780.

8.5 ‘ZAHID REHMAN VS. THE STATE’ SETTLES LAW ON THE SCOPE OF SECTIONS 306, 307 (c) AND 308 PPC

A larger bench of Supreme Court was constituted in *Zahid Rehman vs. The State*⁵¹² in order to erase confusion regarding the scope and application of sections 306, 307 (c) and 308 PPC so that inconsistency and contradiction in decisions could be avoided for good. The apex court also tried to address various other issues of the *qisas* and *diyat* law of Pakistan. The judgment of the larger bench is important for some of its features. Firstly, on the subject matter, unprecedentedly, four members of the bench, except Justice Ijaz Ahmed Chaudhry, jotted their own independent viewpoints. Secondly, on each distinct ambiguity there were divergent opinions of judges. Thirdly, unlike precedent cases on the subject matter, the bench split bitterly. Fourthly, the larger bench was purposely constituted for rendering an authoritative judgment so that confusion regarding application sections 306, 307 (c) and 308 PPC in cases of murder where death sentence is awarded either by way of *qisas* or as *ta'zir*, could be eliminated. It is true that controversies involved in precedent cases on the subject matter were of such importance that they should have been nipped in the bud years before but, unfortunately, it could not be happened. A chronic ambiguity of law is highlighted by Justice Asif Saeed Khan Khosa in the following words:

On a number of occasions this Court had tried to remove the “confusion”, “ambiguity” and “misconception” engulfing the legal issue under discussion but unfortunately uncertainty and misunderstanding in this regard still subsists and this is why we have now been called upon to pronounce upon the matter.⁵¹³

⁵¹² PLD 2015 SC 77.

⁵¹³ *Zahid Rehman vs. The State*, PLD 2015 SC 77 at p. 111. Finding of the apex court in *Faqir Ullah* case was endorsed by 3:2 majority in this case. Majority view reiterated by Justice Khosa under main

Core controversy and ambiguity in this case was application of concessions under sections 306 and 307 (c) PPC in murder cases when capital sentence is awarded either by way of *qisas* or *ta'zir*. Unfortunately, the larger bench had split on the issue. A detailed judgment was authored by Justice Asif Saeed Khan Khosa. Two other members of the bench concurred with the opinion adopted by Justice Khosa who after discussing all important cases of the above two categories, endorsed the previous finding of a numerically equal bench of the apex court in *Faqir Ullah's* case. Justice Khosa reiterated same finding as:

I, thus, feel no hesitation in concluding that the provisions of and the punishments provided in section 308, P.P.C. are relevant only to cases of *Qisas* and that they have no relevance to cases of *Ta'zir* and also that any latitude or concession in the matter of punishments contemplated by the provisions of sections 306, 307 and 308, P.P.C. and extended to certain categories of offenders in *Qisas* cases mentioned in such provisions ought not to be mistaken as turning those cases into cases of *Ta'zir* with the same latitude or concession in the punishments.⁵¹⁴

In his judgment Justice Asif Saeed Khan Khosa neither justified his decision with reasons nor discussed the impression of discrimination and double standard towards those accused who despite conviction and sentence to death under section 302(b) PPC as *ta'zir* for committing offence of *qatl-i-amd* are deprived of the immunities given under sections 306, 307 and 308 PPC.

On the other hand, Justice Ejaz Afzal Khan was not willing to agree with the finding of majority members of the bench. His lordship was inclined to extend

judgment was adopted by Justice Dost Muhammad Khan and Justice Qazi Faez Isa but by supplying their own separate notes.

⁵¹⁴ See *ibid*, at p. 112.

advantage of provisions of sections 306 and 307 (c) PPC to those accused who were sentenced by way of *ta'zir*. Justice Ejaz Afzal Khan was of the view that:

Section 308 deals with punishments falling within the purview of sections 306 and 307(c), P.P.C. In case we subscribe to the view that provisions contained in sections 306 and 308, P.P.C. apply to the cases of *qisas* only, it is apt to give rise to an anomaly. The anomaly is that if sentence in *qatl-i-amd* liable to *qisas*, despite stern and stringent forms of proof, can be lenient in view of the circumstances mentioned in sections 306 and 308, P.P.C. why can't it be lenient in view of the same circumstances in the case of *tazir* notwithstanding the forms of proof and sentence provided thereunder are comparatively less stern and stringent. At no stage, I say so with utmost respect, an effort was made to resolve this anomaly in the light of the relevant provisions of the statute.⁵¹⁵

The anomaly pinpointed by Justice Ejaz Afzal Khan is in fact a real imparity in the law of *qisas* and *diyat* of Pakistan. He has also rightly said that judges, in the case of *Faqir Ullah* and other cases of this category, had failed to address the same anomaly.⁵¹⁶ He, therefore, observed that sections 306, 307 and 308 were equally applicable to those cases of punishment outside the pail of *qisas*.⁵¹⁷ Regarding severity of punishments, in his dissenting note, Justice Ejaz Afzal Khan expressed his firmed belief that punishment of *ta'zir* could not be more stern and stringent than punishment of *qisas*.⁵¹⁸

The observation of Justice Ejaz Afzal Khan again opened a door of controversy. Though his considered view was instantly responded by Justice Qazi Faez Isa in his separate note at page 133 of the judgment by holding that statement by Justice Ejaz Afzal Khan was made without any reference and source. Instead, in support of his view Justice Qazi Faez Isa raised another argument:

⁵¹⁵ See *ibid*, at pp. 119, 120.

⁵¹⁶ See *ibid*, at p. 120.

⁵¹⁷ See *ibid*, at p. 124.

⁵¹⁸ See *ibid*, at p. 119.

I may however question whether a person who comes forth and makes a *voluntary and true confession* of murder (*qatl-i-amd*), thereby coming within the statutory definition of *qisas*, should be deserving of a greater punishment than the one whose crime is painstakingly established through other forms of evidence?⁵¹⁹

Another catchy observation in the case was made by Justice Dost Muhammad Khan who, while dissenting with the opinion of Justice Ejaz Afzal Khan and concurring with the original judgment of Justice Asif Saeed Khan Khosa, tried to elaborate two different constitutional powers, i.e. legislative power to enact law and judicial power to interpret law, and expressed a legal and valid excuse for not annulling the *ratio* of *Faqir Ullah* case. His lordship, explained:

There is another strong reason in support of the above view that once a five members larger Bench in the case of *Faqir Ullah* (*supra*) has held a similar view then, this Bench of equal strength has no authority to override or annul the same rather in view of the consistent practice and the principle of law laid down, the proper course was to have suggested to Hon' ble Chief Justice for constituting a larger Bench of more than five Judges.⁵²⁰

Larger bench of the apex court in *Zahid Rehman* case was assembled with a purpose and eager to find out a more plausible solution to the problems lie under the *qisas* and *diyat* law of Pakistan and to give an authoritative judgment so that all contradictions, conflicts, ambiguities and misconceptions in previous decisions of the apex court, on the law relating to *qatl-i-amd*, could be removed for good. Not only the bench miserably failed to give straightforward answer to all related questions but, ironically, it strengthened the belief that legislative flaws could not be removed through interpretation of law. Even so, the judgment is important as well for many reasons. First, the judgment approved the decision of an earlier larger bench of the

⁵¹⁹ See *ibid*, at p. 133.

⁵²⁰ See *ibid*, at p. 131.

Supreme Court given in *Faqir Ullah* case to be correct law. Secondly, it endorsed many other precedents which were in the line of *Faqir Ullah* case. Thirdly, it declared many decisions of the apex court given in the line of *Khalil-uz-Zaman* case to be law *per incuriam* and lastly it assured that everything was not okay about the law.

8.6 CONCLUSION

Case law analysis can be summed up here with the outcome of *Zahid Rehman's* case. An unrestricted power under section 338-F PPC of seeking guidance from injunctions of Islam for applying and interpreting provisions of Chapter XVI of the Pakistan Penal Code, 1860 was equally available to all criminal courts. Nonetheless, exercise of such power by trial courts could not be discussed because decision of trial courts in murder cases are not reported. A vast and unbridled power of courts provided judges a level playing field to play their cards right. So the power was exercised by judges unreasonably and varyingly. They either assumed role of jurists or Islamic scholars when they tried to seek guidance from the *Qur'an* and the *Sunnah* of Prophet (PBUH). From case law analysis under this chapter, it is evident that interpretation and application of the *qisas* and *diyat* law of Pakistan by judges made it more complicated and uncertain. Even murder committed due to *ghairat* and provocation was made justified. Frequent acquittal of murderers by judges due to family honour proved to be a mischief which the legislature had to curtail by introducing a proviso after clause (c) of section 302 PPC.

Interpretation of provisions of sections 306, 307 (c) and 308 PPC resulted into contradictory and conflicting precedents of High Courts and Supreme Court of Pakistan. In many subsequent decisions of the apex court, a precedent settled by a larger bench of Supreme Court in *Faqir Ullah's* case, wherein it was held that provisions of sections 306, 307 and 308 PPC were not applicable to cases of murder where punishment of death was awarded as *ta'zir*, was not followed. When it became quite impossible to discern a valid precedent on the subject matter, another larger bench of Supreme Court was constituted in *Zahid Rehman vs. The State*. Under main judgment of this case many previous judgments of the apex court were discussed but decision of the bench was sans any agreement. In the end members of the bench gave a split judgment and they remained at variance with each other in their reasoning and justifications. Finally, by majority decision the finding on the issue of an earlier larger bench in the case *Faqir Ullah vs. Khalil-ur-Zaman etc.*, 1999 SCMR 2203 was endorsed. Though neither any drastic change in the earlier position of law could be brought by the apex court through its judgment in *Zahid Rehman's* case nor could anomaly and discrimination in the law could be addressed but still the case is important for the real lacuna of law was enlightened in minority view. The judgment of larger bench has, in fact, drawn a clear line for future. One possibility in future may when the legislature, by taking guidance from the judgment, will remove the anomaly through amendment into the law. A second course can also be taken by the apex court whereby the minority view of the bench in *Zahid Rehman's* case may become a majority view in any subsequent case of a seven member bench of the Supreme Court of Pakistan.

CHAPTER 9

WAIVER OF RIGHT OF *QISAS (AFW)*, COMPOUNDING OF RIGHT OF *QISAS (SULH)* AND COMPOUNDING OF *QATL-I-AMD*

9.1 INTRODUCTION

This chapter relates to a situation in cases of *qatl-i-amd* when accused at any state of case seeks his acquittal of charge on the basis of *afw*, i.e. waiver of right of *qisas* or *sulh*, i.e. compounding of right of *qisas*, or by compounding offence of *qatl-i-amd* by all or any of legal heirs of deceased. The chapter discusses three ways of settlement of offence of *qatl-i-amd* between parties. The chapter further deals with various questions regarding *afw*, *sulh* and compounding offence of *qatl-i-amd*. For instance, who can waive or compound right of *qisas* by entering into compromise? Second, when in cases of *qatl-i-amd* right of *qisas* can or cannot be waived or compounded? Third, whether in every case of *qatl-i-amd* compromise between parties is acceptable under law? Fourth, under what scenarios courts can reject compromise or settlement? Fifth, whether waiver and compounding right of *qisas* relate to only offence of *qatl-i-amd* punishable with *qisas* but not to offence of *qatl-i-amd* punishable by way of *ta'zir*? Sixth, does right to enter into compromise survive? Seventh, are acquittal after trial and acquittal due to compromise different in their affect? Lastly, can courts treat a non-compoundable offence as compoundable where a coordinate compoundable offence in the same case has been compounded?

9.2 PROVISIONS OF LAW RELATING TO (AFW) WAIVER, (SULH) COMPOUNDING OF RIGHT OF QISAS AND COMPOUNDING OFFENCE OF QATL-I-AMD

The Pakistan Penal Code, 1860 and the Code of Criminal Procedure, 1898 deal with the composition of *qatl-i-amd*, i.e. premeditated murder. Sections 309 and 310 PPC deal with *awf* and *sulh* in cases of *qatl-i-amd* where accused is convicted under section 302 (a) PPC by way of *qisas*. On the other hand, section 345 Cr.PC and section 338-E PPC deal with compounding of offence of *qatl-i-amd* where accused is punished with death as *ta'zir*. Moreover, Column No. 6 of Schedule-II of the Code of Criminal Procedure, 1898 indicates about compoundable and non-compoundable offences of the Pakistan Penal Code, 1860.

9.2.1 Waiver of Right of Qisas under Section 309 of the Pakistan Penal Code, 1860

Law of homicide, before the Criminal Law (Second Amendment) Ordinance, 1990, did not contain Islamic concepts of waiver and compounding. The Ordinance, 1990 introduced Islamic concepts of *awf*, i.e. waiver of right of *qisas*, and *sulh*, i.e. compounding right of *qisas*, under Chapter XVI of the Pakistan Penal Code, 1860. Literal meanings of word '*awf*' is 'to forgive' and of '*sulh*' is 'to compromise'. Sections 309 and 310 PPC provide concepts of *awf* and *sulh*, respectively. According to the provisions of section 309 PPC in *awf* an adult, male *wali* of deceased has choice to waive his right of *qisas* at any time but without demanding or receiving any

compensation. Right of *qisas* could not be waived when either government becomes *wali*, or where heir of deceased is minor or insane. Under section 309 (2) PPC it is further provided that even one of the *walis* of deceased can waive right of *qisas* to his extent but other *walis* are entitled to claim share in *diyat*. According to the provisions of section 309 (3) PPC when there are more than one victims then waiver of right of *qisas* by a *wali* of one victim will not affect the right of *qisas* of the *wali* of other victim. It is further clarified under clause (4) of section 309 PPC that when a *wali* waives right of *qisas* against one of the offenders it cannot be considered a waiver against other offenders. Under section 309 PPC, however, nowhere it is mentioned that punishment of *ta'zir* in cases of *qatl-i-amd* can also be waived by the heirs of deceased.

9.2.2 Compounding Right of Qisas under Section 310 of the Pakistan Penal Code, 1860

Section 310 PPC deals with *afw*, i.e. compounding right of *qisas*, in the offence of *qatl-i-amd* punishable by way of *qisas*. In the offence of *qatl-i-amd* an adult and sane *wali* of the deceased has option to compound his right of *qisas* at any time but on receiving *badl-i-sulh*, i.e. a compensation, from the accused. Government as a *wali* is also empowered to compound right of *qisas*. However, it is required that value of *badl-i-sulh* must not be lower than the value of *diyat* which is fixed under section 323 (1) PPC, i.e. 30630 grams of silver or its equivalent price. It is further clarified under section 310 PPC that *badl-i-sulh* is a mutually agreed compensation which can be paid or given by offender to a *wali* in shape of cash, or property whether moveable or

immoveable and it can be paid or given on demand or some deferred date as agreed by the parties.

9.2.3 Power to Compound Right of Qisas in the Case of Qatl-i-Amd under Section 345 of the Code of Criminal Procedure, 1898

Under section 345 of the Criminal Procedure Code, 1898 as amended by the Criminal Law (Amendment) Act, 1997 offence of *qatl-i-amd* punishable under section 302 (b) & (c) PPC may be compounded by the heirs of victim. Through another amendment introduced through the Criminal Law (Amendment) Act, 2005 it is further provided that if offence of *qatl-i-amd* is committed in the name of or on the pretext of *karo kari*, *siyah kari* or similar other customs or practices, then accused as a legal heir cannot be eligible to compound his right of *qisas*. But in such cases, under a new inserted clause, i.e. section 245 (2A) Cr.PC, courts can allow waiving of or compounding right of *qisas* subject to imposing conditions with consent of parties. However, section 345 Cr.PC under a tabular form does not specify the clause of section 302 PPC for compounding offence of *qatl-i-amd*.

9.2.4 Waiver or Compounding of Offences under Section 338-E of the Pakistan Penal Code, 1860

Provisions of section 338-E (1) PPC have overriding affect over all other provisions of chapter XVI of the Pakistan Penal Code, 1860 and over those of section 345 of the Criminal Procedure Code, 1898. Subsection (1) of section 338-E PPC says that all

offences under chapter XVI of the PPC can be waived or compounded and provisions of sections 309 PPC and 310 PPC apply to waiver and composition of the offence *mutatis mutandis*⁵²¹. Further courts are given discretionary power, in case of waiver or compounding of offence, either acquit offender or award him punishment of *ta'zir*. Moreover, under section 338-E (2) PPC, trial court is given power to determine all controversies and issues relating to waiver or compounding of offences before or after passing sentence and same power can be exercised by appellate court during pendency of appeal.

9.3 CASE LAW ANALYSIS RELATING TO WAIVER OF AND COMPOUNDING OF RIGHT OF *QISAS* IN CASES OF *QATL-I-AMD*

A question as to whether provisions of sections 309 and 310 PPC relate only to cases wherein punishment of *qatl-i-amd* is awarded by way of *qisas* under section 302 (a) PPC but not to cases wherein punishment is awarded as *ta'zir* under sections 302 (b) or 302 (c) PPC, had been a subject of debate since promulgation of *qisas* and *diyat* law of Pakistan. The question was answered first time in a leading case of *Safdar Ali* wherein a petition for leave to appeal was filed before the apex court by three accused persons against their conviction under section 302/34 PPC and sentence to imprisonment for life, fine and compensation.⁵²² During pendency of their petition for

⁵²¹ Term *mutatis mutandis* is defined under Black's Law Dictionary, 4th Edition, published by St. Paul, Minn. West Publishing Co. 1968, at page 1172 as "with the necessary changes in points of detail, meaning that matters or things are generally the same, but to be altered when necessary, as to names, offices, and the like."

⁵²² *Safdar Ali and others vs. The State and another*, PLD 1991 SC 202.

leave to appeal, the Criminal Law (Second Amendment) Ordinance, 1990 was promulgated on 05-09-1990 whereby offence of *qatl* was made compoundable. Therefore, an application was moved by petitioners for acquittal on the ground that a compromise has been entered into between parties whereby legal heirs of the deceased have received amount of *badl-i-sulh* as well. Regarding the applicability of section 310 PPC in a case where accused were sentenced to life imprisonment, Justice Nasim Hasan Shah, on behalf of a five member bench, observed:

Accordingly, the right of Qisas means the right of causing death of the convict if he has committed *qatl-i-amd*. In this case, as the petitioners have not been sentenced to death, but to life imprisonment, the question of the heirs of the victim compounding their right of qisas does not arise. The present case, therefore, falls under the provisions of subsection (2) of section 345, as amended by the Criminal Law (Amendment) Ordinance, 1991.⁵²³

In cases of *qatl-i-amd*, subsequent to *Safdar Ali's* case, where parties patched up the matter there were two trends; in some of such cases precedent settled by a larger bench of the Supreme Court in *Safdar Ali's* case was not followed but in other cases the precedent was followed.

9.3.1 Analysis of Early Cases wherein either the Precedent of Safdar Ali's Case is not Followed or not Referred to

The *ratio* of *Safdar Ali's* case is not discussed in the case of *Muhammad Azam*⁵²⁴ wherein during pendency of criminal appeals before the apex court an application was moved on behalf of legal heirs of the deceased regarding effecting a compromise with

⁵²³ See *ibid*, at p. 206.

⁵²⁴ *Muhammad Azam vs. The State*, 1992 SCMR 694.

one of the accused persons namely Muhammad Azam. A larger bench of five judges of the Supreme Court, after taking notice of the provisions of sections 338-E, 338-H, 309 and 310 PPC and those of section 345 Cr.PC, observed that composition of offence with permission of court was possible. However, for determining the genuineness of compromise the apex court directed the concerned district Magistrate to conduct an enquiry through an executive Magistrate and forward a report thereof to the Registrar of the Supreme Court. Similarly, in *Abdul Ghafoor and three others vs. The State* four accused were convicted and one of them namely Abdul Ghafoor was sentenced to death as *ta'zir*.⁵²⁵ On appeal, the High Court reduced his sentence of death to life imprisonment. When criminal petition for leave to appeal was pending before the apex court an application for seeking permission for compromise was moved that legal heirs of deceased, except his real sister, had waived their right of *qisas* under section 309 PPC but a division bench of the apex court dismissed it on some technical grounds. The apex court, however, nowhere in its judgment mentioned that compromise of few legal heirs of the deceased in a case of *qatl-i-amd* where accused was sentenced as *ta'zir* is not acceptable. Another case of this category is *Muhammad Ishaq's* case wherein during pendency of appeal before the apex court against the decision of the High Court, whereby conviction and sentence of accused under section 302 PPC was confirmed, an application of compromise was moved for acquittal of accused as legal heirs of the deceased had compromised and forgiven accused.⁵²⁶ Legal heirs of the deceased had admitted receipt of Rs. 2,25,000/- as *badal-i-sulh* before the apex court. A division bench of the apex court without assessing the genuineness of compromise and its scope in cases of *ta'zir* accepted

⁵²⁵ *Abdul Ghafoor and 3 others vs. The State*, 1992 SCMR 1218.

⁵²⁶ *Muhammad Ishaq alias Kali vs. The State*, 1993 SCMR 1989.

application and acquitted accused of charge. Similarly, in *Muhammad Rafique and another vs. The State*⁵²⁷ a division bench of the apex court, without discussing the law in detail, set aside conviction and sentence of accused and acquitted him of charge as parents of deceased had compromised offence against an amount of Rs. 100,000/- received by them by way of compensation. Similarly, in *Ijaz Ahmad alias Ijaz Hussain vs. The State*⁵²⁸ a three member bench of the apex court acquitted a convict of *qatl-i-amd* as his parents had compounded the offence. In the case of *Ibrahim and 2 others* accused committed murder of two persons and injured a third person as well. However, a three member bench of the apex court accepted compromise as major legal heirs of both deceased persons had waived right to claim compensation. The apex court also did not consider it just to award sentence of imprisonment under section 311 PPC in order to keep intact cordial relationship amongst parties as they were related to each other.⁵²⁹

9.3.2 Analysis of Cases wherein the Precedent Settled in Safdar Ali's Case is Followed

Law settled in the case of *Safdar Ali* is followed or explained in some subsequent cases. For instance, in *Javaid Masih vs. The State*⁵³⁰ for his confession and other evidence accused Javaid Masih was convicted under section 302 PPC for committing murder of his sister and her paramour and was punished with imprisonment for life and fine. Appeal of accused was also dismissed by the High Court. During pendency

⁵²⁷ *Muhammad Rafique and another vs. The State*, 1993 SCMR 1990.

⁵²⁸ *Ijaz Ahmad alias Ijaz Hussain vs. The State*, 1994 SCMR 1247.

⁵²⁹ *Ibrahim and 2 others vs. The State*, 1995 SCMR 1296.

⁵³⁰ *Javaid Masih vs. The State*, 1993 SCMR 1574.

of a criminal petition for leave to appeal, before the apex court, an application of compromise under sections 345 (2) Cr.PC and 309 PPC was moved that legal heirs of deceased lady had forgiven accused in the name of Almighty *Allah* and that they did not claim any compensation from accused. Justice Saleem Akhtar, writing on behalf of a three member bench of the apex court, relying on the *ratio* of *Safdar Ali* case, neither allowed leave to appeal nor accepted application of compromise for the reason that legal heirs of other deceased had not joined compromise. *Manzoor Hussain's* case is another illustration of this category of cases wherein though *Safdar Ali* case was not cited but ruling thereof was followed by the apex court.⁵³¹ In this case offence of *qatl-i-amd* was committed on a trivial household dispute between parties related to each other. On conclusion of trial, accused persons were convicted under sections 302 (c), 148/149 and 337(d) PPC and they were sentenced to twenty-five years' imprisonment. Appeal against conviction and sentence was dismissed by the Lahore High Court. Leave to appeal was moved by convict persons before the apex court contending that both lower courts had failed to appreciate the fact that Mst. Sakina, a widow of deceased, had recorded statement before trial court that she had forgiven her accused brothers by waiving her right of *qisas*. They further argued that due to waiving right of *qisas* courts below could proceed under section 311 PPC wherein maximum punishment is ten years' imprisonment as *ta'zir*. The Supreme Court repelling the contention of appellants maintained conviction and sentence under section 302 (c) PPC against two accused persons namely Zahoor Hussain and Abdul Ghafoor. Regarding no advantage of waiving right of *qisas* in cases of *qatl-i-amd* where conviction was recorded by way of *ta'zir*, Justice Wali Muhammad Khan,

⁵³¹ *Manzoor Hussain and 4 others vs. The State*, 1994 SCMR 1327.

representing a three member bench of the apex court, at page 1330 of the judgment said:

According to her statement recorded by the Court, she has waived her right of Qisas but the same cannot help the appellants in any way as all the appellants were tried, convicted and sentenced under Ta'zir and not Qisas, therefore, the favour bestowed upon them by the widow of the deceased in any way. The trial Court has fairly dealt with this aspect of the case and we have no reasons to differ with it.

Contradictory and inconsistent decisions of higher and superior judiciary on compromise in capital sentence as *qisas* or *ta'zir*, can be seen till the year 1995 and only in few cases law settled by a larger bench of the apex court in *Safdar Ali case* is followed.

9.3.3 Subsequent Approval of Precedent Settled in Safdar Ali Case by the Supreme Court

The issue, discussed above, once again was considered in a considerable length by the apex court in *Sh. Muhammad Aslam and another vs. Shaukat Ali alias Shaoka*.⁵³² In this case accused Shaukat Ali was convicted and sentenced to death under section 302 PPC while other three co-accused were acquitted by trial court. The Lahore High Court, on appeal, altered punishment of accused to imprisonment for life. During pendency of petitions for leave to appeal before the apex court parties patched up the matter and in this regard an application was moved by accused before the apex court that legal heirs of deceased had compromised with him. The apex court referred the matter to the concerned Sessions Judge for determining genuineness of compromise.

⁵³² *Sh. Muhammad Aslam and others vs. Shaukat Ali alias Shaoka and others*, PLD 1995 SC 683.

A three member bench of the apex court, distinguishing the *ratio* of *Safdar Ali* case, suggested a larger bench so that an authentic judgment could be given regarding the question involved. Consequently, a larger bench was constituted which again decided the question.⁵³³ A report submitted by Sessions Judge revealed that widow of deceased had compromised herself and on behalf of her minor children as well but mother of deceased had refused to compromise. As per shares of legal heirs *diyat* amount was deposited with the Assistant Registrar of the Lahore High Court. Before the apex court, counsel for appellant contended that a principle enshrined under section 309(2) PPC regarding the payment of *diyat* would be applicable, on the basis of analogy, to cases of *qatl-i-amd* where punishment was awarded as *ta'zir*. On this argument Justice Ajmal Mian, on behalf of four member bench, raised as a question:

Whether the principle of section 309, P.P.C. could be applied to a case where punishment was awarded by way of *Ta'zir*, or whether the case under section 302, P.P.C. could be compounded if all the heirs did not agree to the compromise keeping in view the provision of section 345 of the Code of Criminal Procedure, 1898 (Act V of 1898), hereinafter referred to as the Cr.P.C.⁵³⁴

In their arguments, learned Advocates General of Punjab and Sindh supported the argument raised by the counsel for accused that provisions of section 309 (2) PPC were also applicable to punishment of *ta'zir* under section 302 (b) PPC as well. Dr. Khalid Ranjha, the then Advocate General of Punjab, also contended that provisions of section 309 (2) PPC are beneficial in nature so their interpretation should be liberal to extend its benefit to cases where penalty is awarded by way of *ta'zir* under section 302 (b) PPC. On the other hand, Sardar Asif Saeed Khan Khosa, who appeared as

⁵³³ *Sh. Muhammad Aslam and another vs. Shaukat Ali alias Shauka and others*, 1997 SCMR 1307.

⁵³⁴ See *ibid*, at p. 1312.

amicus curiae, opposed the view extended by the Advocates General and had taken altogether a different view. According to Mr. Khosa, approach of superior courts on the issue of application of sections 309, 310 and 311 PPC in cases of *qatl-i-amd* had been different. On the force of *ratio* in *Safdar Ali* and *Javaid Masih* cases, Mr. Khosa contended that well settled principle of criminal law is that provision of section 309 (2) PPC could not be pressed into service where courts awarded sentence for murder as *ta'zir*. The apex court accepted view point of Mr. Khosa as correct and, unanimously, rejected the application of compromise by holding that since accused was sentenced under section 302 (b) PPC by way of *ta'zir* so provisions of section 309 (2) PPC would not apply in his case rather his case fell under the provisions of section 345 (2) Cr.PC as amended by the Criminal Law (Second Amendment) Ordinance, 1990.

9.4 LAW SETTLED IN *SH. MUHAMMAD ASLAM* CASE AND WAIVER OR COMPOUNDING OF RIGHT OF *QISAS* IN SUBSEQUENT CASES

The *ratio* of a larger bench of four judges of the apex court in *Sh. Muhammad Aslam*'s case was followed in subsequent cases. For instance, in *Niaz Ahmad vs. The State*, trial court convicted accused under section 302 (b) PPC for offence of murder of a pregnant lady and sentenced him to death.⁵³⁵ The Lahore High Court confirmed murder reference. The counsel for appellant took many grounds for seeking acquittal of accused including compromise, relying on *Sh. Muhammad Aslam* case, that

⁵³⁵ *Niaz Ahmad vs. The State*, PLD 2003 SC 635.

husband of deceased, one of her legal heirs, had compromised *qatl*. The apex court overruled the contention by holding that compromise of one of legal heirs could be accepted only where accused was sentenced as *qisas*. Similarly, in the case of *Riaz Ahmad*, accused challenged before the apex court a decision of the Lahore High Court, whereby his death sentence was confirmed.⁵³⁶ During pendency of appeal, an application was moved for seeking permission of compromise. Report submitted by Sessions Judge revealed that it was only partial compromise and widow of deceased had claimed prosecution. Without referring to any precedent case, the apex court declined to accept such compromise because sentence of death was awarded as *ta'zir*. The court reiterated that appellate court could only allow such a compromise when all legal heirs of deceased had entered into compromise with the convict. The principle of *Sh. Muhammad Aslam* case was again followed in the case of *Muhammad Saleem*⁵³⁷ wherein accused was sentenced to death for two murders. The High Court also confirmed death punishment. The Supreme Court accepted leave to appeal and acquitted accused of charge in one murder case. Later on, one of legal heirs of deceased compounded offence and waived her right of *qisas*. An application for allowing compounding offence was filed before trial court which was allowed and execution of death penalty was held impossible. The order of trial court was assailed by the widow of deceased before the High Court by filing a revision petition. On the other hand, accused also filed a revision petition for altering his conviction from death to life imprisonment due to waiving right of *qisas* by one of legal heirs. Revision petition filed by the widow of deceased was allowed by the High Court. However, decision of the High Court was further assailed to the apex court on the

⁵³⁶ *Riaz Ahmad vs. The State*, 2003 SCMR 1067.

⁵³⁷ *Muhammad Saleem vs. The State*, PLD 2003 SC 512.

ground that accused was convicted and sentenced by trial court under section 302 PPC without specifying any subsection so it should be presumed that conviction and sentence was awarded as *qisas* and in this situation provisions of sections 309 and 310 PPC would be applicable and *qisas* was not applicable even where one of legal heirs had waived right of *qisas*. The Supreme Court reiterated the settled law as follows:

It is settled law that if the offender has been punished under Ta'zir the provisions of sections 309 and 310, P.P.C. would not apply in such a case. A case of similar nature came under consideration before a Full Bench of this Court in Sh. Muhammad Aslam and another v. Shaukat Ali alias Shauka and others (1997 SCMR 1307) and on thorough scrutiny of the law and the Islamic provisions thereof it was held that where the accused has been awarded sentence for murder as Ta'zir and not as Qisas, one of the legal heirs cannot waive his right of Qisas, compromise the offence or accept Badl-i-Sulh.⁵³⁸

Another leading case on the topic is *Muhammad Arshad alias Pappu vs. Additional Sessions Judge*, wherein accused was convicted under section 302 (b) PPC and sentenced to death as *ta'zir*.⁵³⁹ The Lahore High Court as well as the apex court dismissed appeals of accused. Black warrants for executing death sentence were also issued but three weeks execution of sentence an application for seeking permission of compromise was filed by mother and widow of deceased. On the other hand, father of deceased had moved an application before the Sessions Court wherein he explained that two minors of deceased had been living with him and widow of deceased could not enter into compromise on behalf of minors. Applications of compromise were dismissed by Additional Sessions Judge. The order of dismissal of applications was challenged before the High Court but widow resiled from compromise and receiving

⁵³⁸ See *ibid*, at p. 517.

⁵³⁹ *Muhammad Arshad alias Pappu vs. Additional Sessions Judge, Lahore and 3 others*, PLD 2003 SC 547.

amount of *diyat*. The Lahore High Court also dismissed revision petition. A criminal petition was moved before the apex court against the order of High Court. The Supreme Court answered an important question as to how offence of murder committed before the promulgation of the Criminal Law (Second Amendment) Ordinance, 1990 would be treated under new law? In his judgment, Justice Javed Iqbal in this regard observed:

The Criminal Law Amendment Ordinance (VII of 1990) was promulgated and enforced on 12-10-1990 did prior to its promulgation admittedly the offence under section 302, P.P.C, was not compoundable, which was subsequently made compoundable by virtue of an amendment made in section 345, Cr.P.C. The question as to whether any benefit can be extended to the offender qua the offence committed under section 302, P.P.C. prior to 12-10-1990 and implication concerning partial compromise was examined by this Court in Aslam's case.⁵⁴⁰

Similarly, in *Bashir Ahmed's* case⁵⁴¹ a bench of three judges of the apex court followed the principle as enunciated in *Sh. Muhammad Aslam* case. Again in the case of *Khan Muhammad*⁵⁴² during hearing a criminal petition for leave to appeal of accused the Supreme Court went through all relevant cases wherein it was held that offence of *qatl-i-amd* liable to *ta'zir* was compoundable only if all legal heirs had waived or compounded offence. Regarding punishment of *qisas* the bench reiterated that the offence has been made compoundable even if not compounded by all legal heirs. Highlighting the rationale of waiving right of *qisas*, compounding right of *qisas* and compounding offence of *qatl-i-amd* under Islamic law, Justice Iftikhar Muhammad Chaudhry relying on *Sh. M. Aslam's* case, remarked:

⁵⁴⁰ See *ibid*, at pp. 552, 553.

⁵⁴¹ *Bashir Ahmed vs. The State and another*, 2004 SCMR 236.

⁵⁴² *Khan Muhammad vs. The State*, 2005 SCMR 599.

It goes without saying that Islamic system of life is more liberal than any other religion, the object of which is to promote harmony and brotherhood amongst the inhabitants of welfare State, therefore, due to this reason despite of the fact that to prove the offence of the Qatl-e-Amd, liable to death by Qisas, the evidence of the witnesses, fulfilling the test of Tazkiya-tush-Shahood is required, but to achieve the object of the Quran and Sunnah, the sentence of death, liable to Qisas, has been made compoundable even if the offence has not been compounded by all the legal heirs or otherwise, subject to the provisions of sections 309, 310, 311, P.P.C. but as far as the offence of Qatl-e-Amd, liable to death by Tazir, is concerned, it has been made compoundable by enacting section 345(2), Cr.P.C. which says that if all the legal heirs have compounded the offence, the Court is empowered to accord permission to ensure that the parties may bury their hatchets once for all, because the idea behind it is that if any of the legal heirs of the deceased has not agreed to compromise the offence, he would not be entitled for Diyat under section 310, P.P.C. nor on acceptance of such compromise, the Court would be empowered to punish such offender under Tazir whereas in the case of Qisas, notwithstanding the fact that all the legal heirs of the deceased or some of them have compounded the offence but the Court is empowered to award such punishment to such an offender under section 311, P.P.C.⁵⁴³

Again, as late as the year 2007, in the case of *Abdul Jabbar*, a lady was killed by her relatives when she along with her spouse went to attend a criminal case against her husband for she got married to him by her own choice and without consent of her parents.⁵⁴⁴ During trial her parents, i.e. legal heirs of deceased women, submitted an affidavit in court that they had forgiven the murderers. Trial court did not award death punishment due to *Afw* (waiver) on the part of legal heirs in terms of section 309 PPC but sentenced them under section 302 (c) / 34 PPC as *ta'zir* to twenty five years' rigorous imprisonment besides payment of half of *diyat* amount to the husband. The High Court, on appeal, maintained conviction but altered punishment to the period already undergone. Decision of High Court was assailed by deceased's husband before the apex court on the ground that since deceased lady was with her husband so

⁵⁴³ See *ibid*, at p. 604.

⁵⁴⁴ *Abdul Jabbar vs. The State*, 2007 SCMR 1496.

ground of sudden provocation or family honour could not be taken nor could punishment be reduced. A three member bench of the Supreme Court after discussing all facts and analysing provisions of sub-sections 302 (a) & 302 (b) PPC, observed:

Under section 309, P.P.C. an adult sane Wali can waive his right of Qisas even without compensation. But this section is applicable only if proof in terms of section 304, P.P.C. (for Qisas) is available against the accused which proof admittedly is non-existent in the instant case. On account of this deficiency in the quality of the evidence led, but the case otherwise having been proved, the respondents were liable to be punished under section 302(b), P.P.C. as Ta'zir. A conviction / sentence under Ta'zir can be compounded only if all the heirs forgive the offender and the relevant provisions for compounding such offences are section 338(E) read with section 345, Cr.P.C. and not section 309, P.P.C., which is evident from a comparative perusal of these sections.⁵⁴⁵

From above case law analysis the law settled by the apex court is clear that right of *qisas* can be waived by any of legal heirs of deceased under section 309 PPC without any compensation but for compounding right of *qisas* under section 310 PPC it is necessary for accused to pay compensation i.e. *badal-i-sulh* to legal heirs of deceased to such a tune which would be acceptable for them but not less than the amount of *diyat* as provided under section 323 PPC. On the other hand, when accused is convicted and sentenced under section 302 (b) PPC for the offence of *qatl-i-amd* by way of *ta'zir* then permission to compound offence could be sought from concerned court under section 345 Cr.PC when all legal heirs of deceased agree on compromise. It is also not incumbent upon courts to accept every compromise but courts are bound to determine genuineness of compromise before its acceptance. In case of heinous and brutal nature of *qatl-i-amd* courts are empowered to reject compromise entered into by the parties.

⁵⁴⁵ See *ibid*, at p. 1504.

9.5 EFFECT OF ACQUITTAL BY WAIVING *QISAS (AFW)*, COMPOUNDING *QISAS (SULH)* OR COMPOUNDING *QATL-I-AMD*

There are divergent arguments on the point of effect of acquittal of murderers. The prevalent view is that no types of acquittal are there under the criminal law of Pakistan. But according to another view, in effects, acquittal of accused on merits of the case under section 265-H Cr.PC, on completion of trial, is different from acquittal on the basis of compromise after conviction and awarding of sentence.

9.5.1 *Effect of Acquittal without Conviction after Conclusion of Trial and Effect of Acquittal on the Basis of Compromise*

A leading case relating to the effect of acquittal is the case of *Dr. Muhammad Islam* who was posted as veterinary officer health in BPS-17 at the time of occurrence of a murder for which he was charged along with another co-accused.⁵⁴⁶ During pendency of trial, complainant gave statement of compromise to the extent of Dr. Muhammad Islam. Resultantly, he was acquitted of charge. On the other hand, due to charge of murder against him, he was suspended from service. After acquittal he was reinstated in service and intermediating period was treated as his extraordinary leave without pay. To the extent of his extraordinary leave, he filed departmental representation by challenging the order but to no avail. The NWFP Service Tribunal was also not

⁵⁴⁶ *Dr. Muhammad Islam vs. Government of NWFP through Secretary Food, Agriculture, Livestock and Cooperative Department Peshawar and 2 others*, 1998 SCMR 1993.

satisfied with the argument that he was honourably acquitted of charge on the basis of compromise so dismissed his appeal. Leave to appeal was granted by a three member bench of the apex court, held that accused committed no offence and that he was entitled to the grant of arrears and allowances. Justice Raja Afrasiab Khan, regarding effect of acquittal on the basis of compromise, remarked:

It may be noted that there are cases in which the judgments are recorded on the basis of compromise between the parties and the accused are acquitted in consequence thereof. What shall be the nature of such acquittals? All acquittals are certainly honourable. There can be no acquittals, which may be said to be dishonourable. The law has not drawn any distinction between these types of acquittals.⁵⁴⁷

The question again arose before the apex court in the case of *Mumtaz Khan* who was a servant of Agricultural Development Bank and was implicated in a murder case.⁵⁴⁸ On completion of trial accused Mumtaz Khan was convicted under section 302(b) PPC and was sentenced to life imprisonment and fine. The Peshawar High Court dismissed his appeal as well. Later on, an application before trial court was moved for acquittal of accused on the basis of compromise arrived at between convict and legal heirs of deceased. The application was accepted and he was acquitted of charge. The Bank, however, removed him from service as he was convicted and punished by a criminal court. His departmental appeal was dismissed by the competent authority and the order was assailed before the Service Tribunal. The Federal Service Tribunal, however, allowed his appeal by 2:1 majority and convict was ordered to be reinstated in service with all back benefits. The bank through its chairman assailed the order of the Federal Service Tribunal to the apex court by filing

⁵⁴⁷ See *ibid*, at p. 1998.

⁵⁴⁸ *Chairman Agricultural Development Bank of Pakistan and another vs. Mumtaz Khan*, PLD 2010 SC 695.

a civil appeal. Before the apex court few novel questions were raised. First, whether a person acquitted, after conviction and punishment, due to compromise on payment of *diyat* amount, could be declared as a person acquitted honourably? Secondly, as to whether such a person, who was released from prison on payment of *diyat*, was entitled to be reinstated into service? Thirdly, whether payment of *diyat* absolves a person from accusation of murder and would he be called acquitted person or convicted person?

From the side of appellant it was argued that *diyat* is a form of punishment thus acquittal earned by accused through payment of *diyat* had not washed away the blemish of his punishment and due to such blemish he could not be reinstated in service. Secondly, it was argued that entering into compromise by accused was amounting to admission of murder. Thirdly, to reinstate a self-condemned murderer in service is against public policy. On the other hand, counsel for respondent, i.e. the acquitted accused, argued that decision of the Federal Service Tribunal did not suffer from any illegality. After hearing arguments from both sides the apex court did not agree with contentions made by the counsel for appellant. Justice Asif Saeed Khan Khosa clarified that provisions of section 338-E PPC were clear regarding the acquittal of accused on the basis of compounding an offence under section 310 PPC and effect of such compounding of offence has also been clarified under section 345(6) Cr.PC as the composition of offence shall have the effect of acquittal. The bench placed reliance on the decision of apex court in *Dr. Muhammad Islam's* case and held that law had not drawn any distinction between types of acquittal. Eventually, the impugned decision of the Federal Service Tribunal was upheld by the apex court and Justice Khosa observed:

An ultimate acquittal in a criminal case exonerates the accused person completely for all future purpose vis-a-vis the criminal charge against him as is evident from the concept of *autre fois acquit* embodied in section 403, Cr.P.C. and the protection guaranteed by Article 13 (a) of the Constitution of Islamic Republic of Pakistan, 1973 and, according to our humble understanding of the Islamic jurisprudence, Afw (waiver) of Sulh (compounding) in respect of an offence has the effect of purging the offender of the crime.⁵⁴⁹

Similarly, in *Director General, Intelligence Bureau, Islamabad vs. Muhammad Javed and others*, appellant filed appeal against a decision of the Federal Service Tribunal, Karachi whereby respondent was reinstated into service after compromise between parties.⁵⁵⁰ Before the apex court counsel for appellant argued that since due to compromise between parties appellant acquired his acquittal but regarding his service it shall be equated as his conviction. The bench of Justice Anwar Zaheer Jamali and Justice Amir Hani Muslim dismissed appeal with an observation that such acquittal of respondent could not be taken as his disqualification coming in the way of his reinstatement in service.

9.5.2 Whether Compromise Ends the Sentence but not the Conviction under Section 345(6) Cr.PC?

Another difference of opinions can be noticed in the decisions of apex court on the expression 'having effect of an acquittal'. In the case of *Mureed Sultan and others*⁵⁵¹, a three member bench of the apex court could not develop consensus on the point as to whether or not a person once convicted under section 302 PPC for the offence of *qatl-i-amd* if released subsequently on the basis of compromise be considered as

⁵⁴⁹ See *ibid*, at p. 703.

⁵⁵⁰ *Director General Intelligence Bureau, Islamabad vs. Muhammad Javed etc.*, 2012 SCMR 165.

⁵⁵¹ *Mureed Sultan and others vs. The State through P.G. Punjab and another*, 2018 SCMR 756.

acquitted of charge? In this case accused were awarded death punishment as *ta'zir*. On appeal, Lahore High Court maintained conviction but altered punishment to life imprisonment. However, during pendency of petition before the apex court parties entered into a compromise and genuineness of compromise was confirmed by the concerned Sessions Judge. Though on releasing accused persons after compromise the bench did not differ but on the effect of such release and acquittal the bench split. In majority judgment of Justice Ejaz Afzal Khan agreeing with Justice Ijaz ul Ahsan, conviction and sentence against applicants were set aside and they were acquitted of the charge in terms of section 345(6) Cr.PC, 1898 and their forthwith release was ordered. On the other hand, Justice Qazi Faez Isa took a different stance on the point and in his minority view he did not equate release of accused persons with acquittal because the legislature under section 345(6) Cr.PC had used an expression that such a release will have 'the effect of an acquittal'. He further explained;

In my opinion "the effect of an acquittal" is different from an acquittal. The guilt of an accused, that is ascertaining whether the accused has committed the offence for which he is charged, is determined by the Trial Court. Once the guilt of the accused has been determined the judgment is delivered by the Court. The judgment has two components, conviction, which means he is guilty, and the sentence, which is the punishment awarded to him. If the legal heirs of the deceased compound the offence it does not mean that the person who was convicted for murder was not guilty of it, which would be the case if, as a consequence of allowing the composition, he is "acquitted". Subsection (6) of section 345 also avoids creating such a fiction as it provides that the "composition of an offence [...] shall have the effect of an acquittal", which means that the punishment (sentence) part of the judgment is brought to an end; neither this subsection states, nor it could, that the convict is "acquitted of the charge". The verdict of guilt (the conviction part of the judgment) that the Trial Court had recorded could only have been undone by the High Court, failing which by this Court; it cannot be undone by the legal heirs of the murdered persons.⁵⁵²

⁵⁵² See *ibid*, at p. 760.

How acquittal of accused is different from release of accused on the basis of compromise 'having effect of an acquittal' is further explained by Justice Qazi Faez Isa as follows:

A man who has committed murder but is "acquitted" merely because the legal heirs of the murdered person compound the offence, would enable the murderer, for instance, to honestly declare on a job application that he is not and has never been a convict; he could thus be eligible to apply for government employment, be employed as a teacher, be inducted into the Armed Forces, enter the judicial service or even be appointed as a judge of the superior courts. There is then the religious aspect to the discussion. The person who has committed the sin of murder if he professes his guilt or is convicted in this world, and serves out his sentence or is released as a consequence of the legal heirs forgiving him, may be spared the agony of punishment in the Hereafter.⁵⁵³

Recently, same question as to whether or not compounding an offence under section 345 Cr.PC amounts to acquittal of accused was discussed, in a *suo moto* case, by a bench of three judges of the apex court of Pakistan.⁵⁵⁴ Trial court for committing murder punished accused with death as *ta'zir*. High Court dismissed convict's appeal and confirmed murder reference. During pendency of petition for leave to appeal before the apex court another application was moved for seeking acquittal of accused on the basis of compromise with legal heirs of deceased. A bench of three judges of the apex court unanimously accepted application and allowed compromise after seeking report from the concerned Sessions Judge. But their lordships gave divergent opinions on the point that how main appeal was to be disposed of upon acceptance of compromise? Majority view of Justice Sardar Tariq Masood on which Justice Amir Hani Muslim agreed was that since under section 345(6) Cr.PC compromise of an

⁵⁵³ See *ibid*, at p. 761.

⁵⁵⁴ *Suo motu* case No. 3 of 2017, Re; the issue as to whether compounding of offence under section 345 Cr.PC amounts to acquittal of the accused person or not, PLD 2018 SC 703.

offence had the effect of acquittal so appeal was allowed. On the other hand, Justice Qazi Faez Isa was of the view that composition of offence under section 345 Cr.PC did not envisage an acquittal but shall have an effect of acquittal. He therefore, in his separate judgment at page no. 708, requested the Chief Justice of Pakistan to take notice of the matter of public importance under article 184(3) of the Constitution.

The then Chief Justice of Pakistan, on putting up the matter before him, ordered the matter to be fixed before the bench of Justice Asif Saeed Khan Khosa. A bench of three judges of the apex court after discussing all relevant provisions held that 'effect of acquittal' recorded by a court on the basis of compounding offence includes all benefits and fruits of a lawful acquittal. Justice Khosa, speaking for the bench, declared the legal position as follows:

As provided by the provisions of section 338-E(1), P.P.C. and the first proviso to the same and as already declared by this Court in the case of Chairman Agricultural Development Bank of Pakistan and another v. Mumtaz Khan (PLD 2010 SC 695) as a result of a successful and complete compounding of a compoundable offence in a case of Ta'zir under section 345, Cr.P.C., with permission or leave of the relevant court where required, an accused person or convict is to be acquitted by the relevant court which acquittal shall erase, efface, obliterate and wash away his alleged or already adjudged guilt in the matter apart from leading to setting aside of his sentence or punishment, if any.⁵⁵⁵

The upshot of the above case law analysis is that now law has been settled regarding the effect of acquittal of accused of *qatl-i-amd*. So acquittal of accused, either earned on the basis of compromise at any stage of the case or declared by court on conclusion of trial, has no difference in its effect.

⁵⁵⁵ See *ibid*, at p. 728.

9.5.3 *Compromise in Pre-Trial Proceedings and its Effect on Trial of the Case*

Parties to an offence of *qatl-i-amd* may sometimes enter into a compromise and compound offence at bail stage but later on resile from such compromise in trial. The question as to whether compounding of offence at bail stage, shall be given effect subsequently, when during trial complainant denies from compromise, was answered by courts differently. Inconsistency in decisions of superior courts can be pointed out by discussing these cases concisely. First category is of those cases wherein composition of offence at bail stage was considered final compounding of offence and accused persons were acquitted of charge on the basis of statement of complainant recorded at bail stage.⁵⁵⁶ On the other hand, in few cases like *Muhammad Akram vs. Abdul Waheed and 3 others* it was observed that compromise at bail stage between parties had no value at trial stage of the case.⁵⁵⁷ The issue arose again, recently, when a criminal appeal was moved before the apex court in *Tariq Mehmood vs. Naseer Ahmed etc.*⁵⁵⁸ wherein a three member bench of the apex court removed all earlier ambiguities. In this case a pre-arrest bail petition of accused Tariq Mehmood was confirmed on the basis of compromise between parties. Legal heirs of deceased also stated before the court that they had no objection in acquittal of accused. When investigation report was put in court, accused moved an application under section 345(6) Cr.PC and prayed for acquittal on the basis of statements of legal heirs of deceased and the commission. On the other hand legal heirs resiled

⁵⁵⁶ See cases of *Syed Iftikhar Hussain Shah vs. Syed Sabir Hussain Shah and others*, 1998 SCMR 466; *Manzoor Ahmed and another vs. The State and two others*, PLD 2003 Lahore 739 and *Mst. Maqsooda Bibi vs. Amar Javed and others*, 2002 PCr.LJ 713.

⁵⁵⁷ *Muhammad Akram vs. Abdul Waheed and 3 others*, 2005 SCMR 1342.

⁵⁵⁸ *Tariq Mehmood vs. Naseer Ahmed and others*, PLD 2016 SC 347.

from compromise. The Sessions Judge dismissed application of accused. A criminal revisions petition against the order of Sessions Judge was also dismissed by the Peshawar High Court, Abbottabad Bench. Decision of High Court was assailed before the apex court through filing a criminal petition. Counsel for appellant Mr. Mushtaq Ahmad Tahirkheli submitted that legal heirs of deceased could not be permitted to resile from compromise at later stage when they once had compounded offence and subsequently had not challenged the genuineness of compromise. The apex court was not convinced by the contention of appellant and dismissed appeal. The bench approved the legal position declared by the apex court in *Muhammad Akram* case. In this regard Justice Khosa, while giving reference of the decision of apex court in *Zahid Rehman* case, observed:

The provisions of sections 309 and 310, P.P.C. are relevant only to cases of Qisas and not to cases of Ta'zir and a case is to be a case of Qisas only where the provisions of section 304, P.P.C. stand attracted, i.e. where the accused person confesses his guilt before the trial court or where Tazkiya-tul shahood of the witnesses is conducted by the trial court before trial of the accused person as required by Article 17 of the Qanun-e-Shahadat Order, 1984. Be that as it may the fact remains that both such steps required to make a case one of Qisas are relevant to a trial court and, thus, even waiver or compounding provided for in sections 309 and 310 are relevant to a trial court and not to any stage before the case reaches the trial court.⁵⁵⁹

The settled law, therefore, after the decision of *Tariq Mehmood* case is that statement of compromise recorded in pre-trial proceedings for bail purposes cannot be considered final compromise between parties. However, compromise affected between parties during trial of case or on conclusion of trial will be relied upon for acquittal.

⁵⁵⁹ See *ibid*, at pp. 357, 358.

9.5.4 Effect of Compounding a Coordinate Compoundable Offence on a Non-Compoundable Offence in the Same Case

There was confusion in many cases⁵⁶⁰ as to whether by compounding a compoundable offence in a case the other non-compoundable offence in the same case itself becomes compoundable? In a recent case of *Moinuddin* a larger bench of the apex court of seven judges has resolved the confusion by holding that an offence declared by law to be non-compoundable remains non-compoundable even if compounding takes place between parties in a coordinate compoundable offence. Moreover, it was observed that no court can acquit accused of non-compoundable offence solely on the basis of compounding of a compoundable offence.⁵⁶¹

9.6 CONSIDERATION (BADAL-I-SULH) OF COMPOSITION OF QATL-I-AMD

In cases of *qatl-i-amd* where punishment is awarded by way of *ta'zir* under section 302 (b) PPC or section 302 (c) PPC, parties have option to enter into compromise by compounding offence of *qatl-i-amd* under section 345 Cr.PC against consideration - called *badal-i-sulh*. Many questions came forth regarding *badal-i-sulh* in cases where offence of *qatl-i-amd* was compounded by legal heirs of the deceased. For instance,

⁵⁶⁰ For instance, *Ghulam Rasool vs. The State*, 1986 MLD 1111; *Noor Muhammad vs. The State*, 1992 SCMR 2079; *Yousaf Ali vs. The State*, 2002 SCMR 1885; *Nawab-ul-Hassan vs. The State*, 2003 SCMR 658; *Muhammad Rawab vs. The State*, 2004 SCMR 1170; *Ghulam Farid alias Farida vs. The State*, PLD 2006 SC 53; *M. Ashraf Bhatti vs. M. Asam Butt*, PLD 2006 SC 182; *Muhammad Akhtar alias Hussain vs. The State*, PLD 2007 SC 447; *Muhammad Nawaz vs. The State*, PLD 2014 SC 383; *Shahid Zafar and 3 others vs. The State*, PLD 2014 SC 809 and *Kareem Nawaz Khan vs. The State*, 2019 SCMR 1741.

⁵⁶¹ *Moinuddin and others vs. The State and others*, PLD 2019 SC 749.

what can be given and accepted as *badal-i-sulh*? What minimum and maximum limit or value of *badal-i-sulh* is acceptable under law? Finally, can courts intervene where judges found that *badal-i-sulh*, agreed between parties, was not adequate and reasonable?

In many cases, superior court had accepted compromise in cases of *qatl-i-amd* and acquitted convicts of charge if they found compromise genuine and free from any coercion or compulsion.⁵⁶² However, in some cases objection was also raised on some ancillary matters relating to compromise; for example, in the case of *Muhammad Anwar* accused was convicted under section 302 (b) PPC and was sentenced to death.⁵⁶³ On appeal, the Lahore High Court maintained conviction but altered his sentence to life imprisonment. During pendency of petition for leave to appeal before the apex court accused filed an application for permission to compound offence of murder. Following a direction of apex court through his report the concerned Sessions Judge confirmed genuineness of compromise between parties. The report also disclosed that widow of deceased had received a piece of land and saving certificates as *diyat* of minors. A three member bench of the apex court was satisfied regarding the genuineness of compromise affected between parties with free consent and without any external pressure but the bench showed dissatisfaction regarding amount of *diyat* which was calculated when offence was committed rather at the time when compromise was arrived. Regarding the rate of amount of *diyat* payable it was held that rate of *diyat* at the time of compromise would be applicable and not the rate prevailing at the time of commission of offence of murder. Regarding

⁵⁶² See cases of *Khalid Zaman and others vs. The State*, 1996 SCMR 523; *Liaqat Ali vs. The State*, 1996 SCMR 525; *Muhammad Irshad alias Shada vs. The State*, 1997 SCMR 951 and *Maulana Nawab-ul-Hassan and seven others vs. The State*, 2003 SCMR 658.

⁵⁶³ *Muhammad Anwar vs. The State*, PLD 2012 SC 769.

nature of compromise affected between parties Justice Ijaz Ahmad Chaudhry observed:

The compromise in between the legal heirs of the deceased and the convict is a type of a contract that if the legal heirs of the deceased make a statement before the Court of law pardoning the convict they will get Badl-e-Sulah in the shape of Diyat amount and if they forgive the convict in the name of Almighty Allah they will get reward thereof from the Allah Almighty. In case there are some minor legal heirs of the deceased, their natural guardian i.e. mother or father, as the case may, do forgive the convict but their interest is to be safeguarded by paying them their due share as Diyat amount according to the rate of Diyat prevailing at the time of arriving at of the compromise between the parties as contract could not have retrospective effect.⁵⁶⁴

Hence, besides other facts like genuineness of compromise between parties, court should also enquire about the aptness and appropriateness of *badal-i-sulh* in cases of *qatl-i- amd*.

9.7 RELATIONSHIP WITH DECEASED AND ELIGIBILITY OF COMPOUNDING OFFENCE OF *QATL-I-AMD*

Who from the side of deceased can enter into compromise with accused party is also a debatable issue. In few decisions all relatives were not considered *sine quo none* for compounding offence but in some cases, at the stage of compounding offence of *qatl-i- amd* for ascertaining genuineness of compromise, even statements of those relatives of deceased were recorded who were not legal heirs. For instance, in the case of *Sartaj and others*⁵⁶⁵ accused was acquitted of charge by trial court on the basis of compromise entered into by the father of deceased as his legal heir. On the other

⁵⁶⁴ See *ibid*, at p. 772.

⁵⁶⁵ *Sartaj and others vs. Mushtaq Ahmad and others*, 2006 SCMR 1916.

hand, siblings of the deceased and his step mother filed a revision petition before the Peshawar High Court. The High Court allowed petition with an observation that step mother could not become a legal heir of deceased. Consequently, case was remanded to trial court for verification that all legal heirs had entered into compromise. Against the order of the High Court, leave to appeal was sought from the apex court whereby it was contended that siblings of deceased could not become legal heirs in the presence of father of deceased. Justice Syed Jamshed Ali remarked as follows:

In this case, undisputedly, the step-mother is not an heir of the deceased and we have no doubt in our mind that the brothers and sisters of the deceased are also not the legal heirs of the deceased. We may also observe that there is no difference of opinion in the Sunni and Shia schools of thought as far as exclusion of brothers and sisters of the deceased by the father is concerned. The impugned judgment of the learned High Court was, therefore, based on mistaken assumption as to the correct legal position. It is, therefore, not sustainable.⁵⁶⁶

On the other hand, in *Ayaz Baig vs. The State*⁵⁶⁷, accused of a murder case entered into compromise with the widow of deceased who got another marriage. Brothers of deceased were not willing to compound offence of *qatl-i-amd* so application of accused was dismissed by trial court and by the High Court as well on the ground that compromise with the widow of deceased who contracted another marriage was not genuine. A criminal petition for leave to appeal was moved by accused before the apex court challenging the decision of courts below. A question before the apex court was as to whether brothers of deceased can participate in compromise process between parties when deceased died issueless and subsequently his parents passed away and his widow got married to someone else? Justice Sardar Muhammad Raza Khan dismissed application for seeking permission to enter into

⁵⁶⁶ See *ibid*, at p. 1919.

⁵⁶⁷ *Ayaz Baig vs. The State*, PLD 2007 SC 607.

compromise with a lady who lost all relationship and affinity with deceased husband.

Speaking for a division bench of the apex court he observed:

No doubt, at the time of death, the deceased being issueless and the father being alive, his seven brothers and a sister could not be the legal heirs but now, at a belated stage, they cannot be ignored when the question comes to the genuineness of compromise and when they all are most likely to nurse grudge against the convict. They have not agreed to the instant compromise, which agreement is necessary for the future harmony between the families.⁵⁶⁸

Similarly, in *Munir Ahmad's* case accused were convicted and punished under section 302 (b) PPC.⁵⁶⁹ During pendency of petition for leave to appeal before the apex court, mother of deceased had compounded offence. Besides statements of mother, statements of two brothers and three sisters of deceased were also recorded by the Session Judge regarding genuineness of compromise. Consequently, the apex court observed as “we have also examined the statements made by the said heirs of the deceased and affirm the opinion of the learned Sessions Judge on the said issue”.

Though compromise by all relatives of deceased is not a requirement of statutory law but courts, as per settled law, can consider statements of relatives of deceased other than his legal heirs, for determining genuineness of compromise.

9.8 SURVIVAL OF RIGHT OF COMPOUNDING OF OFFENCE OF *QATL-I-AMD*

Another question relating to composition of offence of *qatl-i-amd* is as to whether right to enter into compromise is heritable and it survives on the death of any of legal

⁵⁶⁸ See *ibid*, at p. 608.

⁵⁶⁹ *Munir Ahmad and another vs. The State*, 2008 SCMR 682.

heirs of deceased? Different courts answered the question differently. In *Ahmad Nawaz alias Gogi vs. The State*⁵⁷⁰ accused Ahmad Nawaz along with two others was charged for committing murder. On completion of trial, Ahmad Nawaz was convicted under section 302 (b) PPC and was punished with death. Other two co-accused were convicted under section 324 PPC and were punished with ten years' rigorous imprisonment. Appeal against the decision was preferred by Ahmad Nawaz accused but during pendency of appeal before High Court an application of compromise was moved by accused which was confirmed by the concerned Sessions Judge. Report of Sessions Judge revealed that unmarried deceased was survived by his parents at the time of his death but subsequently his father passed away. Father of deceased had four wives and many legal heirs including three real brothers, three real sisters and three step sisters. A question before a division bench of Justice Khawaja Muhammad Sharif and Justice Asif Saeed Khan Khosa was as to whether right of father of deceased compounding *qisas* of *qatl-i-amd* as *wali* also survived on his death? In reply to this question Justice Khawaja Muhammad Sharif, at page number 127 of the judgment, observed:

According to the spirit and rationale of the provisions of section 305(a), P.P.C. a wali of the victim is the person who is entitled to inherit the property of the victim and the interpretation of the said provisions cannot be stretched to include in the definition of wali a person who claims to have inherited the right of compromise possessed by the Wali. Apart from that the spirit of the Qisas and Diyat laws is to quench the thirst of revenge of the immediate heirs of the victim and thus the right to enter into compromise or otherwise cannot be extended to any other remote relative of the deceased who may not inherit the property from the deceased at the time of his murder but may at some subsequent stage become entitled to inherit some property from some heir of the deceased upon the death of such heir.

⁵⁷⁰ *Ahmad Nawaz alias Gogi vs. The State*, PLD 2007 Lah. 121.

With the above observation the high court accepted compromise as it was genuinely entered into between parties and ordered the convict to be acquitted of charge and be released forthwith. On the other hand, in the case of *Abdul Rashid alias Teddi*⁵⁷¹ leave to appeal was granted to examine a question of law as to whether legal heirs of deceased existing at the time of his death or at the time when parties intended to enter into compromise are competent to effect a compromise with accused who was convicted and sentenced to death as *ta'zir*? One of the legal heirs of deceased was not willing to enter into compromise but after his death all his legal heirs had compounded offence of *qatl-i-amd* and joined the camp of other legal heirs who had already compounded offence. For answering this question a larger bench of five members of the apex court was constituted. It was argued on behalf of petitioners that the question had already been answered by the Lahore High Court in the cases of *Muhammad Jabbar* and *Ahmad Nawaz* as well as by the apex court in the case of *Muhammad Arshad alias Pappu*. After referring verses from the holy *Qur'an* Justice Anwar Zaheer Jamali observed:

We are of the opinion that not only the surviving legal heirs of the victim have legal authority to waive right of qisas and compound the offence with the appellant/convict upon payment of compensation of diyat or without payment in lieu of pleasure of God, but such right is equally inheritable by the successors of any legal heir of the victim, who during his life time had either not entered into compromise with the appellant/convict or refused to enter into such compromise, as despite his earlier refusal he was competent to change his mind and to subsequently enter into such compromise with the appellant/convict, while the principle of estoppel was not attracted in such situation to debar his successor from exercising such right independently at their own free will.⁵⁷²

⁵⁷¹ *Abdul Rashid alias Teddi vs. The State and others*, 2013 SCMR 1281.

⁵⁷² See *ibid*, at p. 1295.

Interestingly, the larger bench of the apex court took altogether a different view from that of *Ahmad Nawaz's* case by holding that legal heirs/*walis* of late heir/*wali* of deceased have right to enter into compromise with accused rather the *walis* of deceased. Similarly, in the case of *Imam Bux*⁵⁷³, appellants were convicted under section 302(b) PPC and punished with life imprisonment. During pendency of appeal before the High Court two applications were moved. One application was under section 345(2) Cr.PC for seeking permission to compound offence while another was under section 345(6) Cr.PC for acquittal of applicants on the basis of compromise affected between parties. Question before court was as to whether right of compounding offence is inheritable? A single bench of High Court answered it in affirmative relying on the case of *Abdul Rashid*. The Supreme Court, however, rejected such compromise unless all legal heirs compound the offence.

Subsequently, in the case of *Muhammad Yousaf*, on the basis of distinction between two categories of *qisas* cases and *ta'zir* cases created by the Supreme Court in the decisions of *Sh. Muhammad Aslam* and *Zahid Rehman's* cases, a larger bench of seven judges of the apex court was constituted to review the decision of *Abdul Rashid alias Teddi*.⁵⁷⁴ In this case deceased Muhammad Aslam was survived by his father, widow and a son. Father of deceased denied entering into compromise but widow and son forgave killers and on the basis of compromise stating that they had no objection in acquittal of accused persons. Father died during pendency of case and an application on behalf of accused was moved before the High Court for their acquittal as all surviving legal heirs of deceased father were agreed on compromise. But the report of Sessions Judge Vehari regarding genuineness of compromise

⁵⁷³ *Imam Bux and two others vs. The State*, 2015 PCr.LJ 1287 Sindh.

⁵⁷⁴ *Muhammad Yousaf vs. The State*, PLD 2019 SC 461.

revealed that all four sons of late father, i.e. brothers of Muhammad Aslam deceased, were not willing to enter into compromise but their denial was irrelevant as they are not legal heirs of deceased. Relying on the report of Sessions Judge, the Lahore High Court accepted compromise and acquitted both accused of charge under section 302 (b) PPC. A son of late father of Muhammad Aslam filed leave to appeal before the apex court whereby he challenged the decision of the High Court relying on a precedent of the Lahore High Court in *Ahmad Nawaz* case. The question before the apex court was as to whether legal heirs of a late legal heir of the pre-deceased could become *walis* of victim or heirs of the deceased in *ta'zir* case? The apex court, however, held that the decision of *Abdul Rashid's* case could neither be approved nor could be treated as a good precedent. In majority view of the judgment the apex court observed that the case of *Abdul Rashid* was, in fact, a *ta'zir* case but due to lack of proper assistance it was decided on the basis of principles of *qisas* cases. It was further held by the apex court that since under Islamic law of inheritance legal heirs are competent either to waive right of *qisas* under section 309 PPC or compound right of *qisas* under section 310 PPC so Islamic law does not apply in the present case of *ta'zir* because offence of *qatl-i-amd* wherein punishment of death is awarded by way of *ta'zir* can only be compounded under section 345 (2) Cr.PC by the heirs of the victim. Nonetheless, the provisions of section 345 Cr.PC do not provide that under which law right to compound offence is devolved upon the heirs after the death of person competent to compound *qatl-i-amd* his death. In order to avoid judicial legislation the apex court referred the matter to the concerned ministry of the Government of Pakistan for appropriate legislation for introducing the concept of legal representation as provided under the analogous section 320 (4) (b) of the Indian

Code of Criminal Procedure, 1973 for compounding offence on behalf of a person who was competent to compound but is dead. Majority of judges in this case avoided judicial legislation except Justice Syed Mansoor Ali Shah, while agreeing with the majority's decision on the merits of the case and issuing a direction to the government, he wrote a separate note wherein he observed that both regimes of *qisas* and *ta'zir* would rely on the principles of Islamic law of inheritance uniformly in determining the heirs of the victim or the *walis* of the victim. Regarding restricting right of compounding the offence of *qatl-i-amd* by subsequent heirs of the victim his lordship observed that it would not be in consonance with the Islamic law of inheritance.

9.9 CASES WHEREIN COMPOSITION OF OFFENCE OF *QATL-I-AMD* WAS NOT PERMITTED

It is a discretionary power of courts under section 345 Cr.PC either to accept or reject a compromise in the case of *qatl-i-amd*. Courts sparingly exercise their discretion in favour of culprits in a compromise case where they found it not free from coercion or threat. For instance, in the case of *Abdul Ghafoor and three others*⁵⁷⁵ accused were tried for the murder of Mst. Sardar Khanam by firing. After occurrence when lady was brought to hospital she succumbed to injuries. On conclusion of trial, four accused were convicted while others were acquitted. Accused namely Abdul Ghafoor was awarded death sentence while other three accused were punished with life imprisonment. On appeal, the High Court reduced sentence of Abdul Ghafoor to that

⁵⁷⁵ *Abdul Ghafoor and 3 others vs. The State*, 1992 SCMR 1218.

of life imprisonment. During pendency of leave to appeal before the apex court parties patched up the matter through compromise but the court did not accept compromise of parties. Regarding rejection of compromise Justice Muhammad Afzal Zullah observed:

Similarly, if the Court has any doubt whatsoever that the compromise is tainted with pressure, coercion, undue influence, blackmail, extortion or similar other infirmities, it shall have to be rejected without much of arguments or discussion. Because only that compromise would qualify for acceptance which is above every blemish, mild or strong.⁵⁷⁶

Similarly, a division bench of the apex court refused a leave to appeal in the case of *Ghulam Sajjad* on the ground that compromise between parties was not quite valid as parents of deceased recorded their statements under undue influence and due to fear.⁵⁷⁷ In another case *Muhammad Jabbar vs. The State*⁵⁷⁸ a division bench of the Lahore High Court dismissed a criminal revision petition for the reasons that legal heirs of deceased persons had stated before the High Court that they were subjected to gruesome cruelty and wanted compromise. Similarly, in a triple murder case accused *Muhammad Siddique* was tried for murder of his young daughter, her husband and their baby girl before a Special Court constituted under the Suppression of Terrorist Activities (Special Courts) Act, 1975.⁵⁷⁹ On completion of trial, besides other punishments accused was convicted under section 302 (b) PPC and sentenced to death as *ta'zir* for murder of Muhammad Saleem. For murders of Mst. Salma Bibi and a baby girl he was convicted under sections 302 (c) & 306 (b) PPC and punished with twenty five years' rigorous imprisonment on each count. During pendency of

⁵⁷⁶ See *ibid.*, at pp. 1222, 1223.

⁵⁷⁷ *Ghulam Sajjad vs. The State and others*, 1997 SCMR 1526.

⁵⁷⁸ *Muhammad Jabbar vs. The State and 10 others*, 2000 PCr.LJ 1688 Lah.

⁵⁷⁹ *Muhammad Siddique vs. The State*, PLD 2002 Lah. 444.

appeal before the Lahore High Court parties patched up the matter and fact of compromise by legal heirs of deceased persons was confirmed by the concerned District and Sessions Judge. However, the High Court declined to accept compromise and his death sentence was confirmed despite that mother of the deceased man had not denied composition of offence and despite genuineness of compromise. In this regard his lordship Justice Tassaduq Hussain Jilani, at page number 452 of the judgment, observed:

We examined mother of Muhammad Saleem who did not deny that the parties have compromised. But we saw tears in her eyes which have not only raised serious questions about the genuineness of the said compromise but also with regard to what should be the judicial response to a gruesome triple murder even if the compromise is voluntary.

While discussing provisions of sections 338-E PPC and 345 Cr.PC, the Lahore High Court had raised three relevant questions. First that under what circumstance accused despite compromise could be convicted? Second question was that what was the concept of crime and punishment under law? Third question was that could law be a social catalyst for change? Regarding the scope of section 338-E PPC the bench observed:

The concept embodied in this provision (of section 338-E P.P.C.) underpins an important legislative intent. The Court has to draw a line between those offences which are more serious and have graver social ramifications and offences which are less serious or reflect some personal vendetta. In the former category of offences acquittal pursuant to compromise may encourage the social trends which led to those crimes whereas upholding a conviction would convey a social disapproval through the majesty of law. In the offences of latter kind, however, a compromise and the resultant acquittal may promote goodwill and social harmony.⁵⁸⁰

⁵⁸⁰ See *ibid*, at p. 454.

The division bench of the High Court rejected compromise and confirmed death sentence awarded by trial court due to taking life of three individuals in a cruel and barbarous manner. Another case of this category is the case of *Muhammad Arshad alias Pappu* wherein a division bench of the apex court rejected compromise of widow of deceased when she stated before the court that she never entered into a compromise with free consent and court found that her signatures were got under coercion and she was told that her life and life of her offspring were under serious danger.⁵⁸¹ His lordship, Justice Javed Iqbal on the point of genuineness of compromise observed at page 563 of the judgment as follows:

On the basis of what has been stated above it can be concluded safely that no compromise will be accepted authenticity and genuineness whereof is not above board and not disputed from any angle. The satisfaction of the court regarding execution of compromise cannot be ignored. We are satisfied on the basis of record that the compromise, if any, was executed by use of coercion and force thus being controversial and disputed it cannot be taken into consideration.

Again, compromise was rejected by all three forums in a quadruple murder case *Naseem Akhtar vs. The State*.⁵⁸² In this case cold blooded murders were committed mere for refusal of giving daughter in marriage and transferring land in the name of culprit. Later on, parties of case patched up the matter by entering into a compromise but the appellate court rejected it. The decision of the High Court rejecting such a compromise was challenged in the apex court by filing leave to appeal by accused party. But a four member bench of the Supreme Court dismissed application and maintained decision of courts below by refusing to accept

⁵⁸¹ *Muhammad Arshad alias Pappu vs. Additional Sessions Judge, Lahore and 3 others*, PLD 2003 SC 547.

⁵⁸² *Naseem Akhtar vs. The State*, PLD 2010 SC 938.

compromise. Regarding duty of judges while considering compromise between parties in cases of *qatl-i-amd* Justice Mian Saqib Nisar remarked:

Rather it is the duty and the prerogative of the Court to determine the fitness of the case for the endorsement and sanction of the compromise and in appropriate cases, where the compromiser and offender is directly or indirectly beneficiary of the crime; the offence is committed or is caused thereof, for an obvious object of grabbing the property of the deceased by the compromiser, through his off spring, who may ultimately benefits himself (the offender) as well, the Court may refuse to give an effect to such a deal, especially coupled with the scenario when the offence is gruesome, brutal, cruel, appalling, odious, gross and repulsive which causes terror and sensation in the society.⁵⁸³

In another case, shocking and mind boggling side of compromise in a non-compoundable case came forth when a gang rape case was highlighted by media.⁵⁸⁴ Despite filing complaint before the concerned Police Station, FIR could not be lodged timely against culprits obviously having influential background. When parties appeared in Sessions Court Rawalpindi, complainant informed the court that he had reached an out of court settlement for a consideration of Rupees ten lac with accused persons. In order to challenge such type of compromises, where miscarriage of justice is so vivid that the whole society feels a sense of insecurity and invulnerability, a petition was filed before the apex court.⁵⁸⁵ In the petition, *inter alia*, it was prayed that the out of court settlement between parties be declared invalid, null and void by setting aside the order of acquittal. The Supreme Court of Pakistan issued notices to respondents as well as to the Prosecutor General of the Punjab to appear and explain the circumstances under which acquittal was recorded by trial court and as to whether

⁵⁸³ See *ibid*, at p. 942.

⁵⁸⁴ In this case a 13 years old girl was subjected to gang rape in March 2012 but local police refused to register a case. The Supreme Court took a *suo motu* action and a HRC No. 13728-P of 2012 was registered.

⁵⁸⁵ *Salman Akram Raja and another vs. Government of Punjab through Chief Secretary and others*, 2013 SCMR 203.

they had filed appeal or not? The apex court, besides giving a useful guideline in rape case, on compounding offence under section 345 Cr.PC observed:

In this regard it is to be noted that section 345, Cr.P.C. provides procedure for compounding of offence and no offence can be compounded except as provided in the said provision. The offence of rape under section 376, P.P.C. is non-compoundable, therefore, compounding of such offence is not permissible. Even otherwise sometimes due to out-of-court settlement, the complainant party does not come forward to pursue the matter or produce evidence, which results in the acquittal of the accused. The cases like rape, etc., are against the whole society and the cases are registered in the name of the State, therefore, in the cases where the accused succeed(s) in out-of-court settlement, the State should come forward to pursue the case and the courts should also take into consideration all these aspects while extending benefit to the accused.⁵⁸⁶

In a relatively latest case of *Ghulam Farooq* the apex court did not find any circumstance to award lesser punishment to accused who murdered his sister, her husband and her daughter in the name of honour.⁵⁸⁷ On the question of reduction of sentence, Justice Asif Saeed Khan Khosa remarked:

As regards the sentence of the appellant the circumstances of the case are such that the cruel and brutal manner in which the appellant had taken three lives has been found by us to be utterly offensive and his conduct has, thus, failed to evoke any sympathy. The appellant had not only killed his sister for choosing a matrimonial partner on her own but had also killed his brother-in-law and also an infant daughter of the appellant's sister apart from killing a fully formed fetus inside the womb of his sister. One of the sentences provided by the law for an offence of murder is death and in the peculiar circumstances of this case the appellant deserves no less, particularly when he has killed not one but three innocent persons and also a fully formed fetus.⁵⁸⁸

From the above discussed cases it has become clear that superior judiciary of Pakistan on few occasions had denied permission of compromise under section 345 Cr.PC for the reasons of barbarity at the hand of accused in cases of *qatl-i-amd*.

⁵⁸⁶ See *ibid*, at pp. 214, 215.

⁵⁸⁷ *Ghulam Farooq vs. The State*, 2015 SCMR 948.

⁵⁸⁸ See *ibid*, at pp. 949, 950.

9.10 CONCLUSION

One of salient features of Islamic law relating to offence of *qatl-i-amd* is forgiveness either with or without consideration but in order to control offence of *qatl* there should be some more restriction on compounding offence of *qatl-i-amd*. The settled law on compounding *qatl-i-amd* can be summarised in points, One; in case of sentence of death under section 302 (a) PPC as *qisas*, right of *qisas* under section 309 PPC can be waived, without compensation, by any of legal heirs of deceased but for compounding right of *qisas* under section 310 PPC payment of *diyat* is a compulsion. Two; when accused is punished under section 302 (b) or (c) PPC by way of *ta'zir* then offence can be compounded under section 345 Cr.PC by all legal heirs subject to permission of court. Three; in a *qatl-i-amd* committed in brutal manner, despite waiver of right of *qisas* by legal heirs or compounding offence accused can be punished because in such cases compromise is not acceptable under law. Four; all acquittals have same effect and every acquittal is honourable in the eye of law. Five; compromise between parties at bail stage in a case of *qatl-i-amd* is not equivalent to final compromise. Six; courts in every case of *qatl-i-amd* of *ta'zir* have discretion to reject compromise if offence is committed in inhumane manner. Seven; legal heirs of deceased can compound offence but statement of other relatives also can be recorded during compromise. Eight; when a legal heir of deceased passes away before entering into compromise with murderer, right to waive *qisas*, to compound *qisas* and to compound *qatl-i-amd* survives to successors of deceased but not the successors of such late legal heir.

CHAPTER 10

PRINCIPLE OF *FASAD-FIL-ARZ* AND RECENT POPULAR UPRISING IN PAKISTAN ON UNJUST APPLICATION OF THE *QISAS* AND *DIYAT* LAW

10.1 INTRODUCTION

Islamic concepts of waiver (*afw*) of *qisas*, compounding (*sulh*) of *qisas* and compounding of *qatl-i-amd* and their application in Pakistan are not free from misuse and criticism. Pakistan judiciary has also enunciated some principles in order to eliminate the misuse of law when parties enter into composition. For instance, non acceptance of partial compromise or if compromise is reached under coercion, threat or cheating. Moreover, despite exercising option of waiving of *qisas* or compounding of *qisas* by any of the legal heirs of deceased, courts are empowered to award punishment under section 311 PPC by way of *ta'zir* under the principle of *fasad-fil-arz*. Similarly, in offence of *qatl-i-amd*, committed during an activity of terrorism, compromise is not acceptable. This chapter deals with the principle of *fasad-fil-arz* and its introduction into the law of Pakistan. Moreover, application of principle of *fasad-fil-arz* in cases of *qatl-i-amd* is discussed by analysing relevant case laws. This chapter also deals with situations when courts refused composition of offences of *qatl-i-amd* having nexus with terrorism. In the end of this chapter few latest cases are discussed wherein compromise was accepted by courts but civil society came out to

record protest against such acceptance of composition of offences of *qatl-i-amd* which actually damage the feelings of every individual of society.

10.2 PUNISHMENT OF *TA'ZIR* DESPITE WAIVER OR COMPOUNDING OF *QISAS* IN CASES OF *QATL-I-AMD*

The legislature under section 311 of the Pakistan Penal Code, 1860 reposed to criminal courts discretionary power of awarding punishment of *ta'zir* in cases of *qatl-i-amd* where right of *qisas* was either waived or compounded. It is not out of place to mention here that provisions of section 311 PPC had been frequently changing by the legislature since first draft on the law. Expression '*fasad-fil-arz*' under section 311 PPC was not mentioned under the provisions of its counterpart section 16 of the Draft Ordinance, 1980. Though under section 16 of the Draft Ordinance, 1980 discretionary power was given to courts to award punishment of imprisonment up to 25 years and whipping but maximum forty stripes as *ta'zir* in cases of *qatl-i-amd* against whom right of *qisas* was either waived or compounded. It was, however, not clear as to whether right of *qisas* could be waived or compounded by any or all legal heirs of deceased. Section 16 of the Draft Ordinance, 1980 reads as follows:

“16. **Tazir after waiver or compounding of qisas:-** Notwithstanding anything contained in section 14 or 15, the court may, in its discretion, award *tazir* to a convict against whom *qisas* has been waived or compounded, and punish him with imprisonment of either description for a term which may extend to twenty-five years and whipping not exceeding forty stripes.”

Principle of '*fasad-fil-arz*' was not added under section 311 PPC when provisions thereof were amended by the Criminal Law (Second Amendment)

Ordinance, 1990. However, under section 311 PPC, the Ordinance provided punishment of imprisonment up to ten years as *ta'zir* for those convicts against whom right of *qisas* was either waived or compounded. In other words, except substituting punishment as *ta'zir* the Ordinance retained the wording of corresponding section of the Draft Ordinance. The Criminal Law (Amendment) Act, 1997 again brought some changes into the provisions of section 311 PPC. The Act added one more ground, i.e. principle of *fasad-fil-arz*, for awarding punishment of imprisonment up to fourteen years as *ta'zir* in cases of *qatl-i-amd* where all *walis* of deceased do not waive or compound right of *qisas*. Since wording of section 311 PPC, as amended by the Act, is altogether different so it is expedient to reproduce the same:

311. *Tazir after waiver or compounding of right of qisas in qatl-i-amd:-*

Notwithstanding anything contained in Section 309 or Section 310, where all the *walis* do not waive or compound the right of *qisas*, or keeping in view the principle of *fasad-fil-arz* the Court may, in its discretion having regard to the facts and circumstances of the case, punish an offender against whom the right of *qisas* has been waived or compounded with imprisonment of either description for a term of which may extend to fourteen years as *tazir*.

Through the Criminal Law (Amendment) Act, 1997 first time 'principle of *fazad-fil-arz*' was introduced under section 311 PPC. The amended section also substitutes word 'convict' with word 'offender', most probably for the reason that word 'offender' is more generic in its scope than that of 'convict'. Moreover, unlike the earlier provisions, amendment elaborates that punishment of *ta'zir* can be inflicted where all *walis* of deceased do not waive or compound right of *qisas*. The Criminal Law (Amendment) Act, 1997 inserts a new explanation under section 311 PPC whereby expression '*fasad-fil-arz*' is further explained. As per amendment, principle of '*fasad-fil-arz*' can be adjudged from the previous conduct of culprit, his

conviction in past, violent nature of his offence, the way of committing offence capable to outrage public conscience and where offender is considered to be a constant danger to the society and vicinity. Lately, provisions of section 311 PPC were amended by the Criminal Law (Amendment) Act, (XXVI of 2005) whereby quantum of punishment for offence of *qatl-i-amd* as *ta'zir* was altered and it was provided that where all *walis* of deceased had not waived or compounded their right of *qisas* or where principle of *fasad-fil-arz* was attracted, the court might punish a culprit against whom either *qisas* was waived or *qatl-i-amd* was compounded, with death or life imprisonment or any imprisonment up to fourteen years by way of *ta'zir*. Moreover, through a proviso under section 311 PPC, inserted into the section in the year 2005, it was further added that if an offence of *qatl-i-amd* was committed in the name of or on the pretext of honour, imprisonment by way of *ta'zir* would not be less than ten years' imprisonment.

10.3 ANALYSIS OF CASES RELATING TO PUNISHMENT OF TA'ZIR UNDER SECTION 311 PPC

After promulgation of *qisas* and *diyat* law of Pakistan discretionary power of courts under section 311 PPC, i.e. of awarding punishment by way of *ta'zir*, was exercised in many cases of *qatl-i-amd* but such decisions were mutually inconsistent. In early cases we find two different approaches regarding application of section 311 PPC. One approach is about the exercise of power under section 311 PPC in all types of punishments of *qatl-i-amd*; irrespective of awarded under section 302 (a) PPC as *qisas* or under section 302 (b) or (c) PPC as *ta'zir*. As per another approach section

311 PPC attracts only in cases of *qatl-i-amd* where punishment is awarded by way of *qisas* under section 302 (a) PPC.

10.3.1 Cases where Provisions of Section 311 PPC were Applied in Ta'zir Cases as Well

The expression of '*fasad-fil-arz*' was added under the provisions of section 311 PPC in the year 1997. In few cases, decided prior to this amendment, discretionary power under section 311 PPC was exercised by courts in cases of murder where accused was punished by way of *ta'zir*. For instance, in *Moula Bux vs. The State*⁵⁸⁹ accused of *qatl-i-amd* was convicted under section 302 (b) PPC and sentenced to death by trial court. During pendency of appeal before the High Court, legal heirs of deceased compounded offence and on application of compromise High Court was pleased to acquit accused of charge. Regarding the scope of section 311 PPC as amended by the Criminal Law (Fourth Amendment) Ordinance, 1991 Justice Qaiser Ahmed Hamidi remarked:

While taking a wholesome view of the above amendment both in Pakistan Penal Code, 1860, a substantive law, and in the Code of Criminal Procedure, 1898, a procedural law, it is obvious that the provisions of section 311 P.P.C. will be attracted only when the Court has declined the permission for compounding of the offence under section 345, Cr.P.C.⁵⁹⁰

Similarly, in the case of *Nisar Ahmad and two others*, three real brothers were charged for committing murder of their step brother and murderous assault on

⁵⁸⁹ *Moula Bux vs. The State*, 1992 MLD 1590 Kar.

⁵⁹⁰ See *ibid*, at p. 1592.

complainant.⁵⁹¹ On conclusion of trial, Nisar Ahmad was convicted under section 302(b) PPC and punished with death and fine. Other two accused were convicted only under section 308 PPC and sentenced to seven years' rigorous imprisonment. During pendency of appeal before the Lahore High Court it was submitted that some of the legal heirs had granted *afw* to accused persons in *qatl-i-amd*. Justice Khalil-ur-Rehman Ramday, while authoring a judgment for a division bench, set aside conviction and sentence of appellant under section 302 (b) PPC but keeping in view the provisions of section 311 PPC punished accused with ten years' rigorous imprisonment. Justice Khalil-ur-Rehman Ramday adopted same approach in a subsequent case of *Muratab Ali*⁵⁹² wherein accused committed murder of his wife's sister who was also wife of his brother. Trial court convicted accused under section 302 (b) PPC and punished him with death as *ta'zir* and fine. During pendency of appeal, some legal heirs of deceased had either waived right of *qisas* by granting *afw* or compounded offence by accepting *badal-i-sulh*. The High Court set aside conviction of accused under section 302 PPC and punished him with rigorous imprisonment of ten years under section 311 PPC by way of *ta'zir*. Another interesting case of this category is *Muhammad Ramzan alias Ramzani vs. The State* wherein accused was convicted and sentenced to death under section 302 PPC.⁵⁹³ Later on, legal heirs of deceased lady had filed a compromise before the apex court stating that they had forgiven accused and had no objection if he was set at liberty. The apex court accepted compromise in *ta'zir* case but punished accused under section 311 PPC. In his judgment justice Said-uz-zaman Siddiqui, speaking for a three member bench, remarked:

⁵⁹¹ *Nisar Ahmad and two others vs. The State*, 1994 PCr.LJ 1587 Lah.

⁵⁹² *Muratab Ali vs. The State*, 1994 PCr.LJ 1413 Lah.

⁵⁹³ *Muhammad Ramzan alias Ramzani vs. The State*, 1996 SCMR 906.

We do not find any reason to reject the compromise and hold that the right of 'Qisas' has been waived against the petitioner. However, keeping in view the fact that the petitioner had earlier committed murder of the sister of the deceased in the case, and was acquitted of the charge to that case also on the basis of compromise, the principle of 'Fisad-fil-Arz' is fully attracted in the case. We, accordingly, while accepting the compromise to the case, convict the petitioner by way of 'Ta'zir' under section 311, P.P.C. and sentence him to R.I. for 14 years.⁵⁹⁴

In this case first time expression '*fasad-fil-arz*' was used though it was not mentioned under section 311 PPC at that point of time and it was subsequently made part of law. Similarly, in the case of *Naseem Akhtar and another*,⁵⁹⁵ the apex court applied principle of *fasad-fil-arz* in a case of composition falling under section 345 (5) Cr.PC and compromise of parties was not accepted on the ground that accused with intention to grab property of deceased persons killed four innocent persons in brutal, cruel, gruesome, appalling, odious, gross and repulsive manner which causes terror and sensation in society. Again, in the case of *Nazak Hussain*⁵⁹⁶ petitioner was convicted under section 302(b) PPC and punished with death for the murder of a lady. His conviction was maintained by the Lahore High Court in appeal but altered sentence to life imprisonment. Leave to appeal of convict was also dismissed by the apex court. After three years of dismissal of petition from the Supreme Court, convict filed a review petition before the apex court on the ground that parties had entered into a compromise whereby adult legal heirs had waived right of *qisas* while amount of *diyat* to the extent of minor legal heirs was deposited in their bank account. The apex court dismissed review petition for being time barred and observed that review in criminal proceedings could be possible only when error was apparent on the face

⁵⁹⁴ See *ibid*, at pp. 907, 908.

⁵⁹⁵ *Naseem Akhtar and another vs. The State*, PLD 2010 SC 938.

⁵⁹⁶ *Nazak Hussain vs. The State*, PLD 1996 SC 178.

of record and no other ground. However, for required relief the Supreme Court directed parties to approach to trial court under section 338-E (2) PPC and gave following guideline:

In case of Qatl-e-Amd, if the right of Qisas is waived without any compensation or the legal heirs of the deceased compound their right of Qisas within the meanings of sections 309 and 310, P.P.C., during the pendency of appeal, applications for permission to compound the offence shall be made before the appellate Court, who shall determine all questions relating to waiver or compounding of an offence or awarding punishment under section 311, P.P.C.⁵⁹⁷

The apex court miserably failed to discern as to whether section 311 applies when punishment is awarded as *qisas* or by way of *ta'zir*. The court while analyzing various provisions of Chapter XVI of the Penal Code further elaborated the scope of principle of *fasad-fil-arz* by seeking guidance from injunctions of Islam as provided under section 338-E PPC and observed that principle of *fasad-fil-arz* includes past conduct of accused and manner of commission of offence.

Even after the amendment of 1997 courts adopted the view that punishment as *ta'zir* under section 311 PPC can be awarded to accused who are convicted in cases of *qatl-i-amd* under section 302 (b) PPC and punished by way of *ta'zir*. For instance, in the case of *Muhammad Saleem and others* accused were charged for committing murder of five persons in two different criminal cases.⁵⁹⁸ In one case they were convicted under section 302 (a) PPC for committing four murders and each of them was sentenced to death as *qisas* by trial court. The convicts challenged their conviction and sentence before the Lahore High Court. During pendency of their appeal, compromise application was submitted by accused that they had patched up

⁵⁹⁷ See *ibid*, at p. 181.

⁵⁹⁸ *Muhammad Saleem and others vs. The State*, 2005 SCMR 849.

the matter with legal heirs of deceased except two ladies and legal heirs had waived their right of *qisas* and had compounded the offence. A division bench of High Court maintained conviction and sentence of convicts, however, advantage of partial compromise of legal heirs was given to convicts as death sentence was set aside by High Court. But due to brutal manner of offence of murder of innocent persons over a small piece of agricultural land the High Court held that their case fall under the concept of '*fasad-fil-arz*' so their conviction was converted to under section 311 PPC and they were punished with rigorous imprisonment of fourteen years. Before the Supreme Court, counsel for accused argued that since most of legal heirs of deceased had compounded offence so accused could not be convicted and punished under section 311 PPC. On the other hand, acting Advocate General Punjab, assisted with few other counsels, argued that death punishment of accused was to be treated as having been awarded as *ta'zir* under section 302 (b) PPC and since appellants were guilty of gruesome and brutal murder of five persons in a manner which would amount to *fasad-fil-arz* so it was not a fit case for taking a lenient view or for granting permission of compromise between parties. The apex court though did not clearly differentiate the application of section 311 PPC in *qisas* and *ta'zir* cases but confirmed death punishments by way of *ta'zir* under section 302 (b) PPC. Regarding principle of *fasad-fil-arz*, Justice Faqir Muhammad Khokhar observed:

The post-mortem reports of deceased persons clearly show that they were slaughtered in a brutal and gruesome manner which constituted *Fisad-fil-Arz*. Therefore, the High Court was justified in answering the Murder Reference No.17 of 1994 in affirmative. We may also observe that the application of the appellants for compromise might have been dealt with differently if all the heirs/Walis of all the deceased had waived their right of *Qisas* by compounding the offence.⁵⁹⁹

⁵⁹⁹ See *ibid*, at p. 855.

In this case the apex court did not extend benefit of partial compromise to accused persons rather their sentence was alter from section 311 PPC to *ta'zir* under section 302 (b) PPC. The principle again came under discussion before the apex court in the case of *Hikmatullah* wherein three accused persons were convicted and punished with death under section 302(b)/34 PPC for causing murder.⁶⁰⁰ All three accused persons were also convicted and sentenced to imprisonment of ten years and fine under section 392 /34 PPC for committing dacoity when offence of *Haraba* was not proved. The Federal Shariat Court dismissed appeal of accused persons. In another murder case accused *Shahid Jabbar* was also convicted and sentenced to death under section 302(b) PPC for committing murder during robbery. He was also convicted and punished with ten years' imprisonment and fine under section 394 PPC. The Shariat Appellate Bench decided both appeals together due to having a common question regarding application of principle of *fasad-fil-arz* as provided under section 311 PPC. In both cases, later on, parties patched up the matter through compromise. Two independent applications for leave to appeal were moved to apex court against the judgments of the Federal Shariat Court. Before the apex court counsel for appellants did not press, on merits, their convictions under sections 392 and 394 PPC, respectively. However, on the basis of compromise they sought acquittal under section 302 (b) PPC. A question before the Shariat Appellate Bench of the apex court was that whether in cases of dacoity and robbery parties could patch up the matter through compromise? The bench, distinguishing case from the case of *Ghulam Farid alias Farida*, held that in that case accused was charged under section

⁶⁰⁰ *Hikmatullah and 2 others vs. The State*, 2007 SCMR 610.

396 PPC because murder was committed during dacoity and was non-compoundable offence so compromise was declined by the court. The bench, therefore, held that compromise could be affected in both appeals to the extent of offence of murder because offences of murder were distinct offences than those under sections 392 and 394 PPC. Justice Sardar Muhammad Raza Khan, speaking for the bench, due to the heinousness of offences observed:

Anyhow, keeping in view the circumstances of the case, the nature of the offence committed and the number of persons killed, we cannot be oblivious of the fact that it seriously attracts the principle of Fasad-fil-Arz and the offenders are most likely to be a potential danger to the community. We are, therefore, constrained to observe that the present two cases are fit cases where this Court should pass an order under section 311, P.P.C.⁶⁰¹

The bench maintained conviction and punishment of Hikmattullah and others under sections 392/34 PPC accepting compromises of parties but set aside punishment of death under section 302 (b) PPC and alter it to that of imprisonment for life within the contemplation of section 311 PPC and fine. Similarly, conviction and punishment of Shahid Jabbar was maintained under section 394 PPC by setting aside his punishment of death under section 302 (b) PPC but he was punished for life imprisonment under section 311 PPC and fine. In another case *Azmat and another vs. The State* both accused persons, i.e. real brother and sister, were booked in a criminal case for murder of their real father, step mother and their two step sisters.⁶⁰² Later on, legal heirs of deceased entered into a compromise with accused. An application for accepting compromise was dismissed by trial court because four innocent persons including two minors were killed by accused in a brutal manner. On assailing order of

⁶⁰¹ See *ibid*, at p. 613.

⁶⁰² *Azmat and another vs. The State*, PLD 2009 SC 768.

trial court the High Court found impugned decision in consonance with law and logical reasons hence petition was dismissed. Accused petitioners prayed before the Supreme Court that decision of the High Court was not justified hence accused petitioners be acquitted due to compromise. The apex court did not differentiate cases where principle of *fasad-fil-arz* applies but gave following guideline:

That it would again be neither possible nor even desirable to categorise cases into classes where such a permission should be granted or where the same should be withheld. Such a decision shall have to be taken by the concerned court after applying its judicial mind to all the attending facts and circumstances of a given case such as the past conduct and character of the accused person; the reasons leading him to committing the murder; the manner in which the said crime was committed---how reckless or brutal was such an act and of course the question whether the act in question amounted to "Fasad-fil-Arz".⁶⁰³

The Supreme Court, after making the legal scenario clear, held that acquittal is not an automatic consequence of a compromise affected between parties. The apex court dismissed petition for finding no reason to intervene into decision of two courts below. So courts in cases of compromise between parties of offence of *qatl-i-amd* will have to go beyond compromise for looking at the nature of occurrence.

10.3.2 Cases where Provisions of Section 311 PPC were Applied Only when Punishment was Awarded under Section 302(a) PPC as Qisas

In many early cases application of section 311 PPC was restricted to cases of *qatl-i-amd* wherein punishment was awarded under section 302 (a) PPC as *qisas*. For

⁶⁰³ See *ibid*, at p. 769.

instance, in the cases of *Nazar Ali*⁶⁰⁴ and *Muhammad Ishaq*⁶⁰⁵ Justice Abdul Karim Khan Kundi observed that punishment of *ta'zir* under section 311 PPC could be awarded after waiver or compounding *qisas* in *qatl-i-amd* but provisions of section 311 PPC have no application to cases of *qatl-i-amd* liable to *ta'zir*. Similarly, in *Usman and another vs. The State*⁶⁰⁶, three accused in a case of *qatl-i-amd* were tried before the court of Additional Sessions Judge. During trial, before pronouncement of judgment, parties entered into compromise under section 345 Cr.PC. On the application of accused, compromise was accepted by trial court but even then accused were convicted and punished under section 311 PPC as *ta'zir* with rigorous imprisonment of ten years. Against conviction and sentence an appeal was filed before the Sind High Court, Karachi and counsel for appellants contended that trial court had misread provisions of section 311 PPC and convicted appellants illegally. Being convinced with his arguments, a single member bench of Justice Shaukat Hussain Zubedi observed as:

I may refer to section 311, P.P.C. which is applicable in those cases where there is no compromise regarding the case as a whole and only right of Qisas is waived under section 309, P.P.C. or if there is compounding right of Qisas under section 310, P.P.C. then only the discretion provided under section 311, P.P.C. become available. It may be noted that the compounding of Qisas and compounding of offence are two separate terms. Compounding of offence is provided by section 345, Cr.P.C. while compounding of Qisas is under section 310, P.P.C. In the present case, the compromise was not in respect of compounding of Qisas, but it was in respect of compounding of offence and since the learned trial Judge had granted the permission and also accepted the compromise, therefore, the only option left with the trial Court, was to pass the necessary orders under section 345(6), Cr.P.C. and acquit the accused.⁶⁰⁷

⁶⁰⁴ *Nazar Ali vs. The State*, PLD 1992 Pesh. 176.

⁶⁰⁵ *Muhammad Ishaq vs. The State*, PLD 1992 Pesh. 187.

⁶⁰⁶ *Usman and another vs. The State*, 1992 PCr.LJ 1960 Kar.

⁶⁰⁷ See *ibid*, at p. 1962.

Same view was followed by the Lahore High Court in the case of *Azmat Ullah Khan*⁶⁰⁸ while deciding a criminal revision petition filed against an order of Additional Sessions Judge whereby applications of compromise on payment of *diyat* to legal heirs of the deceased were dismissed before conclusion of trial. In this case, all legal heirs were not willing to compound offence of *qatl-i-amd*. Counsel for accused persons before the High Court contended that only course open to the court was to order other legal heirs, who had refused to receive *diyat*, to receive the same. It was further argued that since two of legal heirs had already received *diyat* amount so accused could only be charged under section 311 PPC but not under section 302 PPC. Single member bench of Justice Sh. Muhammad Zubair clarified that only after recording statements of eye witnesses who were not willing to compound offence, decision of convicting accused under section 311 PPC could be taken. Regarding the stage of case when provisions of section 311 PPC attract, his lordship reiterated:

Thus, only then on the basis of material brought on record the trial Court would be in a position to assess as to the nature of offence made out against the accused for the purposes of his conviction or acquittal. The provisions of section 311, P.P.C. would be attracted only when the accused is to be convicted by way of Tazir in spite of waiver or compounding of the right of Qisas, which stage has yet not come.⁶⁰⁹

In *Manzoor Hussain and 4 others vs. The State*, five persons were charged for the murder of Muhammad Siddique, brother in law of accused persons.⁶¹⁰ Trial court convicted and punished all accused persons under section 148/149 and 302 (c) PPC. The High Court dismissed appeals of convicts and confirmed punishment. Leave to appeal was granted by a bench of three judges of the apex court on the point that

⁶⁰⁸ *Azmat Ullah Khan vs. The State*, 1993 PCr.LJ 1220 Lah.

⁶⁰⁹ See *ibid*, at p. 1223.

⁶¹⁰ *Manzoor Hussain and 4 others vs. The State*, 1994 SCMR 1327.

since wife of deceased, being one of *walis* of deceased, had waived her right of *qisas* under section 309 PPC so punishment of her brothers accused should have been recorded under section 311 PPC wherein maximum sentence was ten years' imprisonment as *ta'zir*. However, Justice Wali Muhammad Khan in his judgment, concurring with by Justice Ajmal Mian and Justice Manzoor Hussain Sial, observed:

According to her statement recorded by the Court, she has waived her right of *qisas* but the same cannot help the appellants in any way as all the appellants were tried, convicted and sentenced under *ta'zir* and not *qisas*, therefore, the favour bestowed upon them by the widow of the deceased who happens to be their sister cannot come to their rescue in any way.⁶¹¹

The Supreme Court, in this case too, denied punishing appellants under section 311 PPC because conviction of accused persons was not recorded as *qisas* under section 302 (a) PPC. Therefore, provisions of section 311 PPC and principle of *fasad-fil-arz* only attract in cases of *qatl-i-amd* where accused was convicted and sentenced to death by way of *qisas* under section 302 (a) PPC.

10.3.3 Insertion of Principle of 'Fasad-fil-Arz' through the Criminal (Amendment) Act, 1997 under Section 311 PPC and its Application

Principle of *fasad-fil-arz* was inserted under the Pakistan Penal Code, 1860 in the year 1997 when the erstwhile provisions of section 311 PPC were amended through the Criminal Law (Amendment) Act, 1997. Courts, thereafter, were in position to award punishment of *ta'zir* to offenders against whom all *walis* of deceased had not waived or compounded right of *qisas*. First leading reported case wherein on the basis

⁶¹¹ See *ibid*, at p. 1330.

of principle of *fasad-fil-arz* punishment of *ta'zir* under section 311 PPC was awarded is the case of *Khalid Nawaz*.⁶¹² In this case accused was convicted under section 302 (a) PPC for committing murder and was punished with death as *qisas* and fine. The Lahore High Court maintained conviction and sentence awarded by trial court without considering that mother of deceased had waived her right of *qisas*. Leave to appeal was moved before the apex court to consider whether punishment of *qisas* could be enforced when one legal heir of deceased had granted forgiveness? A three member bench of the apex court preferred to reduce sentence due to granting pardon by mother of deceased so accused was punished under section 311 PPC to rigorous imprisonment for fourteen years and payment of *diyat* to mother of deceased without mentioning anything regarding heinous and brutal nature of offence. Again, regarding application of principle of *fasad-fil-arz* in cases of *qatl-i-amd* question arose in *Khan Muhammad v. The State* wherein the apex court held that provisions of section 311 PPC attracted only in cases of *qatl-i-amd* punishable with death as *qisas* under section 302 (a) PPC but not in cases of *ta'zir*.⁶¹³ Similarly, in *Shahbaz vs. The State*⁶¹⁴ one of the accused persons namely Shahbaz for committing murder was convicted and sentenced under sections 308 and 311 PPC with rigorous imprisonment of fourteen years and payment of *diyat*. Reason for conviction and sentence of accused under sections 308 and 311 PPC was that one of legal heirs of deceased had forgiven accused and waived her right of *qisas*. A single member bench of the Lahore High Court of Justice Ijaz Ahmad Chaudhry, observed, "Admittedly, it was not a case of *qisas* falling under section 302 (a) PPC as the eye-witnesses had not undergone the test of *Tazkiyah-al-Shahood* before recording of their evidence but it was a case

⁶¹² *Khalid Nawaz vs. The State*, 1999 SCMR 933.

⁶¹³ 2005 SCMR 599.

⁶¹⁴ *Shahbaz vs. The State*, 2006 PCr.LJ 1541 Lah.

falling under the ta'zir". *Ratio* of these cases that provisions of section 311 PPC apply only to those cases where punishment of death is awarded under section 302 (a) PPC as *qisas* was followed in *Iftikhar-ul-Hassan* case as well.⁶¹⁵

Correct stage of applying provisions of section 311 PPC was reiterated by the apex court in *Iqbal Ahmed vs. The State*.⁶¹⁶ In this case Iqbal Ahmad, charged for murdering two persons, before recording evidence in his case moved an application before trial court for accepting compromise between parties. Trial court though allowed application of compromise but due to brutal nature of offence, committed by firing at deceased persons with Kalashnikov, held that provisions of section 311 PPC attracted in the case. So trial judge convicted accused under section 311 PPC and awarded him sentence of rigorous imprisonment of ten years as *ta'zir*. Before the apex court it was argued on behalf of accused that trial court could not convict accused under section 311 PPC as no evidence was there to hold that it was a premeditated murder outrageous to public conscience. A three member bench of the apex court, after hearing parties, set aside impugned order and remanded case to trial court for decision afresh after recording evidence. Law settled by the apex court in above cases was further elaborated by the apex court in *Iqbal Hussain and others vs. The State and another* wherein by arm firing murder of a lady was committed in a dark night.⁶¹⁷ On the basis of suspicion accused was charged and convicted by trial court. During pendency of appeal before the Lahore High Court parties patched up the matter through compromise. The High Court held that case was of brutal nature and offence was outrageous to public conscience, therefore, compounding right of *qisas* by *walis* would not exonerate accused from punishment. So the High Court

⁶¹⁵ *Iftikhar-ul-Hassan vs. Israr Bashir and another*, PLD 2007 SC 111.

⁶¹⁶ *Iqbal Ahmed vs. The State*, 2013 SCMR 271.

⁶¹⁷ *Iqbal Hussain and others vs. The State and another*, 2014 SCMR 1155.

punished them under section 311 PPC. In appeal before the apex court question was as to whether High Court was justified in convicting and sentencing accused under section 311 PPC after reaching at a genuine compromise between parties? Another question was as to whether any mischief was borne out by the facts and circumstances of the case? The apex court held that High Court was not justified in refusing acquittal of accused persons on the basis of a genuine compromise and convicting accused under section 311 PPC when there was no such evidence. The apex court acquitted accused due to compromise and Justice Dost Muhammad Khan observed:

We have considered with a degree of care and caution, the case from all legal and factual aspects and we see no reason, much less plausible, to maintain the conviction of the appellants, as genuine compromise was effected between the parties because offence under section 302, P.P.C. has been made compoundable in view of the provisions of section 345, Cr.P.C. Thus, in our view, the learned High Court has committed a legal error in convicting and sentencing the appellants for crime under section 311, P.P.C., which, in our view, has caused serious miscarriage of justice.⁶¹⁸

The controversy about application of provisions of section 311 PPC was highlighted by a larger bench of the apex court in *Zahid Rehman vs. The State* in the following words:

The provisions of section 311 P.P.C. had also posed some difficulty in the past and had remained a subject of controversy before different courts of the country but that difficulty has now dissipated and the controversy now stands resolved by this Court.⁶¹⁹

So current position of settled law is that provisions of section 311 PPC attract only in cases of *qatl-i-amd* where conviction and punishment of death are recorded

⁶¹⁸ See *ibid*, at p. 1158.

⁶¹⁹ *Zahid Rehman vs. The State*, PLD 2015 SC 77, at p.116.

under section 302 (a) PPC as *qisas* and subsequently right of *qisas* is waived or compounded by any of legal heirs of deceased but these provisions do not attack in cases of *qatl-i-amd* liable to *ta'zir* under section 302 (b) PPC. It has become clear by examining above cases that principle of *fasad-fil-arz* enshrined under section 311 PPC can be considered by a judge on completion of trial. Secondly, courts in cases of *qatl-i-amd*, where accused is convicted with death as *qisas* under section 302(a) PPC, cannot exercise power to acquit accused on the basis of compromise unreasonably. Thirdly, judges are bound to take care in punishing accused under section 311 PPC by way of *ta'zir* after justifying such decision. Despite settled law, recently during trial of a murder case parties entered into a compromise which was accepted and accused were acquitted of charge under section 302 PPC but due to heinous nature of offence trial court convicted accused under section 311 PPC.⁶²⁰ The decision was subsequently challenged before High Court on the ground that compromise was affected under coercion and life threats. The High Court remanded the case to trial court for decision afresh but did not mention the correct application of provisions of section 311 of the Pakistan Penal Code, 1860.

10.4 PRINCIPLE OF *FASAD-FIL-ARZ* IN CASES OF *QATL-I-AMD* AND TERRORISM

It is not out of place to have a cursory look at murder cases involving elements of *fasad-fil-arz* and terrorism. Generally, principle of *fasad-fil-arz* is relevant only in cases of *qatl-i-amd* because act of terrorism is an independent offence under the Anti-

⁶²⁰ *Inayatullah vs. The State*, PLD 2018 Bal. 11.

Terrorism Act, 1997. Nonetheless, the apex court in *Azmat and another vs. The State* had included terrorism in reasons attracting principle of *fasad-fil-arz*.⁶²¹ In this case offence of *qatl-i-amd* committed during an act of terrorism in a way as mentioned under the Anti-Terrorism Act, 1997 is tried by a special court constituted under the Act. Under a special legislation for controlling and discouraging terrorists' activities, highest punishment is death. It has also been held in numerous cases that offence under section 7 of the Anti-Terrorism Act, 1997 is independent from offence of murder committed under section 302 PPC.⁶²² In offences of murder falling under the definition of terrorism compromise between parties is not acceptable but exceptions are also there. For instance, in the case of *Ghulam Shabbir and two others* accused persons were convicted under section 302 PPC and were punished with life imprisonment and fine.⁶²³ They were further convicted under section 9 of the ATA and were sentenced to rigorous imprisonment of four years and fine. On appeal, High Court maintained sentence under section 9 of the Anti-Terrorism Act, 1997. During pendency of leave to appeal parties patched up the matter and legal heirs of deceased forgave accused persons in the name of Almighty *Allah*. The apex court accorded permission to compound offence under section 345(5) Cr.PC and acquitted accused persons despite conviction and sentence under section 9 of the ATA.

Another category is of those cases wherein application for seeking permission to compromise was not accepted in cases of *qatl-i-amd* and terrorism registered under Anti-Terrorism Act, 1997. For example, in the case of *Muhammad Rawab*, Anti-

⁶²¹ *Azmat and another vs. The State*, PLD 2009 SC 768.

⁶²² See *Muhammad Amin vs. The State*, 2002 SCMR 1017; *Muhammad Rawab vs. The State*, 2004 SCMR 1170; *Shahzad vs. Judge, Anti-Terrorism Court*, 2005 SCMR 1162; *Muhammad Akhtar vs. The State*, PLD 2007 SC 447 and *Kareem Nawaz Khan vs. The State through PGP and another*, 2016 SCMR 291.

⁶²³ *Ghulam Shabbir and two others vs. The State*, 2003 SCMR 663.

Terrorism Court Rawalpindi tried six persons under section 365-A/109, PPC read with section 7 of the Anti-Terrorism Act, 1997.⁶²⁴ On conclusion of trial, five accused were convicted under section 365-A PPC and section 7 of ATA and were punished with imprisonment for life and forfeiture of property while one accused was acquitted of charge. The Lahore High Court, Rawalpindi bench dismissed appeal. During pendency of petition for leave to appeal before the apex court compromise was affected between parties and complainant pardoned convict persons. Genuineness of compromise was confirmed through Sessions Judge, Rawalpindi. A question before the apex court was that whether court could allow compromise when offences were not compoundable and there was a bar under section 345 (7) Cr.PC ? In reply to the question Justice Javed Iqbal, writing on behalf of a three member bench of the apex court, dismissed appeal and observed:

It may be noted that tabulation of the offences as made under section 345, Cr.P.C. being unambiguous remove all doubts, uncertainty and must be taken as complete and comprehensive guide for compounding the offences. The judicial consensus seems to be that "The Legislature has laid down in this section the test for determining the classes of offences which concern individuals only as distinguished from those which have reference to the interests of the State and Courts of law cannot go beyond that test and substitute for it one of their own. It is against public policy to compound a non-compoundable offence, keeping in view the state of facts existing on the date of application to compound. No offences shall be compounded except where the provisions of section 345. Cr.P.C. are satisfied as to all 'matters mentioned in the section'.⁶²⁵

The decision of apex court was again assailed by preferring a review petition before the same court.⁶²⁶ Dr. Baber Awan, counsel for petitioner, contended that compounding of offence were guaranteed by all means in the injunctions of Islam as

⁶²⁴ *Muhammad Rawab vs. The State*, 2004 SCMR 1170.

⁶²⁵ See *ibid*, at p. 1174.

⁶²⁶ *Muhammad Rawab vs. The State*, 2006 SCMR 1703.

laid down in the Holy *Qur'an* and the *Sunnah* of Prophet (pbuh) and that aspect of the matter had not been considered by the apex court in its decision. Again the question before the court was that whether parties could be allowed to compound offences which are not compoundable by virtue of provisions of section 345 Cr.PC, especially in view of bar given under section 345(7) Cr.PC? A three member bench of the apex court dismissed review petition by reiterating the findings of an earlier decision in the same case. The *ratio* of *Muhammad Rawab's* case was followed by the apex court in *Ghulam Farid alias Farida vs. The State*, wherein four persons were charged for committing offence of dacoity with murder under sections 396 and 412 PPC and were tried by a Special Court established under the Anti-Terrorism Act, 1997.⁶²⁷ On completion of trial, accused Ghulam Farid was sentenced to death under section 396 PPC and punished with imprisonment for ten years with fine under section 412 PPC. Appeal of accused against conviction and punishment before the Lahore High Court and leave to appeal before the apex court were also dismissed. Subsequently, parties entered into compromise and an application filed by accused convict before trial court for compounding offence on the basis of compromise in terms of section 309, 310 and 338-E PPC was also dismissed. The Lahore High Court also dismissed criminal revision petition against the order of trial court. The decision of High Court was assailed to the apex court through a petition for leave to appeal. Before the apex court, counsel for petitioner contended that though section 396 PPC is non-compoundable even then offence committed by accused be deemed compoundable as ordained under Chapter II, i.e. *Sura Al-Baqarah*, of the Holy *Qur'an* under verses 178 and 179, notwithstanding the provisions of section 345 Cr.PC. In short, question for

⁶²⁷ *Ghulam Farid alias Farida vs. The State*, PLD 2006 SC 53.

consideration before the apex court was as to whether court could compound a non-compoundable offence on the basis of compromise between parties and the concept of forgiveness in Islam? The apex court on the strength of *Muhammad Rawab* case⁶²⁸ held that non-compoundable offence of dacoity with murder could not be compounded within the purview of section 345 Cr.PC. On the prayer of reduction of quantum of punishment on the basis of compromise, Justice Muhammad Nawaz Abbasi, speaking for a three member bench, observed:

This court is not supposed to undertake such an exercise under Article 187 of the Constitution of Islamic Republic of Pakistan and consider the question relating to the quantum of sentence on the basis of compromise between the parties in such a heinous offence which is considered a crime against the Society.⁶²⁹

Similarly, in the case of *Muhammad Nawaz*⁶³⁰, police party raided at a house in order to arrest accused Muhammad Nawaz nominated and involved in a murder case. On police raid, accused and his allies fired at police party and caused death of one constable. Accused along with other persons successfully escaped but later on was arrested. In trial before Anti-Terrorism Court he was, besides other punishments for different offences, convicted and sentenced to death for the offence of murder on two counts. His conviction and sentence was maintained by the Lahore High Court. The apex court also dismissed his petition. The decision of the Supreme Court was assailed by filing Review Petition under Article 188 of the Constitution of Islamic Republic of Pakistan, 1973. During pendency of review petition compromise was affected between parties and it was requested to accept compromise on the ground that compromise was acceptable in the offence of *qatl-i-amd* under section 302 (b)

⁶²⁸ 2004 SCMR 1170.

⁶²⁹ *Ghulam Farid alias Farida vs. The State*, PLD 2006 SC 53, at p. 61.

⁶³⁰ *Muhammad Nawaz vs. The State*, PLD 2014 SC 383.

PPC. Question before the court was whether or not the offence under section 7 of the Anti-Terrorism Act, 1997 is compoundable in terms of section 345 Cr.PC? The apex court relying on *Muhammad Rawab* case denied to accept compromise for an offence falling under section 7 of the Anti-Terrorism Act, 1997 is not compoundable under section 345 Cr.PC. However, on the authority of *M. Ashraf Bhatti and others vs. M. Aasam Butt and others*⁶³¹ quantum of punishment was re-examined by the apex court and observed:

Accordingly, compromise between parties is accepted to the extent of conviction under section 302 (b) P.P.C. and the petitioner is acquitted of the charge. However, the death sentence under section 7 of ATA is converted into life imprisonment and review petition is disposed of.⁶³²

In *Naseem Akhtar vs. The State*⁶³³ the apex court once again reiterated that in cases where offence was committed in brutal manner causing terror and sensation in the society compromise should not be accepted. The *ratio* of *Muhammad Nawaz* case was further followed by the apex court in the case of *Ghulam Qadir*⁶³⁴ wherein accused was convicted for a murder and was sentenced to imprisonment for life. Later on, offence was compounded by a compromise between parties. An application moved on behalf of convict under section 345 Cr.PC before trial court for seeking permission of compromise was dismissed. A criminal revision against the order was also dismissed by the High Court for the reason that there was a bar under section 345 (2) & (7) Cr.PC for entertaining compromise application. The question of accepting compromise in cases of terrorism again arose in *Kareem Nawaz Khan vs. The State*

⁶³¹ *Muhammad Ashraf Bhatti vs. M. Aasam But*, PLD 2006 SC 182.

⁶³² *Muhammad Nawaz vs. The State*, PLD 2014 SC 383, at p. 388.

⁶³³ *Naseem Akhtar vs. The State* PLD 2010 SC 938.

⁶³⁴ *Ghulam Qadir vs. The State*, PLD 2012 Sindh 277.

*through PGP and another.*⁶³⁵ In this case the Anti-Terrorism Court convicted accused under section 302 PPC and under sections 7 & 21(L) of the Anti-Terrorism Act, 1997 for he had committed murder of two ladies and a man. Consequently, he was punished under section 302 PPC with death for committing three offences of *qatl-i-amd*. He was also sentenced to death under section 7 (a) ATA and fine. He was further sentenced to five years' rigorous imprisonment under section 21(L) ATA. Appeal of accused was dismissed by the Lahore High Court and death sentence was confirmed. The Supreme Court also dismissed two petitions of accused and conviction and punishments awarded by ATC attained finality. Later on, on the basis of compromise accused moved an application under section 338-E PPC which was dismissed by the ATC to the extent of section 7 ATA while application was accepted to the extent of 302 PPC. The Lahore High Court dismissed a Writ Petition against dismissal of application to the extent of section 7 ATA. So a civil petition was moved before the apex court against the decision of the Lahore High Court. Since an issue, as to whether after affecting a compromise between parties in an offence of *qatl-i-amd* under clause (b) of section 302 PPC, punishment awarded under section 7 of the Anti-Terrorism Act, 1997 can independently be maintained, was already pending before a bench of five judges of the apex court so a bench of two judges of same court suspended punishment of accused. The question before the apex court was as to whether compounding of an offence of *qatl-i-amd* under clause (b) of section 302 PPC between parties would *ipso facto* eliminate the effect of conviction recorded under section 7 ATA, 1997 or once maintaining conviction up to the apex court

⁶³⁵ *Kareem Nawaz Khan vs. The State through PGP and another*, 2016 SCMR 291.

subsequent compromise would have no effect on it being a past and closed transaction? Justice Anwar Zaheer Jamali, relying upon many earlier cases, observed:

The offence under section 7(a) of the Act of 1997 is an independent one, which is non-compoundable, thus the sentence awarded under this provision of law is also independent to other sentences under section 302(b), P.P.C. etc., which may be compoundable in nature. Therefore, in view of the bar contained in subsection (7) of section 345, Cr.P.C., conviction of an accused under the Act of 1997 will remain intact despite compromise in other sentences in compoundable offence.⁶³⁶

In a latest case, *Kashif Ali vs. The Judge Anti-Terrorism Court No. II, Lahore and others*, a larger bench of the apex court was constituted in order to settle law by approving correct law in contradictory judgments of the apex court.⁶³⁷ Accused persons were booked in a criminal case registered under section 302/34 PPC and under section 7 ATA for killing two persons by firing upon them after chasing them and successfully made good their escape from the site. During trial of the case an application, moved by one of the accused persons for transferring case to the court of ordinary jurisdiction as provisions of section 7 ATA were not attracting in the case, was dismissed. The order of trial court was assailed to High Court in a Writ Petition which was allowed and the case was transferred to the court of ordinary jurisdiction relying on the cases of *Bashir Ahmed*⁶³⁸ and *Basharat Ali*⁶³⁹. Feeling aggrieved, order of the High Court was challenged by Kashif Ali, complainant of the case, to the apex court through filing a petition for leave to appeal. It was argued before the apex court that reliance upon the judgments was not proper for the case of *Basharat Ali* was over-ruled by the judgment in *Mirza Shaukat Baig and others vs. Shahid Jamil and*

⁶³⁶ See *ibid*, at p. 295.

⁶³⁷ *Kashif Ali vs. The Judge Anti-Terrorism Court No. II, Lahore and others*, PLD 2016 SC 951.

⁶³⁸ *Bashir Ahmed vs. Muhammad Siddique and others*, PLD 2009 SC 11.

⁶³⁹ *Basharat Ali vs. Special Judge, Anti-Terrorism Court-II Gujranwala*, PLD 2004 Lahore 199.

others⁶⁴⁰ and the impugned judgment was *per incuriam*. On the other hand, counsel for accused Mr. Ehtezaz Ehsan contended that ‘design to create terror’ is different from ‘design to kill’ and argued that section 6 of the ATA in its present form draws a line between cases of terrorism and cases of personal vendetta. And as per supplementary statement of the complainant there was a dispute of land between parties so it was contended that provisions of section 6 of ATA could not apply in the case.⁶⁴¹ He further contended that legislature had deliberately used word ‘design’ and not ‘intent’, The larger bench of the apex court observed that correct law had been enunciated by the apex court in the case of *Mirza Shoukat Baig and others* wherein an act of spreading terror, fear, sensation, panic, insecurity and helplessness was declared terror under section 6 of the Anti-Terrorism Act, 1997 so such acts could be tried by the special court constituted for such offenders. The larger bench of the Supreme Court of Pakistan, therefore, sent the matter again to the Anti-Terrorism Court with a direction to dispose of the matter within shortest possible time.

Regarding the scope of section 6 of the ATA Justice Amir Hani Muslim remarked:

Before parting with this judgment, we would like to observe that this Court cannot lay down any hard and fast rules while interpreting Section 6 of the Act in order to conclude as to which of the cases is triable by the Anti-Terrorism Court, as in many criminal cases, facts of the case are also one of the factors in determining the jurisdiction of a criminal Court. However, we have attempted to generalize the principles which need to be applied by the Courts while deciding the jurisdiction of an Anti-Terrorism Court.⁶⁴²

⁶⁴⁰ PLD 2005 SC 530.

⁶⁴¹ Reliance placed on *Basharat Ali* case, *Muhammad Mumtaz Qadri's* case PLD 2016 SC 17; *Ahmed Jan vs. Nasrullah*, 2012 SCMR 59; *Bashir Ahmad* case, *Tariq Mehmood vs. The State*, 2008 SCMR 1631; *Fazal Dad vs. Col. Retd. Ghulam Muhammad Malik*, PLD 2007 SC 571 and *Muhabbat Ali and another vs. The State and another*, 2007 SCMR 142.

⁶⁴² *Kashif Ali vs. The Judge Anti-Terrorism Court No. II, Lahore and others*, PLD 2016 SC 951 at p. 960.

Hence, principle of *fasad-fil-arz* under section 311 PPC becomes irrelevant when accused is tried for any offence punishable under a special law relating to acts of terrorism. Moreover, as discussed in previous chapter, it has been reiterated clearly by a larger bench of seven members of the apex court in the case of *Moinuddin* that a non-compoundable offence cannot be treated compoundable due to compounding a coordinate compoundable offence.⁶⁴³

10.5 POPULAR UPRISING ON UNJUST APPLICATION OF QISAS AND DIYAT LAW IN FEW CASES OF QATL-I-AMD

There are some, relatively recent, decisions of Pakistan judiciary which invited public rage and once again application of *qisas* and *diyat* law was questioned by civil society. The way these cases of *qatl-i-amd* were disposed of by judiciary is more alarming than the commission of offences.

10.5.1 Raymond Davis' Case

Raymond Davis, an American citizen, while working as an US Embassy's Employee in American Consulate - Lahore, shot two young men in day light in a congested area of Lahore city on 27-01-2011. One of the injured persons succumbed to injuries of numerous fires by pistol. Another tried to flee away but the murderer got out of his car and shot several bullets into his back. Meanwhile, to help him out a land cruiser

⁶⁴³ *Moinuddin and others vs. The State and others*, PLD 2019 SC 749.

of American Consulate appeared from wrong side of the one-way road, hit a motorcyclist, killed him and drove away. The third murder further infuriated Pakistanis. The furious civil society demanded government not to surrender before the USA because it was a matter of sovereignty and dignity of nation. Arrest of the American citizen aggravated tense relations between two States. The accused was charged with offences of double murder and keeping with him illegal weapon. During investigation Raymond Davis submitted his written statement wherein he took ground of self-defence but according to the finding of investigation officer his defence was not commensurate with the alleged threat.⁶⁴⁴ Two men who killed the motorcyclist by hitting him left Pakistan instantaneously and when investigation against them was demanded by Pakistan government it was refused by the US Government.⁶⁴⁵

On behalf of each side different versions were extended. Pakistan government took stance that Raymond Davis had no blanket immunity as he was not a diplomat. This hard line stance was taken by the then Foreign Minister, Shah Mehmood Qureshi who invited wrath of the then President of Pakistan, and he had to lose cabinet membership.⁶⁴⁶ As against to the version of Pakistani Officials, narrative of the USA was that her diplomat in Islamabad had killed two men in self-defence who threatened him and subsequently he had been kept under unlawful confinement in jail. Neither status of Mr. Raymond Davis was clearly denied by Pakistani government officially nor his passport and other official record made public which constitutes a failure on the part of government to meet requirements of International

⁶⁴⁴ The Guardian International, '*A CIA spy, a hail of bullets, three killed and a US-Pakistan diplomatic row*', published on Sunday 20 Feb 2011.

⁶⁴⁵ The Guardian International, '*American who sparked diplomatic crisis over Lahore shooting was CIA spy*', published on Sunday 20 Feb 2011.

⁶⁴⁶ The Express Tribune Pakistan, '*Raymond Davis does not have blanket immunity*', published on 16-02-2011.

Law.⁶⁴⁷ On the other hand, the USA officials kept changing stance regarding the status of accused as to whether he was a diplomat or mere an employee of its Consulate of Lahore. It was about three weeks after his arrest that the USA government admitted that Raymond Davis was a CIA contractor and a member of team tracing militants within Pakistan.⁶⁴⁸ However, the USA wanted his man to be set free as he was enjoying diplomatic immunity from conviction being an ambassador. Meanwhile, the judiciary in Pakistan was hearing the case in order to determine the diplomat or no diplomat status of accused. After about a fortnight of occurrence, the US President Mr. Obama in a news conference reiterated the matter as “Davis, our diplomat in Pakistan, should be immediately released under the very simple principle of diplomatic immunity. If our diplomats are in another country, then they are not subject to that country’s local prosecution.”

The American Government relied on the Pakistan People Party’s government to cut a deal for getting Raymond Davis released from jail. Pakistan government was taking time to avoid public regression and any adverse scenario for government. Throughout the country, Islamists groups, religious parties and civil society organized street protests. According to newspapers’ reports, at some places, charged members of civil society extended threats of violent riots in case Raymond Davis was not prosecuted, convicted and punished with death for his offence. Being disappointed from justice through prevailing legal and judicial system, one of the slain Pakistanis’ widow committed suicide in Faisalabad by swallowing poisonous pills. Her death also added fuel to fire and the occurrence gained more sympathies of public across

⁶⁴⁷ Rumi Raza, ‘*Raymond Davis case: Bitter truths*’; The Express Tribune, published on February 16, 2011.

⁶⁴⁸ K. Alan Kronstadt ‘*Pakistan-U.S. Relations*’ published in Congressional Research Service on May 24, 2012.

the country. She committed suicide for having been dissatisfied with the fate of murder of her husband.

On accepting a petition against Raymond Davis the then Chief Justice of the Lahore High Court directed the Federal Government to certify the official status of Raymond Davis. The Chief Justice further observed that if accused was a diplomat then he could, of course, claim diplomatic immunity otherwise law would take its own way.⁶⁴⁹ The observation of the Lahore High Court put the Federal Government into a difficult situation. In both options the Federal Government had to face either USA Government's displeasure or the fury of the masses in Pakistan. During incarceration of Raymond Davis in Lahore Jail, the Senator John Kerry, Chairman of the US Senate Committee on Foreign Relations, visited Pakistan for ensuring release of Raymond Davis.⁶⁵⁰ No doubt, a series of killings had aggravated already tumultuous and hypersensitive relationship between the two States due to issues relating to war against terrorism. Disposal of case under the normal judicial process was not acceptable to the US government. Eventually, for the release of Raymond Davis a new solution was carved out when the then Chief of Inter-Services Intelligence⁶⁵¹ met with the USA Ambassador⁶⁵² in Islamabad.⁶⁵³ For resolving the issue meeting was also held between the top military officials of both States in abroad.⁶⁵⁴ Finally, the agreed solution was based on amicable settlement outside courts which was acceptable under *Sha'riah* law relating to murder. Families of both

⁶⁴⁹ See *ibid*, at p. 115.

⁶⁵⁰ Hassan Tariq, '*Diplomatic or Consular Immunity for Criminal Offenses*'; Virginia Journal of International Law, 2011 Volume II Page 17, at p. 18.

⁶⁵¹ An intelligence agency of Pakistan was headed at that time by General Shuja Pasha.

⁶⁵² Mr. Cameron Munter was the then USA Ambassador in Pakistan.

⁶⁵³ Mazzetti Mark, '*The Way of the Knife; The C.I.A., a Secret Army, and a War at the Ends of the Earth*,' published by the Penguin Press. A version of this article appeared in print on 14-4- 2013, at page MM30 of the Sunday Magazine with the headline: *Pakistan's Public Enemy*.

⁶⁵⁴ Jetly Rajshree, '*The Raymond Davis Case*'; published in the ISAS Brief No. 191 on 28-03-2011.

deceased were approached through the auspices of ISI under the headship of General Pasha. Ultimately, parties showed their willingness on a total consideration of 2.34 Million US Dollars. The government of Pakistan never disclosed that who actually had paid the amount for settlement. Nonetheless, the United States Secretary of State, Hilary Clinton in an interview denied payment of compensation by the US government. *Diyat* under Islamic law is paid by accused or his family / *aqilah* but in the case of Raymond Davis neither he nor the US Government paid rather *diyat* amount was paid by the government of Pakistan.⁶⁵⁵ On 16-03-2011, some eighteen family members and relatives of deceased persons appeared before the court and got recorded their statements of compounding offence of *qatl-i-amd*. Consequently, the culprit was acquitted of charges.

The case of Raymond Davis, from his arrest to release, is disclosed by him in his book.⁶⁵⁶ What Raymond Davis has revealed in his book about compromise and acquittal the same, more or less, is reiterated by the authors of two other books - '*The Way of the Knife*'⁶⁵⁷ and '*The Exile*'⁶⁵⁸. What happened inside the court room on day of acquittal of Raymond Davis is worded by Mark Mazzetti in his book as 'the laws of God had trumped the laws of man'. The deal may be face-saving for both governments but not for Pakistani legal system and the judiciary. The difference in transparency of both legal systems, i.e. USA and Pakistan, can be adjudged by subsequent incarceration of Raymond Davis in a US jail. In fact, after about seven months of his departure from Pakistan, Raymond Davis committed offence of felony

⁶⁵⁵ Strasser Peter G., '*The Evolving Pakistani Criminal Justice System: A Study of the Raymond Davis Matter*' published in 'TULANE J. OF INT'L & COMP. LAW' 2014 [Vol. 23] pp.107-149, at p. 139.

⁶⁵⁶ Davis Raymond, '*The Contractor*', BenBella Books, Inc., Dallas, First Edition (2017) .

⁶⁵⁷ Mazzetti Mark, '*The way of the knife*'; The Penguin Press, New York (2013).

⁶⁵⁸ Scott Cathy - Clark and Levy Adrian, '*The Exile*'; Bloomsbur, New York, USA, First Edition (2017).

assault, on 01-10-2011, against Jeff Maes on a trivial matter of car parking. In this case Raymond Davis was tried and jailed by a local court of the USA.

Strategically, no doubt, acquittal of Raymond Davis from a double murder case was in the interest of both States - Pakistan and USA. But in terms of statutory law and judicial precedents, the way compromise was reached at left few questions on the transparency of the legal and judicial systems of Pakistan. First, is this not illegal to release a person before completion of trial especially when murders were committed in an unashamed and heinous manner by firing multiple bullets? Two, can it be called a genuine compromise when accused was himself unaware of composition, its terms and conditions? Is acquittal of accused legal when not a single penny he paid as *diyat*? Why did judge hurry in recording statement of about 18 legal heirs ignoring the presence of some influential persons inside the court room? Why none of the judicial forums probed the matter of genuineness of compromise, subsequently?

Had trial of Raymond Davis completed in accordance with law, he might be convicted and punished under Anti-Terrorism Act, 1997 or under section 311 PPC as in this case principle of '*fasad fil-arz*' had attracted fully.

10.5.2 Shahrukh Jatoi's Case

Another cold blood murder wherein the apex court had to take *suo moto* action twice-first on media clippings when occurrence took place and again to reiterate its answer to a question as to whether provisions of the Anti-Terrorism Act, 1997 apply in the

case?⁶⁵⁹ Succinctly, it was murder of a twenty years old Shah Zaib Khan, a university student and son of a Deputy Superintendent of Police, who was gunned down in the fateful night of 24-12-2012 in the area of the Defence Housing Society, Karachi. Backdrop of the incident was that before occurrence, the deceased's sister was flirted by some of accused persons. When she informed her family, her brother Shah Zaib Khan went to protect her. When he reached at the place initially he had a verbal fight with Murtaza Lashari who called Siraj Talpur and others. On that day the issue was resolved by the father of Shah Zaib Khan by pacifying both sides but later on accused chased the car of Shah Zaib Khan and shot him dead. Consequently, a criminal case FIR No. 591 was registered at Police Station Darakhshan, District South Karachi on 25-12-2012, under sections 302/34 of the Pakistan Penal Code, 1860. Main accused Shahrukh Jatoi escaped Dubai on 27-12-2012 who was later on brought back to Pakistan by local Police. The incident sparked widespread outrage across the country for accused was given a special treatment by local police. Moreover, confidence and body language of main accused Shahrukh Jatoi sans any embarrassment, as he displayed before camera, was watched and discussed by all and sundry. Accused persons were given special care and treatment due to their family influence. Even main accused, on medical grounds, was kept under treatment in hospital. Due to an unusual and unprecedented treatment given by investigating agency to an accused of heinous offence, the incident was covered by social media, local media and

⁶⁵⁹ *Suo moto* notice of the matter was taken up through Constitution Petition No. 1 of 2013. The case was finally disposed of by the apex court on 22-02-2013 with a finding that since provisions of the Anti-Terrorism Act attracted in the case so the Anti-Terrorism Court would proceed with the trial of the case.

international media. It raised once again every one's eyebrows especially on this particular case and generally on overall *qisas* and *diyat* law of Pakistan.⁶⁶⁰

On the basis of media reports, Justice Iftikhar Muhammad Chaudhary, the then Chief Justice of Pakistan, took *suo moto* notice and when investigation became ripe up the Supreme Court gave a guideline to trial court holding that provisions of the Anti-Terrorism Act, 1997 are attracted in the case.⁶⁶¹ Hence, trial of accused persons was conducted by the Anti-Terrorism Court No. III, Karachi and on completion of trial vide its judgment dated 07-08-2013 court convicted and sentenced Shahrukh Jatoi, the main accused, his friend Siraj Talpur and two others. Though all accused were convicted under section 7(a) of the Anti-Terrorism Act, 1997 to be read with sections 302, 109/34 of the Pakistan Penal Code, 1860 but only main accused, i.e. Shahrukh Jatoi, and his friend Siraj Talpur were sentenced to death while two other accused namely Ghulam Murtaza Lashari and Sajjad Talpur were sentenced for life imprisonment.

Decision of Anti-Terrorism Court was assailed by convicts before the High Court Sindh, Karachi.⁶⁶² The High Court, ignoring the direction of the apex court, after hearing case dropped relevant sections of the Anti-Terrorism Act, 1997 and remanded case back to the court of proper jurisdiction, i.e. Sessions Judge, for *de novo* trial and decision afresh. For an unexpected decision of special court, the victim family of deceased under disappointment from the outcome of legal proceedings had

⁶⁶⁰ Shah Waseem Ahmad, 'Pros and Cons of Qisas and Diyat law', Daily Dawn, dated 16.09.2013.

⁶⁶¹ The apex court vide its order dated 22-02-2013 had directed trial court to proceed with trial of the case on day to day basis. The apex court also reiterated its guideline given in the case of *Sheikh Liaqat Hussain and others vs. Federation of Pakistan through Ministry of Law, Justice and Parliamentary Affairs and others*, PLD 1999 SC 504.

⁶⁶² Trial Court sent a reference i.e. Confirmation Case No. 1/2013 to the High Court Sindh. A Special Criminal Appeal No. 25/2013 was moved by the convict persons. Similarly, a Criminal Revision Petition was preferred by the complainant of the case before the High Court Sindh for the enhancement of sentence of those accused persons who were awarded only punishment of imprisonment.

decided to patch up the matter. Subsequently, a bail petition on behalf of accused persons was moved before the Court of Session on a fresh ground of compromise affected between both parties. In this regard an affidavit was submitted by Shah Zaib Khan's father before the Court of Sessions Judge, South Karachi for allowing bail petition of Shahrukh Jatoi.⁶⁶³ The affidavit was for pardoning of accused in the name of *Allah* and for dropping murder case of deponent's deceased son. On the basis of compromise, on 23-12-2017 bail was granted to Shahrukh Jatoi and others. Consequently, Shahrukh Jatoi was released from Jinnah Hospital, Karachi wherein he was kept for medical treatment while other accused persons were released from jail. It seems that it was pathetic and lengthy legal process which forced the aggrieved family to patch up the matter outside court. The mother of deceased, namely Ambreen Aurangzeb, showing her resentments and disappointment, in her interview to a newspaper, i.e. Daily Dawn, reporter had explained reasons of compounding the offence as follows:

The death of Shah Zaib's killers will not bring back her son. We may not have forgiven them in our hearts, but we have pardoned our son's killers in the name of Allah. She had pardoned the killers as she was still not convinced that the culprits would be punished even after their arrest and convictions. We cannot spend our entire lives in fear [...] we took the decision considering the circumstances.⁶⁶⁴

In this scenario, ultimate outcome of case was acquittal of accused persons as on the basis of compromise. However, order of Division Bench of the Sindh High Court, dated 28-11-2017, whereby sections of Anti-Terrorism Act, 1997 were dropped, was assailed by the members of civil society before the Apex Court of

⁶⁶³ See Daily Dawn dated 23-12-2017. Bail was allowed by Mr. Imdad Hussain Khoso, Learned Sessions Judge, Karachi South subject to furnishing surety bond to the tune of Rs. 500,000/- by each accused.

⁶⁶⁴ See Daily Dawn, dated 09-09-2013.

Pakistan by filing three independent petitions for leave to appeal. These petitions presented on behalf of civil society were signed by above four hundred people of different areas of Pakistan and of different walks of life. According to petitioners the Sindh High Court had erred placing reliance on precedent cases of the Supreme Court of Pakistan.⁶⁶⁵ Petitioners also alleged that the State through its Prosecutor General Sindh unjustly and unlawfully conceded the case of accused persons resultantly failed to carry out its legal and moral responsibility to protect the fundamental rights of citizens as safeguarded under the Constitution of Islamic Republic of Pakistan, 1973. Members of civil society in their petitions also took plea that citizens might lose their confidence in the criminal justice system if on the basis of mere compromise accused are acquitted and this perception would further strengthen the belief that legal system favours the rich.⁶⁶⁶ Through social media campaign it was demanded that the rich and the powerful be held accountable for their offences. Many lawyers and Human Rights' activists argued before the apex court that provisions of section 311 PPC should be invoked to create deterrence and in order to control the increase rate of murder cases.⁶⁶⁷ The Supreme Court of Pakistan accepted these petitions for leave to appeal by converting them into *suo moto* case and recalled the order of the Division Bench of the Sindh High Court by passing a short order.⁶⁶⁸ Consequently, the Supreme Court set aside a common order of the High Court, order for remanding case to the court of ordinary criminal jurisdiction for *de novo* trial and the post remand

⁶⁶⁵ The High Court Sind relied upon the decision of the Supreme Court in cases of *Waris Ali and other vs. The State*, 2017 SCMR 2572; *Kashif Ali vs. the Judge Anti-Terrorism Court Lahore and others*, PLD 2016 SC 951 and *Shahbaz Khan Tippu vs. Special Judge, ATC Lahore*, PLD 2016 SC 1.

⁶⁶⁶ See 'Roundtable Discussion on 'Qisas' and 'Diyat' Law within the Criminal Justice System, dated 21-09-2013 published by the SOL School of Law. Retrieved online on 10-10-2015.

⁶⁶⁷ Shah Waseem Ahmad, 'Pros and cons of Qisas and Diyat law', published on 16-09-2013.

⁶⁶⁸ *Muhammad Jibrán Nasir and others vs. The State and others*, PLD 2018 SC 351. Criminal Appeals No. 1-K to 3-K of 2018 were moved before the apex court of Pakistan were converted by the court into *Suo Motu* Case No. 01 of 2018.

proceeding whereby accused were admitted to bail. Moreover, appeals before the High Court were ordered to be remained pending and a new constituted bench of the High Court would dispose of the matter within a span of two months. Consequently, bail concession extended to accused was recalled, they were ordered to be taken into custody again and their names were placed on Exit Control List. In its judgment the Supreme Court was pleased to give reasons of its order dated 01-02-2018. A three member bench of the apex court while accepting leave to appeal raised a few important questions. In the Judgment, authored by Justice Asif Saeed Khan Khosa, one of those questions is raised as follows:

It also needs to be examined as to whether the legislature had correctly amended the Pakistan Penal Code (PPC) and the Code of Criminal Procedure (Cr.P.C.) in the light of the judgment passed by the Shariat Appellate Bench of this Court in the case of Federation of Pakistan through Secretary, Ministry of Law and another Vs. Gul Hasan Khan (PLD 1989 SC 633) or not because waiver or compounding of the offence of murder was declared to be permissible in the Injunctions of Islam which are relevant to cases of Qisas and Hudood and not to cases of Tazir. The case in hand was a case of Tazir and not of Qisas, particularly whether the ratio of the above judgment shall apply to the cases where it is proved that the matter falls within the purview and scope of the Anti-Terrorism Act, 1997.⁶⁶⁹

The Supreme Court, however, avoided attending the above stated point raised by the court itself at the time of granting leave to appeal and it was left to be taken up in some other appropriate case.⁶⁷⁰

Unlike *Shahrukh Jatoi's* case, in the case of *Raymond Davis* selective justice of Pakistan judiciary is vivid, despite a series of killing took place in day light, in a busy area of Lahore and the incident equally invited attention of media and civil society but judiciary refrained from interfering. Even a question as to whether

⁶⁶⁹ See *ibid*, at p. 356.

⁶⁷⁰ See *ibid*, at p. 366.

Raymond Davis had or had not status of Diplomat was yet to be decided by the High Court but on the basis of compromise accused was acquitted at initial stage of trial. The apex court of Pakistan also did not take *suo motu* action on the incident despite heinous and brutal nature of offence. On the other hand, a stern and quick response from the side of apex court had been witnessed in *Shahrukh Jatoi's* case.

10.5.3 Murder Committed by Colonel Joseph Emanuel Hall in Islamabad

Another American diplomat namely Colonel Joseph Emanuel Hall in a road accident hit and killed a boy and injured another in Islamabad.⁶⁷¹ The Islamabad High Court had taken up the matter when two successive Writ Petitions were moved for restricting the departure of accused to abroad.⁶⁷² The High Court, however, decided both petitions in favour of the respondent accused on the ground that he had diplomatic immunity under the Vienna Convention and cannot be tried under the law of Pakistan. Moreover, the US embassy had refused the request of the Foreign Office whereby the US embassy was asked to withdraw defence of diplomatic immunity so that he could be tried in Pakistan.⁶⁷³ Eventually, accused left Pakistan on 14-05-2018 most probably due to a compromise between parties. However, the decision of the Islamabad High Court regarding the diplomatic status of accused was not assailed by the complainant to the apex court.

⁶⁷¹ The matter was reported and a criminal case FIR No.168/18, dated 07-04-2018 was registered in Police Station Kohsar, Islamabad.

⁶⁷² Writ Petitions No. 1385/2018 and No. 1386/2018 titled '*Adnan Iqbal vs. Federation of Pakistan etc.*' and '*Muhammad Idrees vs. Colonel Joseph Emmanuel etc.*,' respectively, were heard and decided by Justice Amir Farooq of Islamabad High Court, Islamabad.

⁶⁷³ See '*US gets diplomat involved in road accident out of Pakistan*', Daily Dawn dated 15-05-2018.

10.6 CONCLUSION

Discussion under this chapter can be summarised here. In cases of conviction and sentence under section 302(a) PPC even if a wali or *walis* of deceased either have waived *qisas* or compounded *qisas* but offence was committed brutally or there be an element of terror or principle *fasad-fil-arz* is attracted then courts are empowered under section 311 PPC to award punishment of *ta'zir* despite waiver or compounding *qisas*. On the other hand, if accused is convicted and sentenced under section 302(b) PPC or under section 302 (c) PPC by way of *ta'zir* then permission of court, under sections 345 Cr.PC and 338-E of the PPC, is required for compounding offence if all *walis* of deceased agree on such composition. In such cases settled law is that provisions of section 311 PPC do not attract but courts may reject compromise. Since offences of terrorism falling under the purview of the Anti-Terrorism Act, 1997 are non-compoundable so compromise is not accepted in such cases. Burning issue of today is frequent acquittal of killers on the basis of compromise because compromises even in compoundable cases sometimes are unwelcomed by the vibrant civil society, like Raymond Davis case. Modern social trends, wishes and expectations of masses are reasonable which must be taken into consideration by the legislature for revisiting existing law and the judiciary should also interpret law keeping in view the sentiment of members of modern society. The honourable acquittal of Raymond Davis, a killer of two young men in heinous way, from judicial custody under the garb of compromise and the way composition was reached between parties exposed the ineffective and flawed legal system of Pakistan at global level.

CHAPTER 11

MODERN STANDARDS AND APPLICATION OF *QISAS* AND *DIYAT* LAW OF PAKISTAN

11.1 INTRODUCTION

Modern world is different from ancient times due to scientific research, inventions, discoveries, well aware individuals and advanced society. Social change can be assessed by modern standards of society like literacy, civilization, industrialization, urbanization, development, technology, constitutionalism, democracy and above all human rights. Modernity affected social life and as an aspect of society it also affected conception of law, legal system and dispensation of justice. This chapter is about modern trends of law of modern societies having capability of addressing social problems and fulfilling day-to-day needs. The chapter covers modern jurisprudence, modernised laws and role of judges in developing laws through interpretation. The chapter also concisely highlights modern changes in the law of murder of few modern jurisdictions including the United Kingdom, the United States of America and India. New trends introduced into criminal laws of these States will help us to seek guidance therefrom. Moreover, this chapter guides as to how criminal law of Pakistan relating to offences affecting human body can become compatible with Islamic injunctions as laid down in the Holy *Qur'an* and the *Sunnah* of the Prophet Muhammad (pbuh) and modern standards of law so that the law must be capable of addressing the challenges of today world and needs of modern society.

11.2 CHANGING SOCIETY AND LAW

Law is made by a political society⁶⁷⁴ and it is not stagnant in its modern discourse but it keeps on changing with the change of society. In other words, change in a society brings change in its law. Normally, in many jurisdictions including United Kingdom, United States of America and India from time to time law reforms are introduced. In these jurisdictions laws commissions are constituted at government level. Generally, a law commission conducts enquiries, reviews existing laws and proposes reforms in order to clarify law and modernize it. Unfortunately, for reforming laws such serious efforts never had been made in Pakistan. Even the process of Islamizing laws relating to offences of homicide and bodily injuries was given impetus by the successive decisions of Pakistan judiciary. Despite protest of opposite parties, the then ruling party got passed the Criminal Law Amendment Act, 1997 from the Parliament without any debate. The parliamentarians avoided debate knowing that depriving one from his life or act of taking one's life unlawfully is considered one of the most heinous offences in every society.

Law, in its modern discourse, is considered to be for society. Today, conception of law in social perspectives is due to human rights and social rights movements in the western democracies. Most of these movements emerged from Europe and USA after two world wars and affected the jurisprudence of different jurisdictions. Even English jurisprudence, which at times had influenced many

⁶⁷⁴ Denham Paul, '*Law - A modern introduction*', 4th Edition; Hodder & Stoughton, at p. 17.

common wealth States of the world, has not same content as it had in seventeenth and eighteenth centuries.

11.3 MODERN JURISPRUDENCE AND LAW

The destructive end of World War-II realized the world nations that wars were no more a solution to political problems. Consequently, war ridden world resorted to reconstruction and rehabilitation. Process of re-construction in the Western world also changed the politics and jurisprudence of western democracies. Unlimited powers of monarchy were discouraged and monarchical system was replaced with constitutionalism and democracy. Role of society gradually increased and people started electing their representatives in the legislature and the governments on the basis of one man one vote principle. Through constitutions, State powers were distributed among different organs and these powers were balanced by creating a check of each organ over the others. Similarly, theories of law like 'natural law' and 'positive law' were also being discussed with reference to new changes. In this process lawyers, judges, and social scientists played an unforgettable role. It will not be incorrect to say that legal theories like 'legal realism' and 'sociological school of thought' are post World Wars phenomena. Legal realism has, in fact, replaced legal formalism. Since statutory law, enacted by the legislative organ of a State, is applied by executive, including many State agencies, and is interpreted by judiciary so in the processes of application, adjudicating and interpretation of such laws judges not only travel beyond statutes but they add into law as well. Nevertheless, constitutionalists object the trend of judicial intervention in legislative matters as it, according to them,

is contrary to the idea of supremacy of legislature and democratic principles. Hence, the first half of the twentieth century gave rise to two new theories of law - legal realism and sociological theory of law.

11.3.1 Meaning Of Jurisprudence

Jurisprudence is the name of systematic study of law. In the words of G.W. Paton, jurisprudence is a particular method of study, not of the law of one country but of the general notion of law itself.⁶⁷⁵ Decline of legal positivism was the renaissance of the natural law theory and theories of rights. Second half of nineteenth century saw a revolution of technology and industrialization. For their livelihood and due to life facilities people started putting up in urban areas which resulted into heterogeneous societies in shape of big towns and metropolitans. Development of world and a new pattern of society demanded new laws to regulate day to day business of the modern society. First half of the twentieth century witnessed two World Wars causing huge loss to humanity. Consequently, Human Rights activists and International Non-government organizations (NGOs) voiced internationally for recognition, propagation and protection of some basic rights of human being. In fact, it was modern society that had reshaped the world especially in the twenty-first century. Modern society generally in entire world and particularly in western democracies has also affected jurisprudence. So today, when we study law we try to understand it in its modern social perspectives. Modernity in society and socio-economic changes influenced law and theories of jurisprudence. Resultantly, jurists and judges took law as a social

⁶⁷⁵ Paton George White Cross '*A Text Book of Jurisprudence*'; Fourth Edition, Oxford University Press, at page 2.

phenomenon and they started studying it as a living organ of a State or a society. For proper understanding of modernity of law, it is expedient to have a cursory look upon juristic views of proponents of two relatively latest theories of law, i.e. Legal Realism and Sociological School of Law. In both these theories, we see contribution of social scientists, lawyers and judges. Most of them are strong advocates of understanding law in social perspectives; involvement of society in the process of justice and moulding laws for satisfying social concerns and demands.

11.3.2 *Legal Realism; A Response against Legal Formalism*

Legal formalism emphasizes on law as a body of settled and known principles which in itself is enough to give a legal system and can give solution to all queries without having recourse to any of outside considerations. Theory of legal formalism revolves upon a thesis of Ronald Dworkin that there is always a right answer to every legal question.⁶⁷⁶ In legal formalism, judicial legislation is not recognized and formalists deny that judges make law rather they believe that judges discover law where-ever it might be. In other words, formalists are proponents of natural law theory who believe in discovery of law by courts. Formalists are also called constructionists as they believe that judges decide cases according to law whatever it might be but judges have no power to make law. If judges make law then it will, according to formalists, constitute counter-majoritarianism as making law is a function of parliamentarians, i.e. elected representatives of majority of people in a State. Theory of legal realism is an idea against legal formalism. Realists do not believe in what law 'ought to be'

⁶⁷⁶ Nyazee, Imran Ahsan Khan, '*Jurisprudence*'; Advanced Legal Studies Institute, published by Federal Law House, at p. 127.

rather they believe what law 'is' and in this sense realists are positivists. More than 'what law is?' they urge 'what judges do' is, in fact, law. According to Raymond Wacks realists are concerned with actual operation of law in its social context.⁶⁷⁷ So, realists believe in uncertainty of law and according to them judges have to play their role in construing law. In other words, theory of legal realism is that law is what judges do but not what they say. What judges do is concerned with personality, belief and thinking of a judge. In other words, decision of a judge will be quiet predictable for one who knows the judge best. Realists are interested in all such forces which affect or influence a judge in reaching a decision. In short, realists, whether American or Scandinavian, have declared a war against absolute values like justice, morality and law. They are empirical as well as realistic.⁶⁷⁸

In the development of American legal realism, leading role was played by Oliver Wendell Holmes, Benjamin Nathan Cardoso, Karl Llewellyn and Jerome Frank. These four big guns, as members of the movement of legal realism, have shaped out the American realism through their writings. Oliver Wendell Holmes (1841-1935) started his career as a lawyer. He also served as a judge. He remained judge of the Supreme Court of the United State of America from 1902 A.D. to 1932 A.D. He coined a theory called 'bad man theory' also known as prediction theory.⁶⁷⁹ According to the 'bad man theory' a law can be known and predicted by mere material consequences of an act. A bad man, who otherwise has no respect of law, predicts his acts with their consequence that how courts will treat him and will punish him subsequently for his act. He will not violate it if he foresees strict action by

⁶⁷⁷ Wacks Raymond, *Jurisprudence*, 5th Edition, at p. 139.

⁶⁷⁸ See *ibid* at p. 138.

⁶⁷⁹ See *ibid*, at p. 141.

judges and courts.⁶⁸⁰ Hence, according to Holmes, a legal system is defined by predicting law by its effects on a person rather than any ethics or moral rule underlying a law. He, therefore, claimed that the life of law is not logic but experience. Holmes also said that the only proper sense of law was judicial decisions.⁶⁸¹ For Holmes, law and society are always in flux and courts adjudicate with an eye on law's practical effects. He further comments that legal adjudication comes down to weighing questions of social advantage according to the exigencies of the age. In his well-known book⁶⁸², Oliver Holmes described law in the following words:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.⁶⁸³

Oliver Wendell Holmes's contribution to the USA's law is formidable. His writings and theory provided a springboard to his contemporaries to think and write on law from different angles. Another American realist, Benjamin Nathan Cardozo (1870-1938) served as a judge of the New York Court of Appeal and then as a judge of the Supreme Court of the United States of America. He wrote much on judges and on the judicial process in courts. His famous book is 'The Nature of the Judicial Process'. He believed that a judicial decision must be based upon the mores of a community at present time so when a judge adjudicates upon a matter he should be alert to social

⁶⁸⁰ See *ibid*, at p. 139; Holmes defines law as "the prophecies of what the courts will do in fact".

⁶⁸¹ See *ibid*, at pp. 139, 140.

⁶⁸² Holmes Oliver Wendell, 'The Common Law', Edited by Paulo J.S. Pereira & Diego M. Beltran. University of Toronto Law School Typographical Society, September 21, 2011.

⁶⁸³ See *ibid*, at p. 5.

realities as well. According to him, in adjudication a judge considers conflicting interests and then chooses one of those logically admissible choices. In this process his decision is influenced by inherited instincts, acquired beliefs and conceptions of social needs. Even he emphasize that precedents are adhered to by judges but precedents are not final truths and a judge should not follow a precedent when he finds it conflicting with justice and social priorities. To him social forces like logic, philosophy, history, customs, sociology, utility and morality shape principles, rules and norms called law and it affects judicial decisions. About the role of a judge Cardoso's view is that a judge is required to apply the constitution and statutory law to a case but he also serves as an interpreter for the community to harmonize result of cases and to ensure that justice and logic are upheld. Statutes are designed to meet the exigencies of current time. So statutes should not be viewed in vacuum but should be viewed in the context of contemporary conditions. Moreover, according to him a judge sometimes acts as a legislator when he fills gaps in the laws. Similarly, Karl Nickerson Llewellyn (1893-1962) perceived law as an institution which serves certain fundamental functions named by him as 'law jobs'. Law jobs, according to him, include; First, law adjusts troubled cases through courts; second, law channelizes conduct and expectations of masses from courts; third, in case of any change law re-channelize conduct and expectation accordingly; fourth, law allocates authority and determines procedures for authoritative decision making; fifth, law provides direction and incentive within a group and lastly law provides a juristic method.⁶⁸⁴ Llewellyn discussed nine features of legal realism commonly known as

⁶⁸⁴ Wacks Raymond, *Jurisprudence*, 5th Edition, at p. 141; for detail see 'The Bramble Bush' by Llewellyn Karl Nickerson.

manifestos.⁶⁸⁵ One of such manifestos, relevant to the instant discussion, is that law is a judicial creation and is always in flux, i.e. it keeps on changing. Secondly, law is a means to social ends and not an end in itself. Thirdly, like law society is also in flux. A fourth famous American Realist is Jerome Frank (1889-1957). Frank was also a judge of the Supreme Court of America. He wrote 'Law and the Modern Mind' in the year 1930 and discussed legal realism. In his another book 'Courts on Trial' published in the year 1949 Frank highlighted uncertainties and fallacies in the judicial process. According to Jerome Frank, judges follow working backwards method when they decide cases. That is to say that while adjudicating cases judges begin with a vague conclusion; afterwards they try to find rules to substantiate their decision. Jerome Frank also discussed about personality of judges because personality of a judge does affect his decisions. According to him, if law consists of decisions of judges then such decisions are based on the hunches of judges and the way a judge gets his hunches is a key to judicial process. In other words, in order to know the decision in advance or to predict a decision, one should know the personality of the judge.

11.3.3 Sociological School of Thought

Exponents of 'sociological school of thought' see social forces behind a law. Sociologists believe that law is a social phenomenon and they study law as an aspect of society.⁶⁸⁶ Here only few proponents of sociological school of thought are

⁶⁸⁵ See *ibid*, at p. 143; for detail see 'Some Realism about Realism – An Essay' by Llewellyn Karl Nickerson.

⁶⁸⁶ Wacks Raymond, *Jurisprudence*, 5th Edition, at p. 158. It is relevant to mention here that scope of a similar term 'Sociology of Law' has been described by George White Cross Paton as "Sociology of

discussed concisely in order to understand that how they see law in the perspectives of an aspect of society.

One of the most prominent proponents of sociological school of thought is Roscoe Pound who focused on difference between 'law in books' and 'law in action'. He believed that 'law in action' should conform to 'law in books'.⁶⁸⁷ Roscoe Pound is pioneer of the theory of social engineering. According to him, social engineering aims at to establish an efficient society. By social engineering Roscoe Pound means a task for law makers, judges and lawyers whereby some interests are identified and safeguarded so that social cohesion could be achieved. According to him the aim of social engineering is to build structure of society as efficient as possible.⁶⁸⁸ To Pound, such interests include demands and desires of human being and when such interests are legally protected they become legal rights. His theory is also known as 'theory of interests'. Interests of human being are further classified by him as social, public and individuals' interest. The bottom-line of the 'theory of interests' is that it is the business of law to satisfy as many interests as possible.⁶⁸⁹ Similarly, Eugen Ehrlich, another early sociologist, flouted a new idea of 'living law', an idea similar to that of Pound's 'law in action'. To Ehrlich, living law is the law which dominates life itself even though it has not been posited in legal propositions.⁶⁹⁰ In other words, pound's living law could not be confined in a code because of its continuous change and development. Emile Durkheim extended a concept of 'social solidarity'. His concept of social solidarity can be reflected through law. He believed in the development of

law attempts to create a science of social life as a whole and to cover a great part of general sociology and political science". See *A Text Book of Jurisprudence*; Fourth Edition, Oxford University Press, by G.W. Paton at p. 29.

⁶⁸⁷ Wacks Raymond, *Jurisprudence*, 5th Edition, at p. 159.

⁶⁸⁸ Nyazee Imran Ahsan Khan, *Jurisprudence*; Federal Law House, at p. 150.

⁶⁸⁹ Wacks Raymond, *Jurisprudence*, 5th Edition, at p. 162.

⁶⁹⁰ See *ibid*, at p. 163.

society and such development, according to him, can be witnessed in two ways. First, developments in society take place from religion to secularism, from collectivism to individualism and law has become more restitutive and less penal. Secondly, social cohesion can be achieved through punishment - as a collective sentiment against an offender.⁶⁹¹

The realists as well as sociologists premised their contributions on the much of social aspects of their times. On the other hands, legislative organs of different States also adhered to the social concerns while enacting as well as amending laws.

11.4 MODERN JURISPRUDENCE AND LAW REFORMS IN SOME JURISDICTIONS

Law of murder in pre-partitioned India was based on common law. In Pakistan, after independence in the year 1947, same law remained in practice till promulgation of the Criminal Law (Second Amendment) Ordinance, 1990. Through the Ordinance the then law relating to human body was amended and brought in compliance with the judgment of a Shariat Appellate Bench of the Supreme Court in *Gul Hasan Khan's* case. In post-colonial era, common law relating to the offence of murder was adopted by various other jurisdictions. However, numerous reforms had been introduced subsequently to the law relating to the offence of murder in those jurisdictions including the United Kingdom and India. A concise study of these reforms will make it easy to understand that how law relating to the offence of murder was modernized in these States. A study of these reforms may also be advantageous to legislators for

⁶⁹¹ See *ibid.*, at p. 165.

seeking guidance for any further necessary changes or reforms in the law of Pakistan relating to the offences of *qatl* and bodily injuries.

11.4.1 *Reforms, in the United Kingdom, of the Law relating to the Offence of Murder*

Criminal substantive law differentiates serious or heinous offences from those of less serious in nature. In common law jurisdictions generally offence of killing is termed as homicide. Circumstance of killing a man as a result of a single punch naturally is not same where act of successive blows on the head or chest causes death of the victim. It's the gravity and the intensity of acts which in fact determines proportionate sentence of offences. In a civilized society stigma of conviction with harsh punishment, especially death sentence, acts as a deterrent. Homicide can be committed intentionally as well as accidentally. Term 'murder' is used for intentional killing of a man and is considered an offence heinous in nature while word 'manslaughter' is a killing without intention which is less heinous in nature. So intensity of *mens rea* distinguishes murder from manslaughter.⁶⁹² Under common law, offence of murder is punishable with death while lesser punishable is provided for manslaughter. Both terms have been in use for hundreds of years in the legal literature of the British law. Before enacting and enforcing the Homicide Act, 1957, in England and Wales the highest punishment for the offence of murder was death. However, a change introduced through the Act of 1957 was that offence of murder

⁶⁹² Historical distinction between two terms had been discussed in 'Law Reform Commission Consultation Paper on Homicide: The Mental Element in Murder 2001' and 'Law Reform Commission Consultation Paper on Involuntary Manslaughter 2007'. Retrieved online on 17-11-2017.

was categorized into capital murder and non-capital murder. The Act retained death punishment only for capital murder. On the other hand, mandatory life sentence was recommended for non-capital murder.

Generally, a crime or an offence under law of United Kingdom has three elements including *mens rea*, i.e. a guilty mind, *actus reus*, i.e. a guilty act, and causation. Like other offenders, a murderer can only be convicted and sentenced if prosecution proves his involvement up to the hilt and beyond reasonable doubt. However, for few offences, called offences of strict liability, only *actus reus* is required to be proved for seeking conviction and sentence of accused. So considering murder an offence of strict liability scenario in United Kingdom prior to the enactment of the Criminal Justice Act, 1964 was that any person convicted for murder had to be sentenced to death even he had no *mens rea* for omission or commission of offence. However, under the Criminal Justice Act, 1964 the law was amended by introducing changes under sections 3 and 4 of the Act. Through amendments of 1964, in cases of homicide death as a penalty could only be inflicted on those offenders who with clear intention commit such heinous offence. In other words, only intentional murder was punishable with death.

Judiciary in United Kingdom also played its role in interpreting statutory law relating to offence of murder. The change in the law of murder was elaborated by the Supreme Court of the United Kingdom in *Murray* case.⁶⁹³ In this case a married couple after committing bank robbery ran away and an off-duty official pursued them. In order to save her husband, the wife fired off shot which hit the official who succumbed to injuries. On completion of trial, accused couple was convicted of

⁶⁹³ *The People (DPP) vs. Murray*, [1977] IR 360.

capital offence and they were sentenced to death.⁶⁹⁴ In appeal the wife took plea that she did not know that deceased was a police officer, therefore, she had no *mens rea* for her act. The Supreme Court allowed appeal and held that under new law given under section 3 of the Criminal Justice Act, 1964 proof of *mens rea* is required for each constituent element of the offence. On a point as to whether accused lady had committed murder or manslaughter the bench was split. According to Justice Walsh, a new definition of murder in fact brought many homicides, prior to the Act, to the category of manslaughter. He while defining the term 'intention' observed:

To intend to murder, or to cause serious injury [...] is to have in mind a fixed purpose to reach that desired objective. Therefore, the state of mind of the accused person must have been not only that he foresaw but also willed the possible consequences of his conduct. There cannot be intention unless there is also foresight, and it is this subjective element of foresight which constitutes the necessary *mens rea*. Therefore, where a fact is unknown to the accused it cannot enter into his foresight and his cannot be taken to be intentional with regard to it.⁶⁹⁵

Justice Walsh further observed that main difference among three terms is the difference of advertence and inadvertence as to the probable result. He further said that there were two degrees of criminal responsibility - recklessness and intention but recklessness was a lesser than intention. On the other hand, Justice Henchy was of the view that test of lady's guilt for the offence of murder should be subjective one. The Supreme Court interpreted the new law and tried to address the changes brought into the law of murder in 1964. Justice Walsh about the new definition of 'murder' and its

⁶⁹⁴ The death penalty in Ireland was abolished by section 1 of the 1964 Act, except for two reasons including treason and capital murder. Later on, death penalty was entirely abolished under section 1 of the Criminal Justice Act, 1990. The Act brought many changes. Firstly, where an offence under section 3 is committed of a member of Police acting in the course of his duty or prison officer or politically motivated murder or attempts, the accused would be liable for a mandatory imprisonment of forty years. But if the offender is less than 17 years of age then sentence is not mandatory life imprisonment but at the discretion of the court. The courts have two choices either to determinate sentence for the convict or leave it up to the government.

⁶⁹⁵ *The People (DPP) vs. Murray*, [1977] IR 360, at p. 386.

consequences remarked that, after introducing change, some homicide which were considered murder prior to the 1964 Act, would become manslaughter. Law makers of new law, in fact, focused on '*mens rea*', i.e. guilty mind, one of the basic elements of offence of murder. So offence of murder when committed with intention was punishable to death but not otherwise.

After a year of reforms of 1964, being inspired with the era of social liberation and enlightened thinking, in the United Kingdom death punishment for capital murder was wholly eliminated by the Murder (Abolition of Death Penalty) Act, 1965 and for offence of murder punishment of life imprisonment was approved as the highest possible punishment under law. Under new law, punishment of imprisonment for life was known as 'mandatory life sentence'. There were two stages of mandatory life sentence under the Act of 1965. First stage was minimum sentence which was compulsorily to be served and due to seriousness of offence bail or license was an exceptional and rare relief. Second stage was the period of punishment after elapsing minimum sentence wherein bail / license or release was mostly given if offender was no more a risk for public.⁶⁹⁶ Abolition of death sentence in the United Kingdom was, in fact, a reflection of 1960s shift towards a more permissive society.⁶⁹⁷

A few changes were introduced in the law of United Kingdom by the Criminal Justice Act, 2003. The provisions of section 269 and schedule 21 of the Act further elaborated powers of courts to award punishment for offence of murder. Under the said provisions for the purpose of deciding quantum of punishment, murder cases are categorized in three ways. Firstly, for exceptionally serious murder cases punishment

⁶⁹⁶ Mitchell Barry Mitchell and Roberts Julian V., '*Public Opinion and Sentencing for Murder; An Empirical Investigation of Public Knowledge and Attitudes in England and Wales*', Report for the Nuffield Foundation, October 2010, at p. 3.

⁶⁹⁷ B. Knowles QC, Julian, '*The Abolition of the Death Penalty in the United Kingdom*' (London) 2015 at p. 64.

was life imprisonment of murders where two or more persons were killed, or where murder was premeditated, involve tortuous, sexual or seditious conduct of offender, murder advancing political, racial or ideological causes or murder of previously convicted murderer. Secondly, for murders which are also particularly serious in nature imprisonment was for thirty years, like murder of policeman, prison officer, murder with fire-arm and explosives or murder for gain. Third category was murders other than first two categories where fifteen years' imprisonment could be awarded.⁶⁹⁸ Latest statutory reforms were introduced in the United Kingdom by the Coroners and Justice Act, 2009 in criminal law in the areas of diminished liability, provocation and self-defence.⁶⁹⁹ The Act of 2009 though retained diminished responsibility but changed its requirements. Defence of provocation was replaced with the 'loss of control'.⁷⁰⁰ These changes were introduced into the United Kingdom homicide law purposely for making it clear, precise and updated and secondly that the law could be improved in accordance with social standards and scientific development.⁷⁰¹

11.4.2 Reforms of Indian Law relating to the Offence of Murder

Changes into the law of murder of United Kingdom and in the laws of other States in accordance with modern standards influenced Pakistan's neighbour secular jurisdiction, i.e. Indian, as well. Under the provisions of section 302 (b) of the Indian

⁶⁹⁸ Mitchell Barry Mitchell and Roberts Julian V., '*Public Opinion and Sentencing for Murder; An Empirical Investigation of Public Knowledge and Attitudes in England and Wales*', Report for the Nuffield Foundation, October 2010, p. 8.

⁶⁹⁹ Diminished responsibility means when accused is given benefit due to his mental abnormality.

⁷⁰⁰ Yeo Stanley, '*English Reform of Partial Defences to Murder: Lessons for New South Wales*'; at p. 5.

⁷⁰¹ See *ibid*, at p. 16.

Penal Code, 1860 there are two alternate punishments for offence of murder, i.e. death and imprisonment for life. Which punishment is appropriate in a particular case, courts usually decide it keeping in view the circumstances and facts of the case. Normal sentence of murder under section 354 of the Code of Criminal Procedure, 1973 is life imprisonment and exceptional sentence is death. Death punishment is awarded only where punishment of life imprisonment is considered inadequate. Where there is any of the mitigating circumstances then lesser punishment is awarded.

Should punishment of death be retained or abolished? It had been a hot debate in India for decades. Persistent efforts had been made by abolitionists in order to get removed capital punishment from Indian law either by amending law by Congress or declaring it unconstitutional by courts through judicial review. For achieving the set goal, a bill for the purpose of abolishing death punishment under the law of India moved in the *Lok-Sabha* in 1956 was rejected by the house. The upper house of the Indian Congress, i.e. *Raja Sabha*, also rejected such like bills in the years 1958 and 1962.⁷⁰² Likewise efforts were met with same fate when Indian courts refused accepting petitions for abolishing death punishment from law. There is a history of cases decided by Indian courts in which either mode of execution of death punishment or the very legality of capital punishment, in murder and other offences, was challenged. For the sake of clarity it is expedient to discuss here few cases of both categories. First category is of those cases wherein it was prayed that mode of execution of punishment of death by way of hanging as provided for under section 354 of the Code of Criminal Procedure, 1973 was violative of the provisions of the

⁷⁰² Agarwal Arnim, '*Abolition or Retention of Death Penalty in India: A Critical Reappraisal*', retrieved online on 15-03-2017.

Constitution of India. One of such cases is the case of *Deena* wherein the apex court of Indian had declined to declare the provisions of section 354 Cr.PC unconstitutional rather it was observed that it was the function of courts to probe into the reasonableness of a mode of punishment.⁷⁰³ However, in *Attorney General of India vs. Lachma Devi*⁷⁰⁴ the Supreme Court of India observed about public hanging that even if public hanging becomes permissible under law, it would be against the provisions of Article 21 of Indian Constitution due to its barbarity, disgracefulness and shamefulness for a civilized society. The question of constitutionality of public hanging of convicts of murder cases again arose in the case of *Shashi Nayar* wherein it was prayed that since public hanging was barbaric and dehumanizing so it should be replaced with a less painful and cruel method of executing death sentence but the apex court once again refused to take a different view from that of taken it in the case of *Deena*.⁷⁰⁵

Second category is of those cases wherein abolitionists challenged legality and constitutionality of capital sentence. Interestingly, all such efforts could not yet become successful. For instance, in *Jagmohan Singh vs. State of U.P.*, the apex court of Indian rejected a contention that capital punishment was not violative of right of life guaranteed under article 21 of the constitution of Indian.⁷⁰⁶ However, in *Rajendra Prasad vs. State of U.P.*⁷⁰⁷, Justice Karishna Iyer declared death sentence violative of articles 14, 19 and 21 of the Indian Constitution except where murder was committed intentionally and in gruesome manner and it was also observed that in such gruesome cases death punishment must be awarded as a measure of social defence. Many Indian

⁷⁰³ *Deena vs. Union of India*, AIR 1983 SC 1155.

⁷⁰⁴ AIR 1986 SC 467.

⁷⁰⁵ *Shashi Nayar vs. Union of India*, AIR 1992, 1 SCC 96.

⁷⁰⁶ 1973, 1 SCC 20.

⁷⁰⁷ *Rajendra Prasad vs. The State of U.P.*, 1990 Cr.LJ, 1810.

judges are mindful of the fact that if they prefer death penalty in murder cases it would decrease death crime and this way they take capital sentence as a deterrence to overcome crime rate. Moreover, the Indian Supreme Court in *Bachan Singh* case⁷⁰⁸ discussed impacts of death penalty on society and it was observed by the bench that by awarding death penalty courts express moral outrage of society against the offence. In fact, many Indian judges due to moral and social response are inclined to award death penalty. On the other hand, abolitionists or opponents of death penalty argue that death penalty negates the main purpose of criminal justice system of rehabilitation and reformation of offenders. A larger bench of five members of the Indian Supreme Court in *Mithu* case⁷⁰⁹ had struck down the provisions of section 303 IPC wherein mandatory death penalty was provided. Similarly, provisions of section 27(3) of the Arms Act, 1959 were also held *ultra vires* being violative of the Constitution of India.⁷¹⁰

The Supreme Court of India in the case of *Bachan Singh*, while clarifying the provisions of section 354 Cr.PC, observed that for a person convicted in a murder case normal punishment is life imprisonment and capital punishment is an exception which ought not to be awarded save in rarest of rare cases.⁷¹¹ The principle and phrase 'the rarest of rare cases' coined in this case was further explained by the apex court of Indian in *Machhi Singh* case wherein the apex court observed that death punishment could only be inflicted when punishment of imprisonment for life turns up to be totally inadequate sentence keeping in view the facts of the case. The principle was again discussed in the case of *Muhammad Chaman* wherein court

⁷⁰⁸ AIR1980 SC 898.

⁷⁰⁹ *Mithu vs. The State of Punjab*, AIR 1983 SC 473.

⁷¹⁰ *State of Punjab vs. Dalbir Singh*. In this case section 27(3) of the Arms Act, 1959 was held to be *ultra vires* to the constitution of India.

⁷¹¹ *Bachan Singh vs. The State of Punjab*, AIR 1980 SC 898.

declined to lay down any standards and norms for exercising the principle for it was a matter of public policy belonging to the legislature but it was beyond the functions of courts.⁷¹² Another attempt to get rid of capital punishment was unsuccessfully made in *Shashi Nayar vs. Union of India* on the ground that it did not serve any public purpose, however, the apex court observed that death penalty had a deterrent effect and it did serve a social purpose.⁷¹³ Similarly, in many other cases, on humanitarian grounds and for the reasons of dignity of human being, the apex court of India forbade it to keep convicts awaiting death punishment in solitary confinement.⁷¹⁴ Despite all these efforts the proponents of abolishing death as punishment from legal system of India could not gain success. However, due to their efforts imposition of death punishment and execution thereof have become very rare phenomena in India.

11.4.3 Modern Distributive Theory under the Criminal Law of the United States of America

Before discussing American criminal jurisprudence it is better to have some introduction to relevant criminal theories. Two of such theories - retributive theory and utilitarian theory are ethical based. The retributive theory claims that offender should be punished because he deserves punishment. While utilitarianism indicates that by imposing punishment society feels itself safe from offenders. In modern criminal law of America, unlike conventional theories based on ethics, distributive theory of punishment is followed wherein victim's welfare is given prime

⁷¹² *Muhammad Chaman vs. The State*, 2001 Cr.LJ 725 SC.

⁷¹³ *Shashi Nayar vs. Union of India*, 1992 SCC 1, 96.

⁷¹⁴ See cases of *Sunel Batra vs. Delhi Administration*, 1978 Cr.LJ 1741 at p. 1754 and *Triveniben vs. State of Gujarat*, 1990 Cr.LJ 1810 at p. 1822.

consideration. It is called distributive for it distributes happiness and pain amongst parties, i.e. culprit and victim. According to Aya Gruber “criminal law is distributive when it metes out punishment for the primary purpose of ensuring victim’s welfare”.⁷¹⁵ Aya Gruber further explains that distributive justice is for distributing benefits and burdens amongst the members of society fairly. According to him distributive theory of punishment indicates ‘depriving offender from liberty for the purpose of increasing welfare of the victim’.⁷¹⁶ The latest American theory is identical to that of given by Islam centuries before by way of concepts of *qisas* and *diyat* where prime focus is on society and welfare of members thereof. The United States of America Model Penal Code, 1980 introduced almost the same reforms brought through the English Homicide Act, 1957.⁷¹⁷ In both jurisdictions, i.e. the UK and the USA, in twentieth century two major reforms were introduced. First was complete abolition of death penalty in the UK and partial abolition in the USA. Second, was introduction of parole in both systems in order to ensure release of prisoners of homicide offences before completion of term of imprisonment.⁷¹⁸

11.4.4 Abolition of Death Punishment - Latest Debate under International Law

Treaties are one of the sources of International Law. There are few treaties and conventions wherein death penalty has either been discouraged or banned. International

⁷¹⁵ Gruber Aya, ‘*A Distributive Theory of Criminal Law*’; William and Mary Law Review Volume 52, (No. 1 of 2010), Article 2, at p. 9.

⁷¹⁶ See *ibid*, at p. 11.

⁷¹⁷ Simon Jonathan, ‘*How Should We Punish Murder?*’ *Marguette Law Review*, Volume 94, Issue 4, Summer (2011), Article 7, at p. 1275.

⁷¹⁸ See *ibid*, at p. 1267.

commitments regarding elimination of death penalty require signatory or rectifying States to comply with their commitment by incorporating same rules of International Law into their own domestic law. Under international covenants it is required that signatory States will ensure eradication of death as punishment from their domestic laws. For instance, a majority of States of the world has become signatory to the International Covenant on Civil and Political Rights, 1966. Though the Covenant did not require states to abolish death sentence but it does provide a guideline regarding the imposition of death punishment and require the signatories to abide by the same.⁷¹⁹ Nonetheless, Second Optional Protocol of 1991 to the International Covenant on Civil and Political Rights has clearly mentioned that death punishment will not exist further under the domestic law of its member States. Similarly, the Convention on the Rights of the Child also provides that punishment of death will not be inflicted on accused who is under eighteen years of age. Moreover, death penalty though is not proscribed but is discouraged under the torture convention, i.e. 'The Convention against Torture, Cruel, Inhuman, Degrading Treatment or Punishment'; rather the Convention provides some less severe methods of execution of capital sentence. As discussed above, there was a campaign in India for abolishing capital sentence from Indian law for good. Under International Law position of India is that she has signed and ratified the ICCPR and CRC but she only signed the Torture Convention and is reluctant to ratify it. Since under International Law only those States are bound by treaties which have ratified treaties so the death penalty is still existent in Indian law. Pakistan has also not ratified the Torture Convention.

⁷¹⁹ See Article 6 of the Covenant.

On the other hand, few other States has imposed moratorium on execution of death punishment due to some restrictions under International Law but legal system of such States has great concerns of crime rate. For instance, crime rate in Japan was at top in the years 2002 to 2005 and the then prime minister Koizumi in his General Policy Speech to the one hundred and sixty first Session of Diet, held on 12-10-2004, urged to control crime rate. Mr. Koizumi also owed to develop a crime free Japan, a safer place of the world by enhancing anti-crime measures and enhancing sentences of heinous offences like murder. Similarly, Mr. Trump the President of the United States of America publicly gave as statement in the month of October 2018 that offence of murder will be controlled and for this the American need revisit the ban on the death sentence for heinous offences. In Pakistan after a military attack on Army Public School Peshawar moratorium on execution of death penalty, imposed seven years ago, was lifted on 17.12.2014. Under International Law there in no clear ban on imposition of death sentence. However, the International Covenant on Civil and Political Rights under Article 16 restricted death sentence to only few serious offences.

11.5 INTERPRETATION OF LAW RELATING TO *QATL-I-AMD* BY PAKISTAN JUDICIARY IN MODERN SOCIAL PERSPECTIVES

Islamic criminal law recognizes death penalty for the offence of *qatl-i-amd* or premeditated murder. In those Muslim States, including Pakistan, wherein *Shariah* or Islamic law is enforced death penalty is legal. In order to bring domestic law in

harmony with International Law and Human Rights Law many jurisdictions, like European countries, have eliminated death as penalty from legal system but in many countries death as punishment is intact including China, India and majority of Muslim States. But the case of Pakistan is different from the rest of legal systems for some reasons. One, Muslim citizens of Pakistan are in majority and they never demanded elimination of death sentence for offence of murder. Two, it is one of the hallmarks of the Constitutional law of Pakistan that all laws derogatory to the injunctions of Islam would be brought into conformity with such injunctions. Three, under criminal law of Pakistan awarding death sentence as *qisas* and executing it had been a very rare phenomenon and in most of the cases parties through composition patch up the matter amicably. The *qisas* and *diyat* law of Pakistan is not free from flaws as it does not meet with modern standards and trends which are being followed in other jurisdictions. Even so, Pakistan judiciary in few cases tried to interpret *qisas* and *diyat* law in the light of International Law and modern social standards.

11.5.1 Cases of Qatl-i-Amd and Adherence to the Protection of Society by Pakistan Judiciary

Though after the judgment of the Federal Shariat Court in the case of *Muhammad Riaz*⁷²⁰ importance of principles of *qasamah* and *aqilah* have never been highlighted by Pakistan judiciary but in some of its decisions, relating to offence of *qatl-i-amd*, judges tried to adhere to modern concepts and standards including social concerns and effects of offence on community. Courts also suggested in some cases that *qisas*

⁷²⁰ *Muhammad Riaz etc. vs. Federal Government etc.*, PLD 1980 FSC 1, at pp. 39, 40.

and *diyat* law must be interpreted according to social needs and requirements so that community could retain confidence in law and law enforcing agencies and for creating deterrence by punishing criminals. For instance, in the case of *Farman Hussain* deterrence as an aspect of punishment in murder cases was discussed.⁷²¹ A similar view was taken by the Supreme Court in the case of *Noor Muhammad*⁷²² wherein trend of taking lenient view was discouraged in the following words:

However, we may observe that the people are losing faith in the dispensation of criminal justice by the ordinary criminal Courts for the reason that they either acquit the accused persons on technical grounds or take a lenient view in awarding sentence. It is high time that the Courts should realize that they owe duty to the legal heirs/relations of the victims and also to the society. Sentences awarded should be such which should act as a deterrent to the commission of offences.⁷²³

Similarly, in the case of *Pehlwan and another* accused committed murder of his own wife and another man who was brother of his daughter's husband.⁷²⁴ His daughter's husband reported the matter to police station. During trial accused admitted his offence but took defence that he declared his wife *Siya-kar* so due to her illicit relations with another accused, he killed both. Trial court on conclusion of trial convicted him under section 302 (a) PPC and due to his admission sentenced him to death as *qisas*. The court of appeal took notice of many social aspects including false statements of witnesses in order secure release of accused on compromise and encouragement by society for those offenders who commit murder on the pretext of *ghairat*. In appeal, a division bench of the Quetta High Court observed that accused had no right to be treated with leniency for murder was committed on the basis of

⁷²¹ *State through Advocate-General Sindh, Karachi vs. Farman Hussain and others*, PLD 1995 SC 1.

⁷²² *Noor Muhammad vs. The State*, 1999 SCMR 2722.

⁷²³ See *ibid*, at p. 2725.

⁷²⁴ *Pehlwan and another vs. The State and another*, PLD 2001 Quetta 88.

karo kari or *siya kari* but ironically converted conviction of accused under section 302(c) PPC and sentenced him with rigorous imprisonment of twenty five years. The High Court also lamented society for its poor role by suppressing evidence. The court remarked that when members of society come for evidence in courts they depose falsely in order to secure acquittal. It was observed as:

Even near and dear of deceased suppress evidence and depose falsely and when accused earns acquittal, people blame Judges and forget that their hands are tied and they decide on papers. It is high time and people must woke up from slumber and make Jihad for speaking the truth as we have already entered in the twenty first century with the pride of 'Honour Killing'. We need a more tolerant society and everybody should play his role.⁷²⁵

In a triple murder case accused Muhammad Siddique was tried, for the murders of a young lady, her husband and their baby girl, by a Special Court constituted under the Suppression of Terrorist Activities (Special Courts) Act, 1975.⁷²⁶ On appeal a division bench of the Lahore High Court had raised few relevant questions. One of the questions was as to whether or not law become a social catalyst for change? A division bench of Justice Jilani and Justice Khosa answering this question, at page number 457 of the judgment, remarked:

A murder in the name of honour is not merely the physical elimination of a man or woman. It is at a socio-politico plane a blow to the concept of a free dynamic and an egalitarian society. In great majority of cases, behind it at play, is a certain mental outlook, and a creed which seeks to deprive equal rights to women i.e. inter alia the right to marry or the right to divorce which are recognized not only by our religion but have been protected in law and enshrined in the Constitution. Such murders, therefore, represent deviant behaviours which are violative of law, negatory of religious tenets and an affront to society.⁷²⁷

⁷²⁵ See *ibid*, at pp. 97, 98.

⁷²⁶ *Muhammad Siddique vs. The State*, PLD 2002 Lah. 444.

⁷²⁷ See *ibid*, at p. 457.

The bench further observed, at page number 457 of the judgment, as “no tradition is sacred, no convention is indispensable and no precedent worth emulation if it does not stand the test of the fundamentals of a civil society generally expressed through law and the Constitution”. So the division bench of the High Court rejected compromise and confirmed death sentence awarded by trial court. In this case the bench discouraged frequent acceptance of compromises in murder cases and also discussed an important aspect of criminal jurisprudence - relationship between human intellect and law, when their lordships observed:

It is the mind and ability to reason which distinguishes them from other living creatures. Human progress and evolution are the product of this ability. Law is part of this human odyssey and achievement. Law is dynamic process. It has to be in tune with the ever-changing needs and values of a society failing which individuals suffer and social fabric breaks down. It is this dimension of law which makes it a catalyst of social change. Law, including the judge-made law, has to play its role in changing the inhuman social moors. The offence which stands proved against the appellant has to have a judicial response which serves as a deterrent, so that such aberrations are effectively checked. Any other response may amount to appeasement or endorsement. A society which fails to effectively punish such offenders becomes privy to it. They steadily increase in these kinds of murders is reflective of this collective inaction, of a kind of compromise with crime and if we may say so of a complicity of sorts. A justice system of crime and punishment, bereft of its purposive and deterrent elements loses its worth and credibility both. The individual, institutional and societal stakes, therefore, are high.⁷²⁸

Similar views are passed by the apex court in the case of *Dadullah and another* wherein a three member bench of the apex court of Pakistan while hearing a criminal appeal in a bank dacoity case where two persons were killed by firing, has discussed purposes and theories of punishment.⁷²⁹ The bench observed that offenders are punished for the purpose of retribution, deterrence and reformation. First purpose

⁷²⁸ See *ibid.*, at p. 458.

⁷²⁹ *Dadullah and another vs. The State*, 2015 SCMR 856.

of punishment is creating deterrence for those who are inclined to murder crime. Deterrence aspect of punishment prevents crime occurrence and also reforms society. Secondly, mere on the basis of mercy and leniency if courts take soft view and avoid punishing culprit with sever punishments the criminals will take undue advantage and will be scot free while such approach will ridicule and contempt the criminal administrative system.

11.6 COMPATIBILITY OF *QISAS* AND *DIYAT* LAW OF PAKISTAN WITH MODERN STANDARDS

How *qisas* and *diyat* law of Pakistan can be modernised so that it could be acceptable to modern society is not easy to answer. Since, *qisas* and *diyat* law of Pakistan has some flaws in its draft, which could not even be filled up by mere interpretation in modern perspectives, which invited in recent past public protests and rage of society. The law, therefore, is open to new suggestions. The second half of nineteenth century saw a change in the western world. Naturally, global change in society and culture influence Muslim world as well. Therefore, many secular ideas of modern nation States like society and governance have been adopted by Muslim States and a process of secularization of Islamic law took its start.⁷³⁰ According to the modern jurisprudence not only law should reflect social changes but it must understand the prospect changes in society. So mores of the day demand change in the *qisas* and *diyat* law of Pakistan in order to make it acceptable to community as well.

⁷³⁰ Ali Al-Muhairi, Butti Sultan Butti, 'Islamisation and Modernization within the UAE Penal Law: Shari'a in the Modern Era'; Arab Law Quarterly, Vol. 11, No. 1 (1996), pp. 34-49.

Centuries before, under Islamic criminal law, justice was localized by giving victim parties of *qatl-i-amd* or bodily hurts three options of *qisas*, *afw* and *sulh*. Moreover, under Islamic criminal justice system public always participated in dispensation of justice. So in cases where victim party does not prefer composition then giving evidence in Islam is the duty of members of society who are aware of the facts of *qatl* or hurts. Public participation is also assured by two basic principles of Islamic *qisas* and *diyat* law including *aqilah* and *qasama* but both important concepts are missing from criminal law of Pakistan. If these two principles are inserted into the law relating to offence of *qatl*, the society will have a role to play in the administration of criminal justice system. Consequently, the system will be effective in controlling offence of murder in two ways. First, due to a constant check of society or *aqilah* on its members violation of law will be very rare. Secondly, society or a section of society, i.e. *aqilah* of a culprit, will have to contribute either by losing its member in case of capital punishment or by contributing a share in the amount of *diyat*. In fact, due to these two principles, *Shariah* laws work as deterrent. Therefore, provisions under procedural law should be inserted regarding the observance of process of *qasama*, appointment of *aqilah* and test of *Tazkiyah-al-Shahood* on a witness before recording evidence in cases of *qatl* so that conviction and punishment of *qisas* could become a possibility.

The drafters of the 'Draft Ordinance', 1980 on *qisas* and *diyat* law ignored rights of community enunciated by *Hanafi* jurists. Under *Hanafi* school of thought rights are categorized into three types; rights of community, rights of *Allah* and rights

of individuals.⁷³¹ In case of infringement of any of such rights, the offender is liable to be punished under *Hanafi* law with *hadd*, *qisas* or *ta'zir*. *Hadd* punishments relate to rights to God, *qisas* punishments relate to right of individuals but rights of society or community according to *Hanifi* school of thought is *siyasah*.⁷³² One of the major lacunae of the version of *qisas* and *diyat* law incorporated into the Pakistan Penal Code, 1860 is that it does not address rights of society. So for assuring deterrence of punishment of *qatl-i-amd*, there should be minimum mandatory punishment of seven years for accused regardless of the fact that parties have patched up the matter through compromise.

The old religious values, ethical concerns, wealth oriented hierarchies of castes and classes of society have been replaced today with modern values of preservation of life, protection of rights and safeguard of interests. Recent populous rise across Pakistan on the composition of murder cases committed by Raymond Davis and Shahrukh Jatoi is evident to all and sundry that modern society has deep concerns over the application and adjudication of *qisas* and *diyat* law of Pakistan. It raised many questions that the law suits to economically well-off and socially influential people. This concern on many occasions had raised societal reaction and up rise whenever an offence of murder was compromised or right of *qisas* was waived of by legal heirs of the deceased who hail from an economically and society less privileged class.

⁷³¹ Nyazee Imran Ahsan Khan, '*General Principles of Criminal Law (Islamic and Western)*'; Second Edition (2016), Federal Law House, at pp. 15, 16.

⁷³² Ahmad Muhammad Mushtaq, '*The Doctrine of Siyasah in the Hanafi Criminal Law and Its Relevance for the Pakistani Legal System*'; Islamic Studies, Vol. 52, No. 1 (Spring 2013), pp. 29-55, Published by Islamic Research Institute, International Islamic University, Islamabad. It is also relevant to mention here that professor Imran Ahsan Khan Niyazi has discussed 'doctrine of *siyasah* in his book '*General Principles of Criminal Law (Islamic and Western)*'; Second Edition (2016), Federal Law House, at pp. 226, 227.

Another serious issue under the *qisas* and *diyat* law of Pakistan is mode of execution of death punishment. Under *qisas* and *diyat* law of Pakistan death punishment can be awarded for *qatl-i-amd* either by way of *qisas* under section 302 (a) PPC or as *ta'zir* under section 302 (b) and (c) PPC. However statutory law of Pakistan does not distinguish between the modes of execution of death sentence awarded as *qisas* or *diyat*. Under *Shariah* punishment of death as *qisas* requires execution thereof in same way as death was inflicted on the deceased so mode of execution of punishment of death as *qisas* should be different from that of *ta'zir*. According to the provisions of section 368 Cr.PC hanging is the only legal method of execution of death punishment in Pakistan. Provisions of section 368 of the Code require the trial court that while giving judgment it must state that the convict be hanged by the neck till he is dead. These provisions do not create any difference between execution of death punishment either awarded by way of *qisas* or *ta'zir*. Though by promulgation of the Ordinance, 1990 discretionary power of giving direction about the manner of execution of death punishment as *qisas* is given to courts under section 314 PPC but courts in cases of *qatl-i-amd* rarely exercised this power. Moreover, chapter 14 of the Rules of the Superintendence and Management of Prisons in Pakistan, 1978 discuss in detail the procedure of treating inside jails the persons condemned to death, their look after and execution of death punishment. Rules 361, 362 and 363 relate to the procedure of execution of death punishment and under these rules only method of execution of death punishment is hanging. Any person who is *wali*, i.e. legal heir, of the deceased has right to witness the execution of death punishment of the convict. However, spectators who are respectable and male of twelve years of age may be permitted by the Superintendent of jail to witness

such execution.⁷³³ This point is also discussed by the apex court in *Zahid Rehman's* case wherein justice Dost Muhammad Khan was of the view that execution of death sentence in Pakistan is carried out in old fashion by hanging the offender on the gallows through his neck and no different method of execution of death punishment of *qisas* was there under the law.⁷³⁴ Ironically, instead suggesting the government to establish a functionary for the proper implementation of provisions of section 314 PPC for ensuring execution of death as *qisas*, Justice Dost Muhammad Khan suggested amending section 302 (b) PPC for omitting therefrom punishment of death as *ta'zir* by keeping sole punishment of life imprisonment. As per opinion of *Imam Shafi* (God bless him) murderer will be killed in the same manner as he had killed the deceased. However, relying upon a tradition of the Prophet (pbuh) *Imam Abu Hanafi* (God bless him) was of the opinion that death as *qisas* could be inflicted upon murderer by killing him with sword.⁷³⁵

In absence of procedural rules on few occasions judges exercised their discretion under section 314 PPC, unreasonably. For instance, in the case of *Javed Iqbal* who was charged with the murder of one hundred children after committing sodomy. The judge of trial court convicted him under section 302 (a) PPC and punished him with death on one hundred counts and it was ordered that he should be strangulated through iron change, his dead body be cut into one hundred pieces and those pieces be put into a drum containing acid.⁷³⁶ It is strange that the judge miserably failed in taking notice of a precedent case of the Shariat Appellant Bench of the apex court wherein execution of death punishment contrary to the fundamental

⁷³³ See Rule 364 of the Superintendence and Management of Prisons in Pakistan, 1978.

⁷³⁴ *Zahid Rehman vs. The State*, PLD 2015 SC 77 at p. 132.

⁷³⁵ Siddiqui Muhammad Mian, *Qisas-o Diyat*, Islamic Research Institute, IIUI (2009) at pp. 198,199.

⁷³⁶ Wasti Tahir, *The Application of Islamic Criminal Law in Pakistan*, Brills, 2009 at p. 175.

right of dignity of man as safeguarded under article 14 of the Constitution of Pakistan, 1973 was discouraged.⁷³⁷ Similarly, discretion of court under section 314 PPC was exercised by trial court in *Muhammad Asif vs. The State*⁷³⁸ wherein the judge directed that death sentence as *qisas* should be executed by at least three policemen publicly in a suitable place. However, the appellate court altered conviction under section 302 (b) PPC with a direction that the convict be hanged by neck till he is dead. The High Court Peshawar altered conviction because evidence before trial court was recorded without observing the requirements of test of *Tazkiyat-al- Shahood*. In another case of murder a trial judge though did not agree with the suggestion of police to adopt the process of *qasamah* in an untraced murder case but ordered that *diyat* be paid by the government to legal heirs of deceased. The Peshawar High Court allowed criminal revision and set aside the judgment as it was not acceptable under law.⁷³⁹ It servers no useful purpose to keep to parallel punishments of death by way of *qisas* and *ta'zir* under sub-sections 302 (a) and 302 (b) & (c) PPC, respectively, awarded by adopting two different standards of evidence when mode of execution of both is same.

11.7 CONCLUSION

Modernity of society demands modernity of law. Law of murder is a serious concern because if it is faulty it may deprive lives of innocents and may be beneficial for those who are in fact guilty. Latest theories of law, i.e. legal realism and sociological

⁷³⁷ A *suo motu* Constitutional Petition No. 9 of 1991; 1994 SCMR 1028.

⁷³⁸ *Muhammad Asif vs. The State*, 2000 YLR 1778 Peshawar.

⁷³⁹ *The State through Advocate General of NWFP vs. Kotay*, 2004 MLD 1944 Peshawar.

jurisprudence, have given a new interpretation to law in social and societal perspectives. So today law is taken as a social phenomenon and society's concerns cannot be ignored by the legislature and judiciary. With the emergence of new theories of law now much more depends on social forces and law takes its shape with the development of society. Due to some factors like social change, social demand and social pressure in many common law countries, including United Kingdom and India, amendments have been introduced in order to reform law of homicide. Judiciary's role in these States in developing law cannot be ruled out because judges assumed special role in applying law though not being expressly empowered so. The trend settled by judges is also known as judicial activism. Under the theory of American legal realism judges owe a higher role in law discovering process.

From the study of legislative and case law development of law of *qisas* and *diyat* of Pakistan it becomes evident that modern society has been endeavouring to modernize its laws. In modern world, when blameworthiness and culpability are at variance, assuring transparency and parity of sentence is out of question. In other words, heinousness of offence should be reflected in its punishment. So a simple standard which a reasonable man can set up is that murders committed under greed, selfishness, careful planning and display appalling depravity or sadistic violence should be punished differently from those of committed in emotional situation, sudden provocation, self-defence and good faith. In order to meet the standards of modern society, the law of *qisas* and *diyat* of Pakistan requires a revisit so that it could be refined and made flawless by inserted concepts of *aqila*, *qasamah* and mandatory punishment of imprisonment despite composition in cases of *qatl-i-amd*.

CHAPTER 12

CONCLUSION AND RECOMMENDATIONS

The research may be concluded with its summary, findings and recommendations. It goes without saying that the research pertains to the interpretation and application of the *qisas* and *diyat* law of Pakistan in modern world. The term 'modern world' through out the research has been taken at par with the term 'contemporary world' in its social cum legal perspectives. Through the instant research by analyzing case laws on various provisions of the law relating to the offence of *qatl-i-amd*, i.e. premeditated murder, most of the pitfalls, lacunas and weaknesses have been tried to be identified in order to suggest as to how the law can possibly be made more refined and practicable. For the sake of convenience it has been tried up to the level best to chapterise the research in the same sequence as adopted by the legislature under the Pakistan Penal Code, 1860 and so the findings and recommendations.

12.1 SUMMARY AND FINDINGS

In fact, criminal law of ancient India relating to the offence of murder was not based on a single religious law. In India, before the advent of Islam, criminal law was based on Hindu religious scripts and traditions. In the era of Muslim dynasties and Muslim emperors Islamic criminal law and Islamic principles of justice were followed by (*qazis*) judges. Until direct Britain rule on India, started in the year 1857, there was no comprehensive written law for India. However, during colonial period, the first uniform criminal substantive law for India known as the Indian Penal Code, 1860 was

given by a Law Commission. On partition of Indian Subcontinent, in the year 1947, both newly created States, i.e. India and Pakistan, adopted same law. As late as 1973, under the basic law of Islamic Republic of Pakistan, a principle regarding existing laws was adopted that all laws inconsistent with or derogatory to the injunctions of Islam as laid down in the holy *Qur'an* and the *Sunnah* of the Prophet (pbuh) would be brought in conformity with Islamic injunctions. Under this constitutional premise, process of Islamization of laws in Pakistan was initiated. Islamization of criminal law relating to bodily hurts and murder is an effort of un-natural amalgamation of two different systems of law. First draft of the law based on Islamic *qisas* and *diyat* law principles was shaped up in the year 1980 but it could not be approved by General Zia-ul-Haq, the then president of Pakistan, most probably for gaining some political ends. In 1980s three successive judgments, of the Shariat Bench of the Peshawar High Court in *Gul Hassan Khan case*⁷⁴⁰, of the Federal Shariat Court in *Muhammad Riaz case*⁷⁴¹ and of the Shariat Appellate Bench of the Supreme Court of Pakistan in *Gul Hasan Khan case*⁷⁴², declared some of the provisions of the Pakistan Penal Code, 1860 and the Code of Criminal Procedure, 1898 to be un-Islamic and void. Finally, complying with the direction of the apex court, the Federal Government of Pakistan had to promulgate a *Shari'ah* compliant law of murder through enforcing the Criminal Law (Second Amendment) Ordinance, 1990. The Ordinance was extended many times till enactment and promulgation of the Criminal Law Amendment Act, 1997. In order to remove lacunas and flaws the Act was further amended time to time.

⁷⁴⁰ *Gul Hassan Khan v. Federation of Pakistan and others*, PLD 1980 Peshawar 1.

⁷⁴¹ *Muhammad Riaz etc. vs. Federal Government etc.*, PLD 1980 FSC 1.

⁷⁴² *Federation of Pakistan through Secretary, Ministry of Law and another vs. Gul Hasan Khan*, PLD 1989 SC 633.

Under the Islamized law there are two sets of punishments under section 302 of the Pakistan Penal Code, 1860, i.e. *qisas* and *ta'zir*, for the offence of *qatl-i-amd*. Provisions of section 302 PPC provide punishment of *qatl-i-amd* under three clauses, i.e. death as *qisas* under clause (a), death as *ta'zir* under clause (b) and imprisonment up to twenty five years as *ta'zir* under clause (c). Punishment of death as *qisas* can be awarded where accused with free consent confesses offence of *qatl-i-amd* or where *qatl* is proved by evidence of witnesses fulfilling requirements of the test of *Tazkiyah-al-Shahood* as required under section 304 PPC and article 17 of the *Qanun-e-Shahadat* Order, 1984. However, regarding requirements and observance of test of *Tazkiyah-al-Shahood* statutory law is silent. Though in some cases requirements of the test are given but in practice the test was never observed by courts. It is also a fact that since promulgation of *qisas* and *diyat* law of Pakistan not a single offence of *qatl-i-amd* could be proved by the evidence of witnesses fulfilling the requirements of *Tazkiyah-al-Shahood*. Even otherwise, if an accused of *qatl-i-amd* is punished with death as *qisas*, law of Pakistan does not provide a different method of execution of his sentence than that of execution of punishment of death awarded by way of *ta'zir*.⁷⁴³ Moreover, under Islamized law of Pakistan, relating to the offence of *qatl*, sentence is not always the outcome of a criminal litigation. Rather, in many cases accused is honourably acquitted of the charge of *qatl-i-amd* when parties patch of the matter in either of the three legal ways - through waiver of *qisas* (*afw*) under section 309 PPC, by compounding right of *qisas* (*sulh*) under section 310 PPC or by compounding offence of *qatl-i-amd* under sections 338-E PPC and 345 Cr.PC.

⁷⁴³ *Zahid Rehman vs. The State*, PLD 2015 SC 77 at p. 132.

Interestingly, acquittal of a killer, irrespective of the way acquittal is gained, under the law of Pakistan leaves no blemish or scar on the character of culprit.

Since every law is known by its effects and one of the main effects of *qisas* and *diyat* law of Pakistan is that since its promulgation the State failed controlling the offence of murder. Due to its defects and ineffectiveness the law of *qisas* and *diyat* of Pakistan has been objected by people of every walk of life. There are numerous problems in the legislation of *qisas* and *diyat* law of Pakistan and its application. Under this research problems have been identified and solutions thereto are recommended as follows.

12.2 RECOMENDATIONS

- 1- In Islamic law punishment of *qatl-i-amd* in the forms of *qisas* and *ta'zir* requires two different sets of evidence and punishment. It is an anomaly under the *qisas* and *diyat* law of Pakistan that it demands different types of evidence for punishing by way of *qisas* and as *ta'zir* but it creates no difference in execution of punishment of death awarded by way of *qisas* or *ta'zir*. Rationale behind different standards of evidence is that for punishment of death as *qisas* under section 302 (a) PPC mode of execution should be different from the mode of execution of punishment of death awarded by way of *ta'zir* under section 302 (b) & (c) PPC. Unless mode of execution of punishment of death as *qisas* is altered and brought in accordance with the requirements of injunctions of Islam, the punishment thereof cannot be said to be of *qisas*. It is, therefore, recommended that through amendments under section 368 Cr.PC

and jail laws execution of punishment of death by way of *qisas* under section 302 (a) PPC must be assured to be inflicted as death was caused to the victim by the offender. If same or similar way of execution of sentence of death is not possible or does not seem compatible with the contemporary standards of International Law and Human Rights law then any other mode can be specified by the legislature. In this regard guidance can be sought from a narration of Prophet (pbuh) wherein he suggested mode of inflicting punishment of death by a way other than that in which the death was caused by the killer.

- 2- Secondly, the test of *Tazkiyah-al-Shahood* and its pre-requisites for primitive Muslim society do not work in modern heterogeneous society. Some pre-requisites of the test of purgation as identified by Pakistan judiciary under some case laws are quite impossible to meet today. For these reasons inflicting punishment of *qisas* for the offence of *qatl-i-amd* has become just an idea sans any practical importance. So criterion of test of *Tazkiyah-al-Shahood* should be relaxed and it must be determined and defined to its minimum contents so that punishment of *qisas* could possibly be inflicted upon offenders of *qatl-i-amd*. Since pattern of today's society and credentials of its members cannot be taken at par with the society and members in the advent of Islam so finding a witness qualifying that criterion is not less than a wild-goose chase. Therefore, criterion of the test should be based on standards of a certain society for a specified time regarding piety, morality, knowledge and credibility of its members. No doubt in a city state like Madina when the Prophet Muhammad (pbuh) himself educated, trained and purified his

companions, *Tazkiyah-al-Shahood* of a witness was of that level which is impossible to find today. Therefore, it is suggested that provisions should be inserted under section 304 PPC regarding requirements and credentials of a witness for qualifying test of *Tazkiyah-al-Shahood*. Moreover, provisions should also be added under the law for making it compulsory for courts to follow the process of judging *tazkiyah* of every witness of *qatl-i-amd* by his family members, colleagues and neighbours through local judiciary, local government or local police of the area, a witness hails from.

- 3- Alternative punishments of *ta'zir* for the offence of *qatl-i-amd* are provided under clause (b) of section 302 PPC. For awarding punishment of death as *ta'zir* any witness eligible to depose under articles 3 and 17 of the *Qanun-e-Shahadat* Order, 1984 can record his statement in front of court. For the offence of *qatl-i-amd* normal punishment as *ta'zir* is death but for awarding imprisonment for life court has to give reasons thereof. In other words, in a case of *qatl-i-amd* involving any extenuating circumstance courts may take lesser view of imprisonment for life, i.e. lesser punishment. Since such circumstances are not given under law so law is uncertain. It is, therefore, suggested that a list of circumstances which can and cannot be considered for taking lesser view of the punishment should be supplied under clause (b) of section 302 PPC.
- 4- Punishment under section 302 (c) PPC as *ta'zir* is imprisonment up to twenty five years. There had been a consistent controversy about the scope and application of section 302 (c) PPC until the decision of Supreme Court in the

case of *Ali Muhammad*⁷⁴⁴ wherein law was settled that all cases of mitigating circumstances under the erstwhile law relating to murder would fall under clause (c) of section 302 PPC of the amended or Islamized law. So mitigating circumstances of the erstwhile law, ignored by the legislators of the *qisas* and *diyat* of Pakistan, were restored into the law by the judiciary. So in order to avoid inconsistent decisions, a proviso should be added under section 302 (c) PPC that without proving such a circumstance by the accused no court shall record conviction and sentence under clause (c) of section 302 PPC.

- 5- One of the reasons of conflicting and mutually inconsistent decisions on *qisas* and *diyat* law of Pakistan is unbridled power of criminal courts under section 338-F, PPC. By amending law relating to the offence of murder courts have been given power under section 338-F PPC, by the legislature, of seeking guidance from Islamic injunctions in the matters of application and interpretation of the provisions of law under chapter XVI of the PPC. Unfortunately, exercise of this power resulted into contradictory judicial decisions. In fact, the Islamized law was applied and interpreted by judges subject to their own understanding and personal satisfaction. Since all agencies involved in the process of administration of criminal justice including investigation, prosecution, benches and bars were neither trained nor experts in Islamic law so transplantation of Islamic law into a secular legal system opened up a Pandora's box of multiple problems. Judges and lawyers, educated and trained under a legal system given by colonial masters, tried to deal with new Islamized law with old tools of procedure and precedents

⁷⁴⁴ *Ali Muhammad vs. Ali Muhammad and another*, PLD 1996 SC 274.

developed under common law. Since all judges and lawyer might not have deep knowledge of the principles and philosophy of Islam so the legislature should add provisions under the law whereby proper legal assistance of persons who have such expertise and knowledge should be made available to judges for the exercise of power under section 338-F, PPC. The opinions of such experts or jurist consults must be made part of judicial record as well as a ready reference. Secondly, controversy emerging from different interpretations of the provisions of sections 306 and 307(c) PPC can be removed by the legislature. Actually, not extending benefits of the provisions of sections 306 and 307 (c) PPC to those accused who are convicted under section 302 (b) PPC by way of *ta'zir* amounts to discrimination despite clear provisions of section 338-E PPC. The legislature, therefore, should do away with the discriminatory treatment towards the accused persons of *ta'zir* cases by over riding the majority view of the apex court in *Zahid Rehman's* case through adding a provision under section 307 PPC. As per settled law, in *Zahid Rehman's* case, accused of offence of *qatl-i-amd* who though fall under the categories of sections 306 and 307 (c) PPC but cannot get benefit of the provisions of sections 306 and 307 (c) PPC if they are convicted under section 302 (b) or (c) PPC and punished by way of *ta'zir*. Law settled by a five member bench of the apex court creates an impression of discrimination between those who are punished as *qisas* under section 302 (a) PPC and those who are punished as *ta'zir* under section 302 (b) or (c) PPC. Keeping in view the principle of *siyasaḥ* such relaxation should also be extended towards un-

benefited accused of *qatl-i-amd* either by amending law accordingly or by construing it in order to dispel discrimination.

- 6- Frequent acquittal of murderers on the pretext of compromise between parties is not welcomed in Pakistan by the modern society. Compromise in cases of *qatl-i-amd* is one of the salient features of Islamic *qisas* and *diyat* law. Under the law of Pakistan compromise in cases of *qatl-i-amd* is affected in three ways i.e. waiver of right of *qisas* under section 309 PPC, compounding right of *qisas* under section 310 PPC and compounding offence of *qatl-e-amd* under sections 345 Cr.PC and 338-E PPC. Though waiving right of *qisas* (*afw*) without any compensation and compounding right of *qisas* (*sulh*) by seeking some consideration is allowed under Islam but it is nowhere provided under injunctions of Islam that misuse of law cannot be prevented by State. The effect of application of these provisions is that accused can get his acquittal on the basis of compromise. Resultantly, main objective of amended law to control rate of offence of *qatl* and to do justice with victims of *qatl* could not be achieved rather murderers got benefit from the loopholes of Islamized law of *qatl*. One of the drawbacks of Islamized version of law of murder of Pakistan is that thenceforth taking life of any opponent remained no more a dangerous act for killers. Likewise, financially sound and socially influential people take it an opportunity to settle their old scores with rivals by committing murder. Consequently, since the promulgation of *qisas* and *diyat* law in Pakistan punishment for the offence of murder has lost its deterrence. Treating *afw* or *sulh* as a private matter between two parties and giving them free hand of compromise are, in fact, major drawbacks because by doing so

rights of people, i.e. social rights, have been completely ignored. It is a matter of fact that when in a society offence of *qatl-i-amd* or intentional murder is committed, it shackles the whole fabric of society and every member of society becomes aggrieved. So such grievance of a society as a whole can be addressed by a State through legislative actions. In *Hanafi* school of thought, under the principle of *siyasa* the State is empowered to provide penalty of any offence as *ta'zir*. Therefore, in cases of *qatl-i-amd* where parties prefer compromise the legislature, by inserting provisions of compulsory punishment of imprisonment up to seven years as *ta'zir* and *diyat* as well as fine, can restore the deterrence of punishment. Insertion of suchlike provisions has also a valid justification that to the extent of infringement of social rights no redressal has been provided under *qisas* and *diyat* law of Pakistan. Hence, offender of *qatl-i-amd*, despite waiving *qisas*, compounding *qisas* and compounding *qatl-i-amd* by any of the *walis* of the deceased, could be sent to incarceration by making offence of *qatl-i-amd* punishable with mandatory imprisonment for a minimum period of seven years by way of *ta'zir* and *diyat* as well as fine. Even in Saudi Arabia despite compounding offence or waiving of right of *qisas*, the State imposes compulsory punishment as imprisonment of five years by way of *ta'zir*.⁷⁴⁵ Introduction of suchlike amendments in law relating to offence of *qatl-i-amd* would also help controlling the rate of offence of *qatl-i-amd*.

- 7- After making law relating to murder *Sharia'h* compliant, in the year 1990, it has become quite possible for the rich and for influential to manage acquittal

⁷⁴⁵ Zubaidah Ismail Siti, 'The Modern Interpretation of the *Diyat* Formula for the Quantum of Damages: The Case of Homicide and Personal Injuries', Arab Law Quarterly 26 (2012) pp.361-379 at p. 377.

for killers by any hook or crook. Under the latest jurisprudential trends popular laws are welcomed by the modern society for such laws protect society from wrongs and sufferings and provide its' subjects justice up to the level of satisfaction of members of society. In Pakistan, as it has been witnessed, members of society are not satisfied with the justice administered in cases of *qatl-i-amd*, i.e. premeditated murders. Unrestricted acquittal of accused persons on the basis of *afw* or *sulh*, is considered a misuse of law. In most of the cases of *qatl-i-amd* where parties prefer compromise in any of the above discussed manners judges usually kept themselves aloof from as to how compromise was reached at or courts were kept oblivious of the manner of managing compromise. With the passage of time when misuse of law was frequently witnessed by the vibrant modern society it voiced against such misuse in murder cases committed by some influential persons like *Shahrukh Jatoi* and *Raymond Davis*. Reaching at a compromise in these cases has shaken the civil society to its foundation. Hue and cry from the side of society on compromise in these cases is mere a tip of the iceberg of a vast plethora of like cases came to the fore since enforcement of *qisas* and *diyat* law in the year 1990. It goes without saying that majority of the people feel shy on commenting on law of *qisas* and *diyat* merely under a conception that the law is based on the injunctions of Islam as laid down in the Holy *Qur'an* and the *Sunnah* of the Prophet (pbuh).

- 8- In many cases the apex court of Pakistan has settled law that compromise in cases of *qatl-i-amd* is not acceptable when *qatl* is committed in gruesome and brutal manner but the decision of *Raymond Davis* case is a clear violation of

the settled law wherein compromise was accepted at early stage of trial even without raising any objection from the side of prosecution and by the judge. Moreover, despite a hype of this case in media the higher and superior judiciary did not intervene into the matter for judging the legality and aptness of accepting compromise. In modern world, society has become a prime concern in taking all sort of decisions taken by a State through its organs and laws are also made for protecting and safeguarding social rights. That's why the recent societal reaction in Pakistan on accepting compromise in murder cases of *Shahrukh Jatoi* and *Raymond Davis* once again brought law relating to murder in discussion and criticism. So, this is the time to revisit law and amend it in order to ensure justice and to address the concerns of modern vibrant society. In Islamic law, solution to the problem lies under the *Hanafi* doctrine of *siyasa*. Under the doctrine of *siyasa*, State is empowered to legislate in order to eliminate mischief of any rule of Islamic law. Hence, law of *qisas* and *diyat* in Pakistan relating to offence of *qatl* can be harmonized with modern standards and made applicable to and practicable in modern society.

- 9- Under Islamic criminal law of *qisas* and *diyat*, two pre-requisites i.e. 'constitution of *aqilah* of accused' and 'procedure of *qasamah*' are *sine qua non* of the law. *Aqilah* is basically a group of people responsible for payment of *diyat* and each member of *aqilah* contributes in *diyat* on behalf of accused. *Aqilah* of accused consists of those members of a society who are found very close to accused and are considered to have some moral liability towards accused and his conduct. In other words, under Islamic criminal justice system

members of a society owe some duties and rights towards individuals. Members of society pay *diyat* for they failed in controlling accused and his conduct. On the other hand, members of society who are victims are entitled to retrieve *diyat* as they had to suffer from a loss of life of a person. In cases of *qatl-i-amd* where nobody knows the murderer or no one has information about offence of *qatl*, Islamic law requires the inhabitants to take oath in this regard. So Islamic concepts of *aqilah*, *aqilah*'s liability and procedure of *qasamah*, in fact, involve society or a section of society in the administration of criminal justice. The legislature of Pakistan did not adopt the concept of *aqilah* for an accused while passing law of *qisas* and *diyat*. Provisions relating to constituting *aqilah* should be inserted under law and power to constitute *aqilah* should be reposed to courts. Since modern jurisprudents and theorists believe that law and justice are social phenomena so Islamic concepts of *aqilah* and *qasamah* are in conformity with modern social standards. Under new conception of law, tax payers and citizens are considered to be central to a justice system of a modern society and democratic State. Similarly, Islamic law of *qisas* and *diyat* also involves society in the administration of criminal justice by reposing reasonability to the members of society under the concepts of *aqilah* and *qasamah*. So if law relating to *qatl-i-amd* or other types of *qatl* is moulded as suggested above in order to make it consistent with modern standards of advanced world, modern jurisprudence and needs of modern society, it would not only control the rate of offence of *qatl* but also will strengthen the trust of citizens in legal and justice system of State.

10- In cases of compromise a further flaw, especially in the law of *qisas* and *diyat* of Pakistan that irks every prudent mind and member of vibrant society, is lack of interest of prosecution agency and prosecution witnesses in the conviction and sentence of accused. So in cases of *qatl-i-amd* where parties reach to a compromise, despite heinous nature of the offence as well as detrimental to the whole society, parties seem hand in glove with each other on the pretext of compromise. So the legislature in this regard should pass law whereby State could compel witnesses to attend courts for deposition against accused in the interest of justice and for safeguarding rights of public at large.

Besides the aforementioned, the law of Pakistan relating to the offence of *qatl-i-amd* generally requires reforms and modernization in order to achieve various goals. First, law must be un-ambiguous and impeccable. Secondly, punishment for offence of *qatl-i-amd* must create deterrence so that rate of offence of *qatl-i-amd* could be controlled. Thirdly, latest devices and technologies should be used for collecting and adducing evidence in cases of *qatl-i-amd*. Fourthly, the State should enhance accessibility and efficiency of legal system. Lastly, for improving investigation into the cases of *qatl-i-amd*, a mechanism of cohesion, coherence and sharing information amongst various departments and organizations should be introduced by the State.

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harmony with International Law and Human Rights Law many jurisdictions, like European countries, have eliminated death as penalty from legal system but in many countries death as punishment is intact including China, India and majority of Muslim States. But the case of Pakistan is different from the rest of legal systems for some reasons. One, Muslim citizens of Pakistan are in majority and they never demanded elimination of death sentence for offence of murder. Two, it is one of the hallmarks of the Constitutional law of Pakistan that all laws derogatory to the injunctions of Islam would be brought into conformity with such injunctions. Three, under criminal law of Pakistan awarding death sentence as *qisas* and executing it had been a very rare phenomenon and in most of the cases parties through composition patch up the matter amicably. The *qisas* and *diyat* law of Pakistan is not free from flaws as it does not meet with modern standards and trends which are being followed in other jurisdictions. Even so, Pakistan judiciary in few cases tried to interpret *qisas* and *diyat* law in the light of International Law and modern social standards.

11.5.1 Cases of Qatl-i-Amd and Adherence to the Protection of Society by Pakistan Judiciary

Though after the judgment of the Federal Shariat Court in the case of *Muhammad Riaz*⁷²⁰ importance of principles of *qasamah* and *aqilah* have never been highlighted by Pakistan judiciary but in some of its decisions, relating to offence of *qatl-i-amd*, judges tried to adhere to modern concepts and standards including social concerns and effects of offence on community. Courts also suggested in some cases that *qisas*

⁷²⁰ *Muhammad Riaz etc. vs. Federal Government etc.*, PLD 1980 FSC 1, at pp. 39, 40.

and *diyat* law must be interpreted according to social needs and requirements so that community could retain confidence in law and law enforcing agencies and for creating deterrence by punishing criminals. For instance, in the case of *Farman Hussain* deterrence as an aspect of punishment in murder cases was discussed.⁷²¹ A similar view was taken by the Supreme Court in the case of *Noor Muhammad*⁷²² wherein trend of taking lenient view was discouraged in the following words:

However, we may observe that the people are losing faith in the dispensation of criminal justice by the ordinary criminal Courts for the reason that they either acquit the accused persons on technical grounds or take a lenient view in awarding sentence. It is high time that the Courts should realize that they owe duty to the legal heirs/relations of the victims and also to the society. Sentences awarded should be such which should act as a deterrent to the commission of offences.⁷²³

Similarly, in the case of *Pehlwan and another* accused committed murder of his own wife and another man who was brother of his daughter's husband.⁷²⁴ His daughter's husband reported the matter to police station. During trial accused admitted his offence but took defence that he declared his wife *Siya-kar* so due to her illicit relations with another accused, he killed both. Trial court on conclusion of trial convicted him under section 302 (a) PPC and due to his admission sentenced him to death as *qisas*. The court of appeal took notice of many social aspects including false statements of witnesses in order secure release of accused on compromise and encouragement by society for those offenders who commit murder on the pretext of *ghairat*. In appeal, a division bench of the Quetta High Court observed that accused had no right to be treated with leniency for murder was committed on the basis of

⁷²¹ *State through Advocate-General Sindh, Karachi vs. Farman Hussain and others*, PLD 1995 SC 1.

⁷²² *Noor Muhammad vs. The State*, 1999 SCMR 2722.

⁷²³ See *ibid*, at p. 2725.

⁷²⁴ *Pehlwan and another vs. The State and another*, PLD 2001 Quetta 88.

karo kari or *siya kari* but ironically converted conviction of accused under section 302(c) PPC and sentenced him with rigorous imprisonment of twenty five years. The High Court also lamented society for its poor role by suppressing evidence. The court remarked that when members of society come for evidence in courts they depose falsely in order to secure acquittal. It was observed as:

Even near and dear of deceased suppress evidence and depose falsely and when accused earns acquittal, people blame Judges and forget that their hands are tied and they decide on papers. It is high time and people must woke up from slumber and make Jihad for speaking the truth as we have already entered in the twenty first century with the pride of 'Honour Killing'. We need a more tolerant society and everybody should play his role.⁷²⁵

In a triple murder case accused Muhammad Siddique was tried, for the murders of a young lady, her husband and their baby girl, by a Special Court constituted under the Suppression of Terrorist Activities (Special Courts) Act, 1975.⁷²⁶ On appeal a division bench of the Lahore High Court had raised few relevant questions. One of the questions was as to whether or not law become a social catalyst for change? A division bench of Justice Jilani and Justice Khosa answering this question, at page number 457 of the judgment, remarked:

A murder in the name of honour is not merely the physical elimination of a man or woman. It is at a socio-politico plane a blow to the concept of a free dynamic and an egalitarian society. In great majority of cases, behind it at play, is a certain mental outlook, and a creed which seeks to deprive equal rights to women i.e. inter alia the right to marry or the right to divorce which are recognized not only by our religion but have been protected in law and enshrined in the Constitution. Such murders, therefore, represent deviant behaviours which are violative of law, negatory of religious tenets and an affront to society.⁷²⁷

⁷²⁵ See *ibid*, at pp. 97, 98.

⁷²⁶ *Muhammad Siddique vs. The State*, PLD 2002 Lah. 444.

⁷²⁷ See *ibid*, at p. 457.

The bench further observed, at page number 457 of the judgment, as “no tradition is sacred, no convention is indispensable and no precedent worth emulation if it does not stand the test of the fundamentals of a civil society generally expressed through law and the Constitution”. So the division bench of the High Court rejected compromise and confirmed death sentence awarded by trial court. In this case the bench discouraged frequent acceptance of compromises in murder cases and also discussed an important aspect of criminal jurisprudence - relationship between human intellect and law, when their lordships observed:

It is the mind and ability to reason which distinguishes them from other living creatures. Human progress and evolution are the product of this ability. Law is part of this human odyssey and achievement. Law is dynamic process. It has to be in tune with the ever-changing needs and values of a society failing which individuals suffer and social fabric breaks down. It is this dimension of law which makes it a catalyst of social change. Law, including the judge-made law, has to play its role in changing the inhuman social moors. The offence which stands proved against the appellant has to have a judicial response which serves as a deterrent, so that such aberrations are effectively checked. Any other response may amount to appeasement or endorsement. A society which fails to effectively punish such offenders becomes privy to it. They steady increase in these kinds of murders is reflective of this collective inaction, of a kind of compromise with crime and if we may say so of a complicity of sorts. A justice system of crime and punishment, bereft of its purposive and deterrent elements loses its worth and credibility both. The individual, institutional and societal stakes, therefore, are high.⁷²⁸

Similar views are passed by the apex court in the case of *Dadullah and another* wherein a three member bench of the apex court of Pakistan while hearing a criminal appeal in a bank dacoity case where two persons were killed by firing, has discussed purposes and theories of punishment.⁷²⁹ The bench observed that offenders are punished for the purpose of retribution, deterrence and reformation. First purpose

⁷²⁸ See *ibid*, at p. 458.

⁷²⁹ *Dadullah and another vs. The State*, 2015 SCMR 856.

of punishment is creating deterrence for those who are inclined to murder crime. Deterrence aspect of punishment prevents crime occurrence and also reforms society. Secondly, mere on the basis of mercy and leniency if courts take soft view and avoid punishing culprit with sever punishments the criminals will take undue advantage and will be scot free while such approach will ridicule and contempt the criminal administrative system.

11.6 COMPATIBILITY OF *QISAS* AND *DIYAT* LAW OF PAKISTAN WITH MODERN STANDARDS

How *qisas* and *diyat* law of Pakistan can be modernised so that it could be acceptable to modern society is not easy to answer. Since, *qisas* and *diyat* law of Pakistan has some flaws in its draft, which could not even be filled up by mere interpretation in modern perspectives, which invited in recent past public protests and rage of society. The law, therefore, is open to new suggestions. The second half of nineteenth century saw a change in the western world. Naturally, global change in society and culture influence Muslim world as well. Therefore, many secular ideas of modern nation States like society and governance have been adopted by Muslim States and a process of secularization of Islamic law took its start.⁷³⁰ According to the modern jurisprudence not only law should reflect social changes but it must understand the prospect changes in society. So mores of the day demand change in the *qisas* and *diyat* law of Pakistan in order to make it acceptable to community as well.

⁷³⁰ Ali Al-Muhairi, Butti Sultan Butti, '*Islamisation and Modernization within the UAE Penal Law: Shari'a in the Modern Era*'; Arab Law Quarterly, Vol. 11, No. 1 (1996), pp. 34-49.

Centuries before, under Islamic criminal law, justice was localized by giving victim parties of *qatl-i-amd* or bodily hurts three options of *qisas*, *afw* and *sulh*. Moreover, under Islamic criminal justice system public always participated in dispensation of justice. So in cases where victim party does not prefer composition then giving evidence in Islam is the duty of members of society who are aware of the facts of *qatl* or hurts. Public participation is also assured by two basic principles of Islamic *qisas* and *diyat* law including *aqilah* and *qasama* but both important concepts are missing from criminal law of Pakistan. If these two principles are inserted into the law relating to offence of *qatl*, the society will have a role to play in the administration of criminal justice system. Consequently, the system will be effective in controlling offence of murder in two ways. First, due to a constant check of society or *aqilah* on its members violation of law will be very rare. Secondly, society or a section of society, i.e. *aqilah* of a culprit, will have to contribute either by losing its member in case of capital punishment or by contributing a share in the amount of *diyat*. In fact, due to these two principles, *Shariah* laws work as deterrent. Therefore, provisions under procedural law should be inserted regarding the observance of process of *qasama*, appointment of *aqilah* and test of *Tazkiyah-al-Shahood* on a witness before recording evidence in cases of *qatl* so that conviction and punishment of *qisas* could become a possibility.

The drafters of the 'Draft Ordinance', 1980 on *qisas* and *diyat* law ignored rights of community enunciated by *Hanafi* jurists. Under *Hanafi* school of thought rights are categorized into three types; rights of community, rights of *Allah* and rights

of individuals.⁷³¹ In case of infringement of any of such rights, the offender is liable to be punished under *Hanafi* law with *hadd*, *qisas* or *ta'zir*. *Hadd* punishments relate to rights to God, *qisas* punishments relate to right of individuals but rights of society or community according to *Hanifi* school of thought is *siyasah*.⁷³² One of the major lacunae of the version of *qisas* and *diyat* law incorporated into the Pakistan Penal Code, 1860 is that it does not address rights of society. So for assuring deterrence of punishment of *qatl-i-amd*, there should be minimum mandatory punishment of seven years for accused regardless of the fact that parties have patched up the matter through compromise.

The old religious values, ethical concerns, wealth oriented hierarchies of castes and classes of society have been replaced today with modern values of preservation of life, protection of rights and safeguard of interests. Recent populous rise across Pakistan on the composition of murder cases committed by Raymond Davis and Shahrukh Jatoi is evident to all and sundry that modern society has deep concerns over the application and adjudication of *qisas* and *diyat* law of Pakistan. It raised many questions that the law suits to economically well-off and socially influential people. This concern on many occasions had raised societal reaction and up rise whenever an offence of murder was compromised or right of *qisas* was waived of by legal heirs of the deceased who hail from an economically and society less privileged class.

⁷³¹ Nyazee Imran Ahsan Khan, '*General Principles of Criminal Law (Islamic and Western)*'; Second Edition (2016), Federal Law House, at pp. 15, 16.

⁷³² Ahmad Muhammad Mushtaq, '*The Doctrine of Siyasah in the Hanafi Criminal Law and Its Relevance for the Pakistani Legal System*'; Islamic Studies, Vol. 52, No. 1 (Spring 2013), pp. 29-55, Published by Islamic Research Institute, International Islamic University, Islamabad. It is also relevant to mention here that professor Imran Ahsan Khan Niyazi has discussed 'doctrine of *siyasah* in his book '*General Principles of Criminal Law (Islamic and Western)*'; Second Edition (2016), Federal Law House, at pp. 226, 227.

Another serious issue under the *qisas* and *diyat* law of Pakistan is mode of execution of death punishment. Under *qisas* and *diyat* law of Pakistan death punishment can be awarded for *qatl-i-amd* either by way of *qisas* under section 302 (a) PPC or as *ta'zir* under section 302 (b) and (c) PPC. However statutory law of Pakistan does not distinguish between the modes of execution of death sentence awarded as *qisas* or *diyat*. Under *Shariah* punishment of death as *qisas* requires execution thereof in same way as death was inflicted on the deceased so mode of execution of punishment of death as *qisas* should be different from that of *ta'zir*. According to the provisions of section 368 Cr.PC hanging is the only legal method of execution of death punishment in Pakistan. Provisions of section 368 of the Code require the trial court that while giving judgment it must state that the convict be hanged by the neck till he is dead. These provisions do not create any difference between execution of death punishment either awarded by way of *qisas* or *ta'zir*. Though by promulgation of the Ordinance, 1990 discretionary power of giving direction about the manner of execution of death punishment as *qisas* is given to courts under section 314 PPC but courts in cases of *qatl-i-amd* rarely exercised this power. Moreover, chapter 14 of the Rules of the Superintendence and Management of Prisons in Pakistan, 1978 discuss in detail the procedure of treating inside jails the persons condemned to death, their look after and execution of death punishment. Rules 361, 362 and 363 relate to the procedure of execution of death punishment and under these rules only method of execution of death punishment is hanging. Any person who is *wali*, i.e. legal heir, of the deceased has right to witness the execution of death punishment of the convict. However, spectators who are respectable and male of twelve years of age may be permitted by the Superintendent of jail to witness

such execution.⁷³³ This point is also discussed by the apex court in *Zahid Rehman's* case wherein justice Dost Muhammad Khan was of the view that execution of death sentence in Pakistan is carried out in old fashion by hanging the offender on the gallows through his neck and no different method of execution of death punishment of *qisas* was there under the law.⁷³⁴ Ironically, instead suggesting the government to establish a functionary for the proper implementation of provisions of section 314 PPC for ensuring execution of death as *qisas*, Justice Dost Muhammad Khan suggested amending section 302 (b) PPC for omitting therefrom punishment of death as *ta'zir* by keeping sole punishment of life imprisonment. As per opinion of *Imam Shafi* (God bless him) murderer will be killed in the same manner as he had killed the deceased. However, relying upon a tradition of the Prophet (pbuh) Imam Abu *Hanafi* (God bless him) was of the opinion that death as *qisas* could be inflicted upon murderer by killing him with sword.⁷³⁵

In absence of procedural rules on few occasions judges exercised their discretion under section 314 PPC, unreasonably. For instance, in the case of *Javed Iqbal* who was charged with the murder of one hundred children after committing sodomy. The judge of trial court convicted him under section 302 (a) PPC and punished him with death on one hundred counts and it was ordered that he should be strangulated through iron chain, his dead body be cut into one hundred pieces and those pieces be put into a drum containing acid.⁷³⁶ It is strange that the judge miserably failed in taking notice of a precedent case of the Shariat Appellant Bench of the apex court wherein execution of death punishment contrary to the fundamental

⁷³³ See Rule 364 of the Superintendence and Management of Prisons in Pakistan, 1978.

⁷³⁴ *Zahid Rehman vs. The State*, PLD 2015 SC 77 at p. 132.

⁷³⁵ Siddiqui Muhammad Mian, *Qisas-o Diyat*, Islamic Research Institute, IIUI (2009) at pp. 198,199.

⁷³⁶ Wasti Tahir, *The Application of Islamic Criminal Law in Pakistan*, Brill, 2009 at p. 175.

right of dignity of man as safeguarded under article 14 of the Constitution of Pakistan, 1973 was discouraged.⁷³⁷ Similarly, discretion of court under section 314 PPC was exercised by trial court in *Muhammad Asif vs. The State*⁷³⁸ wherein the judge directed that death sentence as *qisas* should be executed by at least three policemen publicly in a suitable place. However, the appellate court altered conviction under section 302 (b) PPC with a direction that the convict be hanged by neck till he is dead. The High Court Peshawar altered conviction because evidence before trial court was recorded without observing the requirements of test of *Tazkiyat-al- Shahood*. In another case of murder a trial judge though did not agree with the suggestion of police to adopt the process of *qasamah* in an untraced murder case but ordered that *diyat* be paid by the government to legal heirs of deceased. The Peshawar High Court allowed criminal revision and set aside the judgment as it was not acceptable under law.⁷³⁹ It servers no useful purpose to keep to parallel punishments of death by way of *qisas* and *ta'zir* under sub-sections 302 (a) and 302 (b) & (c) PPC, respectively, awarded by adopting two different standards of evidence when mode of execution of both is same.

11.7 CONCLUSION

Modernity of society demands modernity of law. Law of murder is a serious concern because if it is faulty it may deprive lives of innocents and may be beneficial for those who are in fact guilty. Latest theories of law, i.e. legal realism and sociological

⁷³⁷ A *suo motu* Constitutional Petition No. 9 of 1991; 1994 SCMR 1028.

⁷³⁸ *Muhammad Asif vs. The State*, 2000 YLR 1778 Peshawar.

⁷³⁹ *The State through Advocate General of NWFP vs. Kotay*, 2004 MLD 1944 Peshawar.

jurisprudence, have given a new interpretation to law in social and societal perspectives. So today law is taken as a social phenomenon and society's concerns cannot be ignored by the legislature and judiciary. With the emergence of new theories of law now much more depends on social forces and law takes its shape with the development of society. Due to some factors like social change, social demand and social pressure in many common law countries, including United Kingdom and India, amendments have been introduced in order to reform law of homicide. Judiciary's role in these States in developing law cannot be ruled out because judges assumed special role in applying law though not being expressly empowered so. The trend settled by judges is also known as judicial activism. Under the theory of American legal realism judges owe a higher role in law discovering process.

From the study of legislative and case law development of law of *qisas* and *diyat* of Pakistan it becomes evident that modern society has been endeavouring to modernize its laws. In modern world, when blameworthiness and culpability are at variance, assuring transparency and parity of sentence is out of question. In other words, heinousness of offence should be reflected in its punishment. So a simple standard which a reasonable man can set up is that murders committed under greed, selfishness, careful planning and display appalling depravity or sadistic violence should be punished differently from those of committed in emotional situation, sudden provocation, self-defence and good faith. In order to meet the standards of modern society, the law of *qisas* and *diyat* of Pakistan requires a revisit so that it could be refined and made flawless by inserted concepts of *aqila*, *qasamah* and mandatory punishment of imprisonment despite composition in cases of *qatl-i-amd*.

CHAPTER 12

CONCLUSION AND RECOMMENDATIONS

The research may be concluded with its summary, findings and recommendations. It goes without saying that the research pertains to the interpretation and application of the *qisas* and *diyat* law of Pakistan in modern world. The term 'modern world' through out the research has been taken at par with the term 'contemporary world' in its social cum legal perspectives. Through the instant research by analyzing case laws on various provisions of the law relating to the offence of *qatl-i-amd*, i.e. premeditated murder, most of the pitfalls, lacunas and weaknesses have been tried to be identified in order to suggest as to how the law can possibly be made more refined and practicable. For the sake of convenience it has been tried up to the level best to chapterise the research in the same sequence as adopted by the legislature under the Pakistan Penal Code, 1860 and so the findings and recommendations.

12.1 SUMMARY AND FINDINGS

In fact, criminal law of ancient India relating to the offence of murder was not based on a single religious law. In India, before the advent of Islam, criminal law was based on Hindu religious scripts and traditions. In the era of Muslim dynasties and Muslim emperors Islamic criminal law and Islamic principles of justice were followed by (*qazis*) judges. Until direct Britain rule on India, started in the year 1857, there was no comprehensive written law for India. However, during colonial period, the first uniform criminal substantive law for India known as the Indian Penal Code, 1860 was

given by a Law Commission. On partition of Indian Subcontinent, in the year 1947, both newly created States, i.e. India and Pakistan, adopted same law. As late as 1973, under the basic law of Islamic Republic of Pakistan, a principle regarding existing laws was adopted that all laws inconsistent with or derogatory to the injunctions of Islam as laid down in the holy *Qur'an* and the *Sunnah* of the Prophet (pbuh) would be brought in conformity with Islamic injunctions. Under this constitutional premise, process of Islamization of laws in Pakistan was initiated. Islamization of criminal law relating to bodily hurts and murder is an effort of un-natural amalgamation of two different systems of law. First draft of the law based on Islamic *qisas* and *diyat* law principles was shaped up in the year 1980 but it could not be approved by General Zia-ul-Haq, the then president of Pakistan, most probably for gaining some political ends. In 1980s three successive judgments, of the Shariat Bench of the Peshawar High Court in *Gul Hassan Khan case*⁷⁴⁰, of the Federal Shariat Court in *Muhammad Riaz case*⁷⁴¹ and of the Shariat Appellate Bench of the Supreme Court of Pakistan in *Gul Hasan Khan case*⁷⁴², declared some of the provisions of the Pakistan Penal Code, 1860 and the Code of Criminal Procedure, 1898 to be un-Islamic and void. Finally, complying with the direction of the apex court, the Federal Government of Pakistan had to promulgate a *Shari'ah* compliant law of murder through enforcing the Criminal Law (Second Amendment) Ordinance, 1990. The Ordinance was extended many times till enactment and promulgation of the Criminal Law Amendment Act, 1997. In order to remove lacunas and flaws the Act was further amended time to time.

⁷⁴⁰ *Gul Hassan Khan v. Federation of Pakistan and others*, PLD 1980 Peshawar 1.

⁷⁴¹ *Muhammad Riaz etc. vs. Federal Government etc.*, PLD 1980 FSC 1.

⁷⁴² *Federation of Pakistan through Secretary, Ministry of Law and another vs. Gul Hasan Khan*, PLD 1989 SC 633.

Under the Islamized law there are two sets of punishments under section 302 of the Pakistan Penal Code, 1860, i.e. *qisas* and *ta'zir*, for the offence of *qatl-i-amd*. Provisions of section 302 PPC provide punishment of *qatl-i-amd* under three clauses, i.e. death as *qisas* under clause (a), death as *ta'zir* under clause (b) and imprisonment up to twenty five years as *ta'zir* under clause (c). Punishment of death as *qisas* can be awarded where accused with free consent confesses offence of *qatl-i-amd* or where *qatl* is proved by evidence of witnesses fulfilling requirements of the test of *Tazkiyah-al-Shahood* as required under section 304 PPC and article 17 of the *Qanun-e-Shahadat* Order, 1984. However, regarding requirements and observance of test of *Tazkiyah-al-Shahood* statutory law is silent. Though in some cases requirements of the test are given but in practice the test was never observed by courts. It is also a fact that since promulgation of *qisas* and *diyat* law of Pakistan not a single offence of *qatl-i-amd* could be proved by the evidence of witnesses fulfilling the requirements of *Tazkiyah-al-Shahood*. Even otherwise, if an accused of *qatl-i-amd* is punished with death as *qisas*, law of Pakistan does not provide a different method of execution of his sentence than that of execution of punishment of death awarded by way of *ta'zir*.⁷⁴³ Moreover, under Islamized law of Pakistan, relating to the offence of *qatl*, sentence is not always the outcome of a criminal litigation. Rather, in many cases accused is honourably acquitted of the charge of *qatl-i-amd* when parties patch of the matter in either of the three legal ways - through waiver of *qisas* (*afw*) under section 309 PPC, by compounding right of *qisas* (*sulh*) under section 310 PPC or by compounding offence of *qatl-i-amd* under sections 338-E PPC and 345 Cr.PC.

⁷⁴³ *Zahid Rehman vs. The State*, PLD 2015 SC 77 at p. 132.

Interestingly, acquittal of a killer, irrespective of the way acquittal is gained, under the law of Pakistan leaves no blemish or scar on the character of culprit.

Since every law is known by its effects and one of the main effects of *qisas* and *diyat* law of Pakistan is that since its promulgation the State failed controlling the offence of murder. Due to its defects and ineffectiveness the law of *qisas* and *diyat* of Pakistan has been objected by people of every walk of life. There are numerous problems in the legislation of *qisas* and *diyat* law of Pakistan and its application. Under this research problems have been identified and solutions thereto are recommended as follows.

12.2 RECOMENDATIONS

- 1- In Islamic law punishment of *qatl-i-amd* in the forms of *qisas* and *ta'zir* requires two different sets of evidence and punishment. It is an anomaly under the *qisas* and *diyat* law of Pakistan that it demands different types of evidence for punishing by way of *qisas* and as *ta'zir* but it creates no difference in execution of punishment of death awarded by way of *qisas* or *ta'zir*. Rationale behind different standards of evidence is that for punishment of death as *qisas* under section 302 (a) PPC mode of execution should be different from the mode of execution of punishment of death awarded by way of *ta'zir* under section 302 (b) & (c) PPC. Unless mode of execution of punishment of death as *qisas* is altered and brought in accordance with the requirements of injunctions of Islam, the punishment thereof cannot be said to be of *qisas*. It is, therefore, recommended that through amendments under section 368 Cr.PC

and jail laws execution of punishment of death by way of *qisas* under section 302 (a) PPC must be assured to be inflicted as death was caused to the victim by the offender. If same or similar way of execution of sentence of death is not possible or does not seem compatible with the contemporary standards of International Law and Human Rights law then any other mode can be specified by the legislature. In this regard guidance can be sought from a narration of Prophet (pbuh) wherein he suggested mode of inflicting punishment of death by a way other than that in which the death was caused by the killer.

- 2- Secondly, the test of *Tazkiyah-al-Shahood* and its pre-requisites for primitive Muslim society do not work in modern heterogeneous society. Some pre-requisites of the test of purgation as identified by Pakistan judiciary under some case laws are quite impossible to meet today. For these reasons inflicting punishment of *qisas* for the offence of *qatl-i-amd* has become just an idea sans any practical importance. So criterion of test of *Tazkiyah-al-Shahood* should be relaxed and it must be determined and defined to its minimum contents so that punishment of *qisas* could possibly be inflicted upon offenders of *qatl-i-amd*. Since pattern of today's society and credentials of its members cannot be taken at par with the society and members in the advent of Islam so finding a witness qualifying that criterion is not less than a wild-goose chase. Therefore, criterion of the test should be based on standards of a certain society for a specified time regarding piety, morality, knowledge and credibility of its members. No doubt in a city state like Madina when the Prophet Muhammad (pbuh) himself educated, trained and purified his

companions, *Tazkiyah-al-Shahood* of a witness was of that level which is impossible to find today. Therefore, it is suggested that provisions should be inserted under section 304 PPC regarding requirements and credentials of a witness for qualifying test of *Tazkiyah-al-Shahood*. Moreover, provisions should also be added under the law for making it compulsory for courts to follow the process of judging *tazkiyah* of every witness of *qatl-i-amd* by his family members, colleagues and neighbours through local judiciary, local government or local police of the area, a witness hails from.

- 3- Alternative punishments of *ta'zir* for the offence of *qatl-i-amd* are provided under clause (b) of section 302 PPC. For awarding punishment of death as *ta'zir* any witness eligible to depose under articles 3 and 17 of the *Qanun-e-Shahadat* Order, 1984 can record his statement in front of court. For the offence of *qatl-i-amd* normal punishment as *ta'zir* is death but for awarding imprisonment for life court has to give reasons thereof. In other words, in a case of *qatl-i-amd* involving any extenuating circumstance courts may take lesser view of imprisonment for life, i.e. lesser punishment. Since such circumstances are not given under law so law is uncertain. It is, therefore, suggested that a list of circumstances which can and cannot be considered for taking lesser view of the punishment should be supplied under clause (b) of section 302 PPC.
- 4- Punishment under section 302 (c) PPC as *ta'zir* is imprisonment up to twenty five years. There had been a consistent controversy about the scope and application of section 302 (c) PPC until the decision of Supreme Court in the

case of *Ali Muhammad*⁷⁴⁴ wherein law was settled that all cases of mitigating circumstances under the erstwhile law relating to murder would fall under clause (c) of section 302 PPC of the amended or Islamized law. So mitigating circumstances of the erstwhile law, ignored by the legislators of the *qisas* and *diyat* of Pakistan, were restored into the law by the judiciary. So in order to avoid inconsistent decisions, a proviso should be added under section 302 (c) PPC that without proving such a circumstance by the accused no court shall record conviction and sentence under clause (c) of section 302 PPC.

- 5- One of the reasons of conflicting and mutually inconsistent decisions on *qisas* and *diyat* law of Pakistan is unbridled power of criminal courts under section 338-F, PPC. By amending law relating to the offence of murder courts have been given power under section 338-F PPC, by the legislature, of seeking guidance from Islamic injunctions in the matters of application and interpretation of the provisions of law under chapter XVI of the PPC. Unfortunately, exercise of this power resulted into contradictory judicial decisions. In fact, the Islamized law was applied and interpreted by judges subject to their own understanding and personal satisfaction. Since all agencies involved in the process of administration of criminal justice including investigation, prosecution, benches and bars were neither trained nor experts in Islamic law so transplantation of Islamic law into a secular legal system opened up a Pandora's box of multiple problems. Judges and lawyers, educated and trained under a legal system given by colonial masters, tried to deal with new Islamized law with old tools of procedure and precedents

⁷⁴⁴ *Ali Muhammad vs. Ali Muhammad and another*, PLD 1996 SC 274.

developed under common law. Since all judges and lawyer might not have deep knowledge of the principles and philosophy of Islam so the legislature should add provisions under the law whereby proper legal assistance of persons who have such expertise and knowledge should be made available to judges for the exercise of power under section 338-F, PPC. The opinions of such experts or jurist consults must be made part of judicial record as well as a ready reference. Secondly, controversy emerging from different interpretations of the provisions of sections 306 and 307(c) PPC can be removed by the legislature. Actually, not extending benefits of the provisions of sections 306 and 307 (c) PPC to those accused who are convicted under section 302 (b) PPC by way of *ta'zir* amounts to discrimination despite clear provisions of section 338-E PPC. The legislature, therefore, should do away with the discriminatory treatment towards the accused persons of *ta'zir* cases by over riding the majority view of the apex court in *Zahid Rehman's* case through adding a provision under section 307 PPC. As per settled law, in *Zahid Rehman's* case, accused of offence of *qatl-i-amd* who though fall under the categories of sections 306 and 307 (c) PPC but cannot get benefit of the provisions of sections 306 and 307 (c) PPC if they are convicted under section 302 (b) or (c) PPC and punished by way of *ta'zir*. Law settled by a five member bench of the apex court creates an impression of discrimination between those who are punished as *qisas* under section 302 (a) PPC and those who are punished as *ta'zir* under section 302 (b) or (c) PPC. Keeping in view the principle of *siyasah* such relaxation should also be extended towards un-

benefited accused of *qatl-i-amd* either by amending law accordingly or by construing it in order to dispel discrimination.

- 6- Frequent acquittal of murderers on the pretext of compromise between parties is not welcomed in Pakistan by the modern society. Compromise in cases of *qatl-i-amd* is one of the salient features of Islamic *qisas* and *diyat* law. Under the law of Pakistan compromise in cases of *qatl-i-amd* is affected in three ways i.e. waiver of right of *qisas* under section 309 PPC, compounding right of *qisas* under section 310 PPC and compounding offence of *qatl-e-amd* under sections 345 Cr.PC and 338-E PPC. Though waiving right of *qisas* (*afw*) without any compensation and compounding right of *qisas* (*sulh*) by seeking some consideration is allowed under Islam but it is nowhere provided under injunctions of Islam that misuse of law cannot be prevented by State. The effect of application of these provisions is that accused can get his acquittal on the basis of compromise. Resultantly, main objective of amended law to control rate of offence of *qatl* and to do justice with victims of *qatl* could not be achieved rather murderers got benefit from the loopholes of Islamized law of *qatl*. One of the drawbacks of Islamized version of law of murder of Pakistan is that thenceforth taking life of any opponent remained no more a dangerous act for killers. Likewise, financially sound and socially influential people take it an opportunity to settle their old scores with rivals by committing murder. Consequently, since the promulgation of *qisas* and *diyat* law in Pakistan punishment for the offence of murder has lost its deterrence. Treating *afw* or *sulh* as a private matter between two parties and giving them free hand of compromise are, in fact, major drawbacks because by doing so

rights of people, i.e. social rights, have been completely ignored. It is a matter of fact that when in a society offence of *qatl-i-amd* or intentional murder is committed, it shackles the whole fabric of society and every member of society becomes aggrieved. So such grievance of a society as a whole can be addressed by a State through legislative actions. In *Hanafi* school of thought, under the principle of *siyasah* the State is empowered to provide penalty of any offence as *ta'zir*. Therefore, in cases of *qatl-i-amd* where parties prefer compromise the legislature, by inserting provisions of compulsory punishment of imprisonment up to seven years as *ta'zir* and *diyat* as well as fine, can restore the deterrence of punishment. Insertion of suchlike provisions has also a valid justification that to the extent of infringement of social rights no redressal has been provided under *qisas* and *diyat* law of Pakistan. Hence, offender of *qatl-i-amd*, despite waiving *qisas*, compounding *qisas* and compounding *qatl-i-amd* by any of the *walis* of the deceased, could be sent to incarceration by making offence of *qatl-i-amd* punishable with mandatory imprisonment for a minimum period of seven years by way of *ta'zir* and *diyat* as well as fine. Even in Saudi Arabia despite compounding offence or waiving of right of *qisas*, the State imposes compulsory punishment as imprisonment of five years by way of *ta'zir*.⁷⁴⁵ Introduction of suchlike amendments in law relating to offence of *qatl-i-amd* would also help controlling the rate of offence of *qatl-i-amd*.

7- After making law relating to murder *Sharia'h* compliant, in the year 1990, it has become quite possible for the rich and for influential to manage acquittal

⁷⁴⁵ Zubaidah Ismail Siti, 'The Modern Interpretation of the *Diyat* Formula for the Quantum of Damages: The Case of Homicide and Personal Injuries', Arab Law Quarterly 26 (2012) pp.361-379 at p. 377.

for killers by any hook or crook. Under the latest jurisprudential trends popular laws are welcomed by the modern society for such laws protect society from wrongs and sufferings and provide its' subjects justice up to the level of satisfaction of members of society. In Pakistan, as it has been witnessed, members of society are not satisfied with the justice administered in cases of *qatl-i-amd*, i.e. premeditated murders. Unrestricted acquittal of accused persons on the basis of *afw* or *sulh*, is considered a misuse of law. In most of the cases of *qatl-i-amd* where parties prefer compromise in any of the above discussed manners judges usually kept themselves aloof from as to how compromise was reached at or courts were kept oblivious of the manner of managing compromise. With the passage of time when misuse of law was frequently witnessed by the vibrant modern society it voiced against such misuse in murder cases committed by some influential persons like *Shahrukh Jatoi* and *Raymond Davis*. Reaching at a compromise in these cases has shaken the civil society to its foundation. Hue and cry from the side of society on compromise in these cases is mere a tip of the iceberg of a vast plethora of like cases came to the fore since enforcement of *qisas* and *diyat* law in the year 1990. It goes without saying that majority of the people feel shy on commenting on law of *qisas* and *diyat* merely under a conception that the law is based on the injunctions of Islam as laid down in the Holy *Qur'an* and the *Sunnah* of the Prophet (pbuh).

- 8- In many cases the apex court of Pakistan has settled law that compromise in cases of *qatl-i-amd* is not acceptable when *qatl* is committed in gruesome and brutal manner but the decision of *Raymond Davis* case is a clear violation of

the settled law wherein compromise was accepted at early stage of trial even without raising any objection from the side of prosecution and by the judge. Moreover, despite a hype of this case in media the higher and superior judiciary did not intervene into the matter for judging the legality and aptness of accepting compromise. In modern world, society has become a prime concern in taking all sort of decisions taken by a State through its organs and laws are also made for protecting and safeguarding social rights. That's why the recent societal reaction in Pakistan on affecting compromise in murder cases of *Shahrukh Jatoi* and *Raymond Davis* once again brought law relating to murder in discussion and criticism. So, this is the time to revisit law and amend it in order to ensure justice and to address the concerns of modern vibrant society. In Islamic law, solution to the problem lies under the *Hanafi* doctrine of *siyasah*. Under the doctrine of *siyasah*, State is empowered to legislate in order to eliminate mischief of any rule of Islamic law. Hence, law of *qisas* and *diyat* in Pakistan relating to offence of *qatl* can be harmonized with modern standards and made applicable to and practicable in modern society.

- 9- Under Islamic criminal law of *qisas* and *diyat*, two pre-requisites i.e. 'constitution of *aqilah* of accused' and 'procedure of *qasamah*' are *sine qua non* of the law. *Aqilah* is basically a group of people responsible for payment of *diyat* and each member of *aqilah* contributes in *diyat* on behalf of accused. *Aqilah* of accused consists of those members of a society who are found very close to accused and are considered to have some moral liability towards accused and his conduct. In other words, under Islamic criminal justice system

members of a society owe some duties and rights towards individuals. Members of society pay *diyat* for they failed in controlling accused and his conduct. On the other hand, members of society who are victims are entitled to retrieve *diyat* as they had to suffer from a loss of life of a person. In cases of *qatl-i-amd* where nobody knows the murderer or no one has information about offence of *qatl*, Islamic law requires the inhabitants to take oath in this regard. So Islamic concepts of *aqilah*, *aqilah*'s liability and procedure of *qasamah*, in fact, involve society or a section of society in the administration of criminal justice. The legislature of Pakistan did not adopt the concept of *aqilah* for an accused while passing law of *qisas* and *diyat*. Provisions relating to constituting *aqilah* should be inserted under law and power to constitute *aqilah* should be reposed to courts. Since modern jurists and theorists believe that law and justice are social phenomena so Islamic concepts of *aqilah* and *qasamah* are in conformity with modern social standards. Under new conception of law, tax payers and citizens are considered to be central to a justice system of a modern society and democratic State. Similarly, Islamic law of *qisas* and *diyat* also involves society in the administration of criminal justice by reposing responsibility to the members of society under the concepts of *aqilah* and *qasamah*. So if law relating to *qatl-i-amd* or other types of *qatl* is moulded as suggested above in order to make it consistent with modern standards of advanced world, modern jurisprudence and needs of modern society, it would not only control the rate of offence of *qatl* but also will strengthen the trust of citizens in legal and justice system of State.

10- In cases of compromise a further flaw, especially in the law of *qisas* and *diyat* of Pakistan that irks every prudent mind and member of vibrant society, is lack of interest of prosecution agency and prosecution witnesses in the conviction and sentence of accused. So in cases of *qatl-i-amd* where parties reach to a compromise, despite heinous nature of the offence as well as detrimental to the whole society, parties seem hand in glove with each other on the pretext of compromise. So the legislature in this regard should pass law whereby State could compel witnesses to attend courts for deposition against accused in the interest of justice and for safeguarding rights of public at large.

Besides the aforementioned, the law of Pakistan relating to the offence of *qatl-i-amd* generally requires reforms and modernization in order to achieve various goals. First, law must be un-ambiguous and impeccable. Secondly, punishment for offence of *qatl-i-amd* must create deterrence so that rate of offence of *qatl-i-amd* could be controlled. Thirdly, latest devices and technologies should be used for collecting and adducing evidence in cases of *qatl-i-amd*. Fourthly, the State should enhance accessibility and efficiency of legal system. Lastly, for improving investigation into the cases of *qatl-i-amd*, a mechanism of cohesion, coherence and sharing information amongst various departments and organizations should be introduced by the State.

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