

Tahir Wasti

The Application of
Islamic Criminal Law
in Pakistan

Sharia in Practice

BRILL

The Application of Islamic Criminal Law
in Pakistan

Brill's Arab and Islamic Laws Series

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The Application of Islamic Criminal Law in Pakistan

Sharia in Practice

By
Tahir Wasti



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To Fatima and Zainab

CONTENTS

List of Tables	ix
List of Graphs	xi
Acknowledgements	xiii
List of Abbreviations	xv
Glossary	xvii
Introduction Islamic Law in Practice: The Application of <i>Qisas</i> and <i>Diyat</i> Law in Pakistan	1
Chapter One The Study	17
Chapter Two Legal and Theoretical Foundation of the <i>Qisas</i> and <i>Diyat</i> Law in Pakistan	57
Chapter Three The Evolution of the <i>Qisas</i> and <i>Diyat</i> Law in Pakistan: A Brief History	99
Chapter Four Assembly Debates on the Law of Murder and Homicide, 1981–97	143
Chapter Five The New Law and Judiciary	165
Chapter Six Impact of <i>Qisas</i> and <i>Diyat</i> Law on the Administration of Criminal Justice in Pakistan	239
Chapter Seven Conclusion	283
Appendix A: Chronology of Events	289
Appendix B: Draft Ordinance	299
Appendix C: The Ordinance 1990	315
Appendix D: The Act of 1997	328
Appendix E: Tables of the Ten District’s Police Records	354
Appendix F: Tables of the Ten Districts’ Session Courts Records	365
Appendix G: Homicide Rate of Pakistan	376

Appendix H: Questionnaire	378
Appendix I: List of Cases	380
Appendix J: List of Statutes	385
Bibliography	387
Index	403

LIST OF TABLES

Table 6.1	Accumulative Data of Ten Districts of the Sample Area Derived from the Police Records	258
Table 6.2	Accumulative Data of the Sample Area Derived from the Sessions Courts Records	262
Table 6.3	Multan High Court: Murder References Decided by the Multan High Court, 1981–2000	270
Table 6.4	Criminal Appeals Decided by the Supreme Court of Pakistan, 1981–2000	274
Table E.1	District Multan Police Records	354
Table E.2	District Khanewal Police Records	356
Table E.3	District Vehari Police Records	357
Table E.4	District Sahiwal Police Records	358
Table E.5	District Pakpattan Police Records	359
Table E.6	District Lodhran Police Records	360
Table E.7	District DG Khan Police Records	361
Table E.8	District Rajanpur Police Records	362
Table E.9	District Layyah Police Records	363
Table E.10	District Muzaffargargh Police Records	364
Table F.1	Sessions Courts Multan	365
Table F.2	Sessions Courts Khanewal	367
Table F.3	Sessions Courts Vehari	368
Table F.4	Sessions Courts Sahiwal	369
Table F.5	Sessions Courts Pakpattan	370
Table F.6	Sessions Courts Lodhran	371
Table F.7	Sessions Courts DG Khan	372
Table F.8	Sessions Courts Rajanpur	373
Table F.9	District Layyah	374
Table F.10	Sessions Courts District Muzaffargargh	375
Table G.1	Homicide Rate in Pakistan	376
Table G.2	Average Homicide Rate per 100,000 Population in Two Decades	376

LIST OF GRAPHS

Graph 6.1	Homicide Rate per 100,000 Population (Sample Area)	259
Graph 6.2	Conviction Rate from Police Records (Sample Area)	260
Graph 6.3	Percentage of Cases Undecided and Cancelled by Ten Districts' Police Records	261
Graph 6.4	Conviction Rate from Sessions Courts Records (Sample Area)	264
Graph 6.5	Rate of Death Sentences from Sessions Courts Records	264
Graph 6.6	Rate of Life Sentences from Sessions Courts Records	265
Graph 6.7	Rate of Compromise from District Attorney's Office	265
Graph 6.8	Rate of Acquittals on Merits from Sessions Courts Records	266
Graph 6.9	Rate of Total Acquittals from Sessions Courts Records	266
Graph 6.10	Rate of Conviction, Multan Bench of Lahor High Court, 1981–2000	271
Graph 6.11	Rate of Conviction, Supreme Court of Pakistan, 1981–2000	275
Graph 6.12	Rate of Acquittal, Supreme Court of Pakistan, 1981–2000	275
Graph 6.13	Homicide Rates in Pakistan since 1981	377

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LIST OF ABBREVIATIONS

AIR	All India Reporter
ALQ	Arab Law Quarterly
BSOAS	Bulletin of the School of Oriental and African Studies
CII	Council of Islamic Ideology
CMLA	Chief Martial Law Administrator
Cr or CrI	Criminal
CrPC	Code of Criminal Procedure
CS	Central Statues
FC	Federal Council (<i>Majlis-e-Shoora</i>)
FIR	First Information Report
FSC	Federal Shariat Court
IPC	Indian Penal Code
J	Journal
Kr	Karachi
Lah	Lahore
LC	Law Commission
MLD	Monthly Law Digest
MOL	Ministry of Law
NCSW	National Commission on the Status of Women
NLR	National Law Reporter
PCrLJ	Pakistan Criminal Law Journal
Pesh	Peshawar
PLD	[All] Pakistan Legal Decision
PLJ	Pakistan Law Journal
PO	President's Order
PPC	Pakistan Penal Code
Q	Quetta
SC	Supreme Court
SCMR	Supreme Court Monthly Review
SD	Shariat Decision
YLR	Yearly Law Reports

GLOSSARY

<i>adl</i>	Justice; good character; qualification of character and piety for appearing as a witness in the court of law and the principal criterion for judicial appointment
<i>ahkam</i>	rules; judgments; plural of <i>hukm</i>
<i>alim</i> (pl. <i>ulamah</i>)	an Islamic religious scholar
<i>amd</i>	intentional or deliberate
<i>amir al-muminin</i>	‘commander of the faithful’; standard title of the caliph
<i>aqilah</i>	nearest parental kin to an offender (also family and associates)
<i>arz</i>	land, but also used to indicate a piece of land such as a State or country
<i>asbah</i>	male residuaries or agnates
<i>afw</i>	Pardon
<i>badl-i-sulh</i>	consideration for compromise or settlement
<i>baitul mal</i>	Public Exchequer—an Islamic treasury set up for the benefit of Muslims and the Islamic State
<i>bulugh</i>	age of puberty or majority
<i>dhimmis</i>	non-Muslims who are protected by a treaty of surrender
<i>diyat</i>	compensation; blood-money for bodily injuries or death
<i>fasad</i>	corruption; decay; evil
<i>fasad</i>	to spoil, vitiate, ruin, demoralize, foil, frustrate, negate, deteriorate, invalidate, purify or decompose
<i>fasad-fil-arz</i>	corruption on earth
<i>fatwa</i>	an advisory opinion by a qualified scholar on a point of law; plural <i>fatawa</i>
<i>fiqh</i>	Islamic jurisprudence
<i>gharib</i>	strange, weakly attested hadith
<i>hadd</i>	limit or boundary; punishment for offences for which limits have been defined in the Quran and Sunnah
<i>hadith</i>	a narrative record of the prophet Muhammad’s sayings and deeds

<i>hakim</i>	Arbitrator
<i>haq al-allah</i>	rights of God
<i>haq al-ibad</i>	rights of individuals
<i>haraba</i>	<i>hadd</i> crime of brigandage
<i>ijma</i>	consensus; agreement of scholars of age; one of four <i>usul al-fiqh</i>
<i>ijtihad</i>	to exercise personal judgment based on the Quran and the Sunnah
<i>ijtihadi</i>	striving; individual research for a ruling from God's law or to govern a human action in conditions where the divine law is definitely not revealed
<i>ikrah</i>	duress; coercion
<i>ikrah-i-naqis</i>	any form of duress which did not amount to <i>ikrah-i-tam</i> (section 299(h) PPC)
<i>ikrah-i-taam</i>	putting any person, his spouse or any of his blood relations within the prohibited degree of marriage in fear of instant death, instant permanent impairing of any organ of the body, or instant fear of being subjected to sodomy or <i>zina-bil-jabr</i> (section 299(g) PPC)
<i>imam</i>	Literally 'leader'; hence, leader of prayer, caliph, founder of a <i>madhhab</i>
<i>iqrar</i>	confession
<i>jahilyyah</i>	pre-Islamic period of ignorance
<i>kaffarah</i>	religious expiation or self-imposed penalty
<i>khata</i>	accidental or mistaken
<i>madhhab</i>	literally 'way of going', hence, school of thought, Islamic legal school (e.g., hanafi, maliki)
<i>majlis-i-shoora</i>	advisory council (parliament)
<i>mal</i>	property
<i>masum</i>	protected
<i>mirath</i>	inheritance
<i>mujtahid</i>	one who is qualified to practice <i>ijtihad</i>
<i>qadhf</i>	slander; <i>haad</i> crime; false accusation of unchastity in a woman
<i>qarinah</i>	circumstantial evidence
<i>qasamah</i>	procedure of compurgation
<i>qatl</i>	homicide
<i>qatl shibh-i-amd</i>	quasi-deliberate homicide: "Whoever with the intent to cause harm to the body or mind of any person

	or causes the death of that or of any other person by means of a weapon or act which in the ordinary course of nature is not likely to cause death is said to commit <i>qatl shibh-i-amd</i> .” (section 315 PPC)
<i>qatl-bis-sabab</i>	homicide by intermediate cause (section 321 PPC)
<i>qatl-i-amd</i>	intentional homicide
<i>qatl-i-khata</i>	homicide by mistake or accidental homicide (section 318 PPC)
<i>qatl-i-tariq</i>	highway robbery or brigandage
<i>qazi/qadi</i>	judge
<i>qisas</i>	equality; retaliation; retribution (as in “an eye for an eye, life for a life”)
<i>razinama</i>	compromise; settlement
<i>sariqah</i>	theft
<i>shahadah</i>	testimony
<i>shariah/shariat</i>	Islamic law
<i>shibh amd</i>	quasi-deliberate
<i>shoora, also shura</i>	consultation
<i>shrub al-khamr</i>	wine drinking
<i>shubhah</i>	doubt
<i>sulh</i>	peaceful settlement, compromise
<i>sunnah</i>	practices of the prophet Muhammad
<i>tazir</i>	chastisement; a class of criminal penalties that are defined by the State or ruler, in contradistinction to <i>hudud</i> , which are prescribed by God
<i>tazkiya</i>	purification
<i>tazkiyah-al-shuhood</i>	attestation of witness and the screening of witness to establish their creditability
<i>ulema</i>	those who know; scholars of Islamic religion and law
<i>uqubat</i>	punishment
<i>usul-al din</i>	roots or fundamentals of Islam
<i>wali</i>	guardian; however, in the <i>qisas</i> and <i>diyat</i> law it is rendered for people who are entitled to claim <i>qisas</i> (a legal guardian); legal heirs according to section 209(i) PPC
<i>zina</i>	illicit sexual intercourse or unlawful intercourse

INTRODUCTION

ISLAMIC LAW IN PRACTICE: THE APPLICATION OF QISAS AND *DIYAT* LAW IN PAKISTAN

Islamic criminal law is not something anachronistic, as is the assumption of many scholars interested in the Arab and Muslim world.¹ It is in fact the prevailing form of law in many Muslim states² and may well become a penal law in the majority in the future. According to a recent survey conducted by Gallup World Poll, an average of 79% of people in the ten Muslim countries³ opined that the incorporation of Sharia must be a source of legislation.⁴ Interestingly, whilst a minority in Lebanon, Turkey, Iran, Indonesia and Morocco wanted Sharia as a source of legislation, a majority in Egypt, Pakistan, Jordan and Bangladesh wanted Sharia as *the only* source of legislation.⁵ Of the States that want Sharia as *the only* source of legislation, Pakistan is the one where presently all the penal laws of Sharia are fully enforced. If this survey is to be trusted as an authentic statement by the Muslim population and the argument is expanded, then the 22 Arab states, along with Afghanistan,⁶ Bangladesh and some Central Asian states may also at some point enforce Sharia penal laws. In this case, the states where Islamic criminal law is currently in practice would serve as a basis for evaluating the ramifications of the enactment and application of Islamic criminal law.

In most States where Islamic criminal law is practiced, with the exception of Saudi Arabia, governments provide the statutes that govern

¹ R. Peters, *Crime and Punishment in Islamic Law*, Cambridge, 2006, p. 142; also see Noah Feldman, "Why Sharia", *The New York Times*, 16 March 2008.

² Saudi Arabia, Qatar, Yemen, UAE, Sudan, Libya, Pakistan, Iran, and Nigeria.

³ Egypt, Pakistan, Jordan, Bangladesh, Morocco, Indonesia, Iran, Turkey, and Lebanon.

⁴ Gallup World Poll, "Special Report: Muslim World", The Gallup Organisation, Princeton, 2006.

⁵ *Ibid.*

⁶ In Afghanistan, Islamic criminal law is the substantive of the State, which is generally applied; however, this conflicts with the 1964 Constitution of the State. See Martin Lau, "Afghanistan's Legal System and its Compatibility with International Human Rights Standards: Final report", International Commission of Jurists, Geneva, 2002.

the provisions of Islamic criminal law which are applied.⁷ Therefore, the Islamic criminal law in these countries is primarily the legislature's understanding of Sharia injunctions, whereby it legislates the law and procedure that is applied in the area of criminal law. This is an exercise that may be construed as present day *ijtihad* by the State. The introduction of Islamic criminal law in these States is known and regarded as a process of the reintroduction of Islamic criminal law. It is considered to be reintroduced because Western-influenced legal codes had abolished the application of Islamic criminal law in these States during colonial rule, and existing methods of administration of justice were replaced with the Western legal System. This reintroduction, as Rudolph Peters astutely observes, is thus actually a graft of Islamic criminal law onto a legal system that was essentially Western.⁸ This phenomenon and its ramifications have attracted the considerable interests of many scholars⁹ and human rights organisations,¹⁰ which have keenly observed the development and operation of these laws in the States concerned. According to a recent study by Amnesty International, for example, a majority of the 1,252 executions carried out worldwide in 2007 took

⁷ See Peters, *Crime and Punishment in Islamic Law*.

⁸ *Ibid.*, p. 142.

⁹ For instance, see Y. Kebir, Algeria, "[Country Survey] Algeria" in *Yearbook of Islamic and Middle Eastern Law*, vol. 1, 1995, pp. 397–405; M. El-Alem, "[Country Survey] Libya" in *Yearbook of Islamic and Middle Eastern Law*, vol. 1, 1995, pp. 225–35; S. Safwat, "[Country Survey] Sudan" in *Yearbook of Islamic and Middle Eastern Law*, vol. 1, 1995, pp. 237–339; M.A. Ansari-Pour, "[Country Survey] Iran" in *Yearbook of Islamic and Middle Eastern Law*, vol. 1, 1995, pp. 340–49; B.S.B.A. al-Muhairi, "The Federal Penal Code and the Aim of Unification", *Arab Law Quarterly*, 12, 1997, pp. 197–210; A.E. Mayer, "Libyan Legislation in Defence of Arabo-Islamic mores", *American Journal of Comparative Law*, vol. 28, 1980, pp. 287, 313; Tijani Muhammad Naniya, "History of Sharia in Some States of Northern Nigeria to Circa 2000", *Journal of Islamic Studies*, vol. 13, no 1, 2002, pp. 14–31; Osita Nnamani Ogbu, "Punishments in Islamic Criminal Law as Antithetical to Human Dignity: The Nigerian Experience", *International Journal of Human Rights*, vol. 9, no. 2, 2005, pp. 165–82; Martin Lau, "The Legal Mechanism of Islamization: the New Islamic Criminal Law of Pakistan", *Journal of Law and Society*, vol. 11, no. 18, 1992, pp. 43–58; Shaheen Sardar Ali, "Sigh of the Oppressed? Islamisation" of Laws in Pakistan under Muttahida Majlis-e-Amal: The Case of the North West Frontier Province", in *Yearbook of Islamic and Middle Eastern Law*, vol. 10, 2006, pp. 107–25; Hassan Rezaei, "Iranian Criminal Justice under the Islamization Project", in *European Journal of Crime, Criminal Law and Criminal Justice*, vol. 10, no. 1, 2002, pp. 54–69.

¹⁰ For instance, see reports and research published by the United Nations Human Rights Commission, Amnesty International, Human Rights Watch, Asian Human Rights Commission, International Commission of Jurists, Human Dignity and Humiliations Studies, International Humanist and Ethical Union's Campaign Defending Human Rights in Islamic Countries, and the Human Rights Commission of Pakistan.

place in five countries: China, Iran, Saudi Arabia, Pakistan and USA. The report reveals that Saudi Arabia had the highest number of executions, followed by Iran and Libya;¹¹ at least 135 people were executed in Pakistan. The statutes under which these sentences were passed, and the executions of convicts in Iran and Pakistan, are a result of the Islamisation of the law.

The phrase “the Islamisation of law”, according to Al-Muhairi,¹² is generally used in Islamic countries¹³ to refer to the official programme of replacing laws of ‘western origin’ with laws based on ‘Islamic’ sources. However, the term connotes an even wider meaning in the case of Pakistan. Here it is not confined to the replacement of western codes with Islamic ones, but also includes the creation of new institutions of State, laws, and even constitutions in consonance with the injunctions of Islam.

Since the establishment of Pakistan in 1947, there has been a conflict between ‘traditionalist’ and ‘non-traditionalist’ forces in the country over whether an Islamic order should be enforced or whether the country should be allowed to develop along secular lines as a modern nation-state. This struggle has some linkage with, if not its roots in, the movement for Pakistan. “Pakistan was achieved in the name of Islam” has been the popular slogan of the country’s traditionalist *ulema*,¹⁴ irrespective of whether they had taken part in the movement to establish a separate homeland. Even the ‘indifferent’ Abul Ala Maududi (1903–79) had said,

why should we foolishly waste our time in expediting the so-called Muslim-nation-state and fritter away our energies in setting it up, when we know that it will not only be useless for our purpose, but rather prove an obstacle in our path.¹⁵

¹¹ Amnesty International, “Death Sentences and Executions in 2007”, AI Index: Act 50/001/2008, London, 2008.

¹² Butti Sultan Butti Ali Al-Muhairi, “Islamisation and Modernization within the UAE Penal Law: Sharia in the Modern Era”, *Arab Law Quarterly*, vol. 11, no. 1, 1996, pp. 34–49.

¹³ Islamic states are those whose constitutions declare them to be Islamic or Muslim.

¹⁴ *Ulema* is the plural of *alim*. The literal meaning of *alim* is ‘learned in Islamic theology’. It is also used to mean ‘religious leader’; I have used the word in this sense.

¹⁵ Abul Ala Maududi did not support the Congress, unlike other *ulema* like Rashid Ahmad Gangohi, Ataullah Shah Bokhari, and Maulana Hussain Ahmad Madni. Instead, he criticised the Muslim League and its leaders vehemently for their stance on the idea of Pakistan. He has thus been viewed as ‘indifferent’ to the Pakistan movement by some

However, while delivering a speech at the Law College, Lahore, on 6 January 1948, he moved away from his previous stance, saying “it [Pakistan] has been achieved exclusively with the object of becoming the homeland of Islam”.¹⁶ It was only in 1979 that a head of Government for the first time declared that Pakistan had been created for the sake of Islam. When introducing the notorious *Hudud* Laws¹⁷ on 14 August 1979, General Muhammad Zia-ul-Haq¹⁸ proclaimed that Pakistan had been achieved to become an Islamic State and promised to enforce an Islamic order in the country. The establishment of Shariat Benches dealing with Shariat (Islamic) law in every provincial High Court of the country was the most significant outcome of that policy. In 1980, the Federal Shariat Court was created to examine “whether or not any law or provision of a law is repugnant to the injunctions of Islam, as laid down in the holy *Quran* and *Sunnah*”.¹⁹

The process of the Islamisation of law has been opposed by ‘non-traditionalists’ on the authority of the writings and speeches of the leaders of the movement of Pakistan. Mohammad Ali Jinnah (1876–1948), who led the movement for Pakistan and who is honoured as the Father of the Nation, had maintained that the new State would be a modern democratic State, with sovereignty resting in the people and with every member of the new nation having equal rights of citizenship regardless of religion, caste or creed. As Jinnah himself put it in a radio interview in 1947, “nationality, rather than religion, is the basis for a separate homeland for the Muslims of India”.²⁰ This statement is often quoted as proof that the ideology that created Pakistan—‘*Pakistan ka matlab kya, La Ilahlah Illallah*’ (‘what does Pakistan mean? Pakistan means that there is no God other than Allah’)—had in fact never been raised on

authors. For details, see I.H. Qurashi, *Ulema in Politics*, Lahore, 1972, and Khalid bin Saeed, *Pakistan: The Formative Phase*, Karachi, 1968.

¹⁶ Abul Ala Maududi, *The Islamic Law and its Introduction in Pakistan*, Lahore, 1960, p. 10.

¹⁷ These were five Ordinances pertaining to the establishment of Islamic criminal law: (1) The Offences Against Property (Enforcement of *Hudud*) Ordinance, 1979 (VI of 1979); (2) The Offences of *Zina* (Enforcement of *Hudud*) Ordinance, 1979 (VII of 1979); (3) The Offences of *Qazf* (Enforcement of *Hudud*) Ordinance, 1979 (VIII of 1979); (4) The Prohibition (Enforcement of *Hudud*) Ordinance, 1979 (IV of 1979); (5) Execution of the Punishment of Whipping Ordinance, 1979 (IX of 1979).

¹⁸ Mohammed Zia-ul-Haq was the head of Government in the period 1977–88.

¹⁹ Article 203D was added to the Constitution of 1973. It stipulated that the Court, at the request of a citizen or the government, will carry out this examination and can rescind any law or provision which it finds repugnant to the injunctions of Islam.

²⁰ Edward Mortimer, *Faith and Power*, London, 1982, pp. 188–89.

the platform of the Muslim League. Used as an election slogan coined by a Sialkot poet during the 1945 elections to decide the partition of India, it was vehemently opposed by Jinnah himself at the first and last meeting of the All Pakistan Muslim League,²¹ held under his chairmanship in 1947. The incident is quoted in the memoirs of a member of the Council of the Muslim League:

During the meeting, a man who called himself Bihari put to the Quaid that “we have been telling the people Pakistan ka matlab kya, La Ilaha Illallah.” “Sit down, sit down,” the Quaid shouted back. “Neither I nor my working committee, nor the Council of the All India Muslim League has ever passed such a resolution wherein I was committed to the people of Pakistan. Pakistan *ka matlab*, you might have done so to catch a few votes”.²²

Raja Saheb Mahmoodabad, a leader of the Muslim League and close associate of Jinnah, also cites the incident in his memoirs. Mahmoodabad adds his personal experience with Jinnah on the matter of establishing Pakistan as an Islamic State:

During 1941–5, we advocated that Pakistan should be an Islamic State. I must confess I was very enthusiastic about it and in my speeches I constantly propagated my ideas. My advocacy of an Islamic State brought me into conflict with Jinnah. He thoroughly disapproved of my ideas and dissuaded me from expressing them publicly from the league platform lest the people might be led to believe that Jinnah shares my view and that he was asking me to convey such ideas to the public. As I was convinced that I was right and did not want to compromise Jinnah’s position, I decided to cut myself away and for nearly two years kept my distance from him, apart from seeing him during the working committee meetings and other formal occasions.²³

Non-traditionalists also quote the Lahore Resolution which demanded that the Muslim majority provinces of India be joined together to form an independent State,²⁴ but made no reference to the establishment of an Islamic State. What the ‘orthodoxy’ in Pakistan finds difficult to explain

²¹ The Muslim League, a political party founded in 1906, led the movement for the creation of Pakistan. Jinnah was its most prominent member.

²² Malik Ghulam Nabi, *Daghon ki Barat*, cited in Ahmad Bashir, “Islam, Shariat and the Holy Ghost”, *Frontier Post*, Peshawar, 9 May 1991.

²³ Raja Sahib Mahmoodabad, “Some Memories” in Mushirul Hasan, ed., *India’s Partition—Process, Strategy and Mobilization*, Oxford, 1993.

²⁴ The Lahore Resolution, also called the Pakistan Resolution, was passed at the 27th Annual Session of the All-India Muslim League, held at Lahore on 23 March 1940.

is why, if Pakistan was to become a homeland of Islam, all prominent members of the *ulema* in India at the time of partition opposed the movement for Pakistan.²⁵ As Keith Callard argues in his well-known study, “the background of the men who organized the campaign was not theology and Islamic law, not Deoband, but Cambridge and the Inns of Courts”.²⁶ He suggests that had the movement for Pakistan been one for an Islamic State, it would have arisen from religious schools and been led by the *ulema*.

Vast work has been done on this theme and different standpoints have been presented. However, what the existing historiography has not specifically recorded are the views on Islamic law of the leaders of the movement of Pakistan. In this context, one needs to focus on the views of Syed Ahmed Khan (1817–1898), who advanced ‘the two nations theory’; Muhammad Iqbal (1875–1938), who is often believed to be the first to have presented the idea of a separate homeland for Muslims; and Jinnah. These three figures whose views shall be examined were not only leaders of the movement for separation, but were also connected with law. Whilst they were trained in western law, they also possessed a deep knowledge of traditional Islamic law.

There seems now to be a scholarly consensus²⁷ on that the process of Islamisation began in Pakistan after the demise of its founding father, Jinnah, and with the introduction of the Objectives Resolution²⁸ in the first Constituent Assembly of Pakistan on 7 March 1949. The Objectives Resolution embodied generalised ideas set out in loose terms and phrases, and its close examination makes it clear that the whole process of the Islamisation of the country is opposed to its spirit. The Resolution simply noted that “sovereignty over the entire universe belongs to Almighty Allah alone” and that the people of Pakistan, therefore, were to exercise power as a “sacred trust” only by doing so “within the limits

²⁵ Manzoor Ahmad, “Political Role of the Ulema in the Indo-Pakistan”, *Islamic Studies*, 1967. vol. 6, pp. 3–7.

²⁶ Keith Callard, *Pakistan: A Political Study*, New York, 1957, p. 197. *Deoband* was an educational institution established in India in 1866 to advance ‘Islamic sciences’.

²⁷ For example, see Afzal Iqbal, *The Islamization of Laws in Pakistan*, Lahore, 1986; Smruti Pattanaik, “Islam and Ideology of Pakistan”, *Researcher Institute for Defense Studies and Analyses*, 1998; Herbert Feldman, *From Crisis to Crisis: Pakistan, 1962–1969*, London, 1972.

²⁸ The Objectives Resolution was passed on 11 March 1949. It stipulated: “the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings of the *Quran* and the *Sunnah*”. For further details, see *The Constituent Assembly of Pakistan Debates*, vol. 1, Karachi 1947.

prescribed by Him". The Resolution also stated that it would enable Muslims to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the holy *Quran* and *Sunnah*. What the Resolution avoided was the explicit declaration that the laws of the country be Islamised.

Paradoxically, therefore, a loosely-worded Resolution that had deliberately left much room for the interpretation and interplay of diverse ideologies came to be used by legislators and courts for the specific purpose of Islamising the laws of the country. When the Basic Principles Committee²⁹ was appointed, on the basis of the Objectives Resolution, to report in accordance with the Resolution on the main principles upon which the future constitution was to be framed, it suggested, *inter alia*, that:

suitable steps should be taken for bringing the existing laws into conformity with the Islamic principles, and for the codification of such injunctions of the Holy *Quran* and *Sunnah* as can be given legislative effect. [...] No legislative body should enact any law which is repugnant to the Holy *Quran* and *Sunnah*.³⁰

Eventually, the Objectives Resolution was enshrined as a Preamble in all three constitutions of the country (the Constitution of 1956, the Constitution of 1962 and the Constitution of 1973). All three embodied, though with slightly different articulations, a common provision that became the criterion to examine a law of the country:³¹

No law shall be enacted which is repugnant to the Injunctions of Islam as laid down in the Holy *Quran* and *Sunnah*, hereinafter referred to as injunctions of Islam, and all existing law shall be brought in conformity with such injunctions.³²

It was this provision that was subsequently to be utilised and manipulated by various groups advancing the cause of Islamisation.

²⁹ The Basic Principles Committee was constituted by the first Constituent Assembly of Pakistan on 12 March 1949. For details, see the *Constituent Assembly Debates*, vol. 5, no. 1, Karachi, 1947.

³⁰ See, the Report of the Basic Principles Committee 1953, in Safdar Mahmood, *Constitutional Foundation of Pakistan*, Lahore, 1975, p. 54.

³¹ Article 198 of the Constitution of 1956; Article 9 of the Constitution of 1962, as added by the Constitution Amendment Act, 1963 (1 of 1964); and Article 227 of the Constitution of 1973.

³² Article 198(1) of the Constitution of Pakistan 1956, PLD 1956 Statute, Lahore, 1956; Articles 199–206 in the Constitution of The Islamic Republic Of Pakistan 1962; Articles 227–31 in the Constitution of the Islamic Republic of Pakistan 1973.

The introduction of the law of *Qisas* and *Diyat* law in Pakistan is the result of a 'judge-led' process of Islamisation executed by the Shariat Courts of the country.³³ When this article, with minor changes, was made enforceable in the Shariat Benches, one Gul Hasan filed a Constitutional Petition at the Shariat Bench of the Peshawar High Court, seeking a declaration that the provisions of the Pakistan Penal Code, 1860 (formerly the Indian Penal Code) and the Code of Criminal Procedure, 1898, which do not recognise the options of blood money and pardon for the next of kin or heirs of the deceased, are repugnant to the injunctions of Islam as laid down in the *Quran* and *Sunnah*. The Court pronounced that *qisas* (retaliation), *diyat* (blood money) and pardon were the only three options available for dealing with murder cases under Islam. As the Pakistan Penal Code did not include any provision to that effect, it held that the whole law with regard to the offences of murder provided therein needed amendment.³⁴ The law of *Qisas* and *Diyat* supplanted the provisions of the Pakistan Penal Code of 1860, dealing with offences affecting the human body and life, and amended the provisions of the Criminal Procedure Code of 1898. By this law, the legal heir of a victim of murder could compromise with the offender by either waiving his right of *qisas* or compounding the right of *qisas* by accepting *badal-i-sulh* (consideration for compromise) or blood money. This law was promulgated by the Criminal Law (Second Amendment) Ordinance in 1990. The law of *Qisas* and *Diyat* was enacted as the Criminal law (Amendment) Act by the Parliament in 1997.

Given these changes, it is necessary to contextualize the law of *Qisas* and *Diyat*, as practised in Pakistan, in the traditions of Islamic criminal justice. Therefore, according to Iqbal's theory, Islamic law applied in different countries and in different environments must take into account the indigenous and prevalent customs, conditions and habits of the people. Therefore, the following section explores the theories and objectives of punishment under Islam that condition its application in any context.

³³ The phrase has been used by Martin Lau, "Islam and Constitutional development in Pakistan" in Ian Edge, ed., *Comparative Law in Global Perspective*, New York, 2000.

³⁴ *Gul Hasan Khan v. Government of Pakistan*, PLD 1980, FSC 187.

THEORIES AND OBJECTIVES OF PUNISHMENT UNDER ISLAM

A system of criminal law and its administration cannot be an end in itself, but only a means to attaining an end. Its merits hence cannot be determined and punishments cannot be justified on the basis of the sole criterion of it being a criminal law of a particular system, society, religion or country; it must be judged on the basis of its efficacy, i.e., whether it achieves the required ends and objectives of justice. One end is the aim of punishment itself. Traditionally, punishment has been viewed from two basic standpoints: as a method of protecting society by reducing occurrences of crimes, and as an end in itself. The first is an argument of the collectivist philosophy, in which criminal law is primarily required to ensure a sense of security and to preserve and increase welfare. The infliction of specific punishments is a means to procure this end. The second approach is linked with the individualistic philosophy, which is founded on the ethical conception of punishment and concerned with the treatment of the individual as an individual rather than as a unit in a group. Hegel and Kant are supporters of this view. Kant, for example, argues that:

judicial punishments can never be administered merely as a means for promoting a good society but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime. Justice therefore is not a means to an end but an end in itself, and punishment is inflicted for no other reason than that it is merited by wrong doer.³⁵

In both of these views, the nature and form of punishment are determined exclusively in light of its specific objectives. The most common objectives for inflicting punishment are deterrence, reformation, prevention, expiation, restitution and retribution. The first three concepts regard law as a means of protecting the community from the further commissioning of crime and structured for protecting society from transgressions. The last three theories, on the other hand, regard punishment as a means to an end. Additionally, the purpose of punishment can be political, religious, or the protection of property or interests of a particular class.

Laws, which are in consonance with one or another end, may be at variance with other objectives. So far as capital punishment—the

³⁵ G.W. Keeton, *The Elementary Principles of Jurisprudence*, London, 1972 (first published 1930), p. 326.

death penalty—is concerned, it is preventive in nature as it excludes reformation. Mutilation may be seen as retaliation and a deterrent, while its reformatory and preventive effects are arguable as the punished may commit the offence again if compelled by necessity. Confinement, while being an effectual measure of prevention, is incompatible with immediate retaliation. In order to enable a final evaluation of a penal law, an assessment of the comparative importance of the various possible ends is necessary. It is only after this that some comments about the worth and efficacy of a law may be made.

An important feature of criminal law is that it reflects an inherent conflict of interests: the interests of the actual potential offenders against the interests of their actual potential victims. What benefits the first may usually be detrimental to the second and vice versa: while the offender asks for exemption or pardon, the victim demands security, prevention and justice. A humanitarian view for the reprobate may be a blow for the victims, while a no less humanitarian interest in the safety of potential victims may lead to ruthless action against offenders. The clash of these interests therefore needs to be dealt with judiciously.³⁶

Islam maintains a balance in this frame of reference as it insists on examining all conditions and circumstances connected with an offence. When analysing a crime, it takes into consideration the standpoints of offender, victim and society against which an act of aggression is often believed to be directed. Taking into account these perspectives, Islamists claim that “Islam prescribes the punishment which is in accordance with the sound logic and wise reasoning”.³⁷ It is from this standpoint that we intend to explore the place of laws concerning *qisas* and *diyat* in different theories of punishment. This chapter analyses the philosophy of Islamic penal laws, chiefly, the *Qisas* and *Diyat* with reference to western theories of punishment.

So far as the nature of punishments is concerned, J. Heath states that:

punishment may be designed as evil, by threatening which the sovereign seeks to deter his subjects from breaking the law, and which if they do break the law, he visits upon them in just proportion to their offences, with a view to obtaining some future benefit.³⁸

³⁶ J. Fisch, *Cheap Lives and Dear Limb: The British Transformation of the Bengal Criminal Law, 1769–1817*, Wiesbaden, 1983, p. 8.

³⁷ See Mohammad Iqbal Siddiqi, *The Penal Law of Islam*, Lahore, 1985.

³⁸ J. Heath, *Eighteenth Century Penal Theory*, London, 1963, p. 181.

This definition outlines the fact that punishment, an evil, is not a desirable act in itself and that it should possess a deterrent effect under all circumstances. Though its nature ought to be retributive, it should also be commensurate with the gravity of offence committed.³⁹ According to Beccaria *et al.*, averting the recurrence of the offence is not only the prime objective but the sole permissible purpose of inflicting a criminal punishment.⁴⁰ Bentham upholds that punishment is mischief; that every punishment is in itself an evil.⁴¹ If it is to be admitted at all, upon the principles of utility it can be inflicted to exclude a greater evil from society. He enumerates several necessary ingredients of a proper punishment, e.g., it should be susceptible or divisible, there should be the possibility of increasing or decreasing its incidence, it should be analogous to the offence, etc.⁴²

What are the objects of Islamic punishments, predominantly the *Qisas* and *Diyat*? Are they means in themselves or a means to an end? What are their characteristics? Are they retributive, punitive, deterrent, redressive, restitutive, reformative, protective or expiative? The *Quran*—the foundation of Islamic law—ordains:

In the law of Equality, (*Qisas*)
There is (saving of) Life
To you, O ye men of understanding...⁴³

Does the law of *Qisas* and *Diyat* really function in this way? Or, as Schacht believes, is there an untidy relationship between the ideal theory of Islamic law and actual practice by Muslims and their leaders that is at work in Pakistan?⁴⁴ In this connection, theories that question the law of retaliation in general, and condemn capital punishment by killing, hanging or other modes, become important in the context of the concepts of *qisas* and *diyat*.

³⁹ Tahirul Qadri, *Islamic Penal System and its Philosophy*, Lahore, 1986, p. 481.

⁴⁰ C.S. Kenny, *Outlines of Criminal Law*, Cambridge, 1966, p. 32.

⁴¹ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, ed. J.H. Burns and H.L.A. Hart, London, 1948, p. 170.

⁴² *Ibid.*

⁴³ All references to the *Quran* in this book use the translation of Abdullah Yusuf Ali, *The Meaning of the Holy Quran*, Beltsville, 1997. Wherever a comparison is necessary, other translations are used and particularly referenced.

⁴⁴ J. Schacht, *Islamic Law in Contemporary States*, as quoted by M. Cherif Bassiouni in *The Islamic Criminal Justice System*, London, 1981, p. 17.

QISAS AND *DIYAT*

The Arabic term *qisas*, as used in the *Quran*, is translated as retaliation⁴⁵ or equality.⁴⁶ It can be described as ‘equality in retaliation’. It is derived from its root verb *qassa*, which means ‘he followed’, after his track or footsteps. Another derivative is *qassas*, which means storyteller—one who follows the track of past generations. In Islamic law, the expression of ‘retaliation’ is termed *qisas* because it follows the footsteps of the offender, perpetrating on him an injury, as a punishment, exactly equal to the injury which he inflicted upon his victim, but no more.⁴⁷ *Diyat* means compensation or blood money. In Islamic criminal law, *qisas* and *diyat* are also known as *al-Jinayat* (literally ‘offences’, sing. *jinaya*) and refer to homicide, bodily harm and damage to property.⁴⁸ *Qisas* is divided into two categories: retaliation of life for a life, and retaliation for/of organs. The crimes against the life of a person fall in the first category, while others that do not affect life but may injure the organs of a person fall within the scope of the second.

The law of *Qisas* and *Diyat* was ordained in the *Quran* in the following words:

O ye who believe! The law of equality is prescribed to you in cases of murder
 The free for the free the slave for the slave, the woman for the woman.
 But if any remission is made by the brother of the slain then grant any reasonable demand and compensate him with handsome gratitude;
 This is a concession and a Mercy from your Lord.
 After this whoever exceeds the limits shall be in grave penalty
 In the law of equality there is (saving of) life to you
 O ye men of understanding! That ye may restrain yourselves.⁴⁹

As Anderson states, the obligation of vengeance was “inbred” in the Arabs.⁵⁰ Even before the revelation of these verses, the Arabs would requite a murder with killing. The difference was that their retaliation had no limits depending on the strength or weakness of their tribe.

⁴⁵ Pickthall, Mamaduke, *The Meaning Of The Glorious Quran: An Explanatory Translation*, London, 1930.

⁴⁶ Yusuf Ali, pp. 71–2.

⁴⁷ For details, see E.W. Lane, *Arabic English Lexicon*, Edinburgh, 1867.

⁴⁸ Schacht, *An Introduction To Islamic Law*, Oxford, 1964, p. 181.

⁴⁹ Q. 2:178 in Yusuf Ali, p. 71.

⁵⁰ J.N.D. Anderson, “Homicide in Islamic Law”, *BSOAS*, vol. 13, no. 4, 1951, p. 811.

Islam introduced the law of *Qisas*—the just retaliation—into this society. Thus, the *Qisas* was intended to limit the vicious blood feuds that Arab tribes would pursue with great fervour, sometimes from generation to generation. The *Quran* states:

We ordained therein for them: "Life for life, eye for eye, nose for nose, Ear for ear, tooth for tooth and wounds equal for equal."
But if anyone remits the retaliation by way of charity it is an act of atonement for himself. And if any fail to judge by (the light of) what Allah hath revealed they are (no better than) wrong-doers.⁵¹

The Jews also had the law of retribution.⁵² The Christian tradition, in contrast, was to take remission and payment of blood-money in the matter of murder.

Diyat (blood money) was also known among the Arab tribesmen as a peaceful substitute for vengeance, but it varied according to the position of the murderer and his tribe. Traditionally, the *diyat* was set at 100 camels for the death of a person and proportionally for lesser injuries. Today, monetary equivalents are calculated by the courts.⁵³ Into this sort of Arabic tradition of vengeance, the *Quran* introduced the principle of *lex talionis*. But the *Quran* stated only the general principles which were developed, construed, and interpreted and applied by the prophet Mohammad.

We see in the *Quran* that only two kinds of homicide are mentioned: deliberate and accidental. In the case of deliberate homicide, the punishment prescribed in the *Quran* is the killing of the offender or payment of blood money, if the legal heirs of the victim do not ask for *qisas*. Verse 92 of Sura 5 (*Maida*), however, explains that in the case of accidental killing the murderer should pay blood money unless the heirs of the victim remit it freely. A later development of the law classified *qisas* into five categories based on the *Sunnah* of the prophet. Likewise, *qisas* for injury is established neither from the *Quran* nor from the *Sunnah*, but forms the integral part of the law on the basis of *ijma*.⁵⁴

⁵¹ Mohammad Hussain Tabatabai, *Al-Mizan: An Exegesis of the Qur'an*, vol. 2, Tehran, 1984, p. 328.

⁵² "But if a fatal accident should occur, then you must give soul for soul (24), eye for eye, tooth for tooth, hand for hand, foot for foot (25), branding for branding, wound for wound, blow for blow", Exodus 21:23, New World Translation of *The Holy Scriptures*, USA, 1984, p. 105.

⁵³ *The Qisas and Diyat Act 1997*, PLD 1997 Statute, Lahore.

⁵⁴ Mohamed S. El-Awa, *Punishment in Islamic Law: A Comparative Study*, Indianapolis, 1982, p. 73.

The concepts of *qisas* and *diyat* as ordained in the *Quran* were further explained and construed by the prophet Mohammad. Thereafter, the *Kulfa-i-Rashideen* (companions of the prophet) applied the law according to their own understanding of these concepts. Various Islamicists, who later become the founders of various schools of thought, also then further developed those concepts of Islam in the medieval period. A small number of verses and a few *hadiths* (the traditions of the prophet) regarding the law of *qisas* and *diyat* engendered conflicting interpretations of the law. What needs to be examined in the case of the enacted law of *Qisas* and *Diyat* in Pakistan is which interpretations of the law were acknowledged and adopted by the Legislature, and which were not considered suitable to be applied in the particular circumstances of Pakistan.

The introduction of the concepts of *qisas* and *diyat* were a radical step taken by the prophet Mohammad to resolve crises that had arisen in the nomadic tribal societies of the Arabs. When applying *Quranic* injunctions, however, the prophet took into consideration the indigenous cultures and traditions of the Arabs. Historical evidence suggests that in pre-Islamic societies, blood feud was a mechanism by which social order was maintained.⁵⁵ The principles of *qisas* and *diyat* brought an end to the endless killing of human beings as a result of tribal animosity. However, the concepts of *qisas* and *diyat* must be reviewed in the light of modern nation states.

The implementation of the law of *Qisas* and *Diyat* in Pakistan changed the whole structure of criminal litigation with regard to the offence of murder, inasmuch as it altered the role of the State in the prosecution of criminal cases. With the implementation of the new law, the role of the State became restricted to merely ensuring a fair passage of the case through the courts. Furthermore, even in the case of *qisas*, the law provided various exemptions by which punishment could not be imposed.⁵⁶ Most importantly, as will be demonstrated throughout this

⁵⁵ Hamza Alvi, "Significance of *Riba* and Interest", *Dawn*, 9 February 2000.

⁵⁶ Section 306 of the Pakistan Penal Code provides that *qatl-i-amd* (wilful murder) shall not be applicable to the law of *Qisas* in the following cases: (a) when an offender is a minor or insane: provided that, where a person liable to *Qisas* associates with himself in the commission of the offence a person not liable with the intention of saving himself from *Qisas*, he shall not be exempted from *Qisas*; (b) when an offender causes the death of his child or grand-child, how-low-so-ever; and (c) when any *wali* (legal heir) of the victim is a direct descendant, how low-so-ever, of the offender.

book, the option of entering into compromise by waiver (pardoning for the sake of God) or through compensation to the legal heirs of the victim, has led to the deterioration of the situation of law and order in Pakistan. The law as practised in Pakistan has failed to achieve some of the more important aims of punishment: deterrence, retribution, and reformation. Further, the implementation of a particular interpretation of Islamic law which is dissociated from the needs of the existing social order in Pakistan has adversely affected several underprivileged sections of society, particularly women and non-Muslims.

ORGANISATION OF THE BOOK

Chapter One introduces the conceptual basis of this study, including sources of Islamic law and Islamic criminal law, and the methodology employed. Chapter Two examines the three judgments of the Shariah courts of Pakistan that formally broached the debate of the application of *qisas* and *diyāt* law in the State. This chapter reinforces Martin Lau's thesis that the Islamisation process of Pakistan has been primarily a judge-led process.⁵⁷ Chapter Three examines the lego-political history of Pakistan and looks into the State's role, stance and performance in the legislation-making process, as well as the reasons for putting aside orders of the Shariah courts. Chapter Four focuses on debates that took place in the various Assemblies concerning the enactment of *qisas* and *diyāt* law in Pakistan. This brings into light the legislators' understanding of the law and their expectations regarding its application, and also illustrates the minority's point of view. Chapter Five analyses the case law pertaining to the crimes of culpable homicide and murder. It accentuates the different interpretations by the various judges who contradict each others' understandings of Islamic law. This chapter illustrates how the law has at times been misused and misapplied by certain influential sections of society. Chapter Six offers an examination of the ramifications of the new law's application on the litigation pertaining to murder and homicide. There is an analysis of the application of the law by the various agencies involved in the administration of criminal justice in Pakistan. This chapter also presents the crime

⁵⁷ Martin Lau, "The Legal Mechanism of Islamization: The New Islamic Criminal Law of Pakistan", *Journal of Law and Society*, vol. 18, no. 18, 1992, pp. 43-58.

statistics relating to murder from 1980–2000 in Pakistan in general and in the sample area in particular, showing that the rate of cancellation of cases by the Police and acquittals by the courts has doubled since the application of the *qisas* and *diyat* law. Finally, Chapter Seven presents the conclusion of the research.

CHAPTER ONE

THE STUDY

OVERVIEW

Pakistan's system of criminal law changed radically in 1979, when the military regime of General Zia-ul-Haq (1977–85) embarked upon a process of Islamisation¹ by promulgating a set of Islamic penal laws² and establishing Shariat Benches in the superior judiciary of Pakistan.³ Intriguingly, during this phase of Islamisation, the law pertaining to offences affecting the human body and life which had been provided in the *Pakistan Penal Code (1860)* was omitted from Zia-ul-Haq's project. However, this part of Pakistan's secular criminal law was successfully challenged in the Shariat courts of the country on the ground that it violated principles of Islamic law.⁴ The courts declared that the existing law pertaining to the crimes of bodily injuries and homicide was un-Islamic and therefore ordered Zia-ul-Haq's Government to amend it in accordance with the principles of *qisas* (retaliation) and *diyat* (blood-money).⁵ Even then, however, Zia-ul-Haq did not replace the secular law with the Islamic one, but instead appealed against the decisions.⁶ It was only ten years later, in 1990, that an interim Government⁷ accomplished the task of the Islamisation of penal laws and promulgated an Ordinance providing for *qisas* and *diyat* in the State of Pakistan.⁸

This book examines the introduction and application of the *qisas* and *diyat* law in Pakistan and, although the law covers all offences

¹ The word 'Islamisation' is used here to refer to the official programme of replacing laws of 'Western origin' with laws based on 'Islamic' sources.

² See Introduction, footnote 17, on the five Ordinances pertaining to the establishment of Islamic criminal law.

³ *Shariat Benches of the Superior Courts Order, 1979*, Constitutional (Amendment) Order, 1979, PO 3 of 1979. For details, see Chapter Two.

⁴ See Chapter Two.

⁵ Ibid.

⁶ See Chapter Three.

⁷ Ibid. and also see Chapter Four.

⁸ Ibid.

pertaining to bodily injuries and life,⁹ focuses more specifically on that part of the law which deals with offences of culpable homicide and murder.¹⁰ The study analyses this part of the law as it is enacted in Pakistan, rather than as it is propounded by the jurists of Islam (under the title of 'Islamic law of *qisas* and *diyat*'). The central thesis is that the present homicide law of Pakistan is incompatible with the criminal justice system of the State. It is argued that the legislation in question works against the overall aims and objectives of the criminal justice system, which are to protect life and prevent crime by convicting and punishing the guilty and saving the innocent. It is also argued that there was never a truly legal rationale for the new law and that political expediency was rather the main motivation for its introduction.

The book demonstrates that the formulation of the new law encouraged judges to interpret it according to their personal beliefs and understandings of Islam, rather than to follow the doctrine of *stare decisis* as enshrined in the constitution of Pakistan.¹¹ The effect of such an individualistic approach has been a blurring of the concepts of crime and punishment pertaining to the offences of culpable homicide and murder. The application of the law has also resulted in a significant fall in convictions for culpable homicide and murder, although the rate of homicide has soared and a large number of convicted murderers have escaped punishment.

To support this argument, the research does not employ Western philosophies of crime and punishments¹² as benchmarks, but weighs the law as practiced against the principles and theories of Islamic criminal law which have been postulated by early and modern jurists and scholars of Islam.¹³ It will be argued that the graft of the *qisas* and

⁹ For research regarding the Pakistani law of *qisas* and *diyat* pertaining to offences with regard to bodily injuries, see Najibah Mohammad Zin, *The Law of Personal Injuries and Assessment in Islamic Law: Ibn Qudamah (d. 620 A.H./1223 A.D.) and The Pakistan Penal Code of 1860*, PhD dissertation, Glasgow Caledonian University, Scotland, 1995.

¹⁰ See The Criminal Law (Amendment) Act, 1997, PLD 1997 CS 171.

¹¹ See Articles 189, 201 and 203-DD of The Constitution of the Islamic Republic of Pakistan, 1973 (hereafter the 1973 Constitution), Lahore.

¹² For Western theories of crime and punishment, see Chapter 5 in J.W. Harris, ed., *Legal Philosophies*, London, Butterworth, 1980, p. 49, and the sources cited therein; also see Michel Foucault, *Discipline and Punish: The Birth of the Prison*, London, 1977.

¹³ Theories of Islamic law deal with a variety of issues, for example, the theory of Islamic governance, the preservation of Islamic law and the objective of an Islamic State. In this book, I illustrate how Islamic criminal law has been dealt with in these theories.

diyat law into the body of a penal code enacted by the British in 1860, and into a system of criminal justice essentially based on an English legal tradition, is an incongruity that causes friction among the various components of the criminal justice system of Pakistan and has resulted in the misuse and misapplication of the law. This book argues that the new law has in fact ‘privatised’ the crime of murder in Pakistan, thus allowing influential persons charged with murder to escape punishment. Furthermore, there have even been cases where the compensation of the heirs of a murder victim has amounted to a crime itself, as the new law allows girls to be part of any ‘compensation package’.

Thematically, the book is organised into three parts. Chapters One through Four explore and analyse the politico-legal history of the *qisas* and *diyat* law of Pakistan. Chapter Five deals with the application of *qisas* and *diyat* by the courts of law. This chapter primarily examines judges’ interpretations of the law and illustrates the differences in their opinions that are based on their disparate understandings of Islamic criminal law. Chapter Six examines the practical ramifications of the application of the *qisas* and *diyat* law on murder litigation in Pakistan. It analyses the data of two divisions of Pakistan that form the jurisdiction of the Lahore High Court, Multan Bench.

1.1 WHY THIS RESEARCH?

The idea for this study emerged while I was working as an Assistant Advocate General in Punjab and appearing on behalf of the State of Pakistan at the Lahore High Court. From 1996–2000, I appeared in a large number of murder cases for the prosecution, thus representing the interests of the State. Prior to that, I had practiced for six years as a Defence Counsel in criminal law.

Pakistani laws of murder and homicide underwent a drastic change in 1990. The Government replaced Chapter Sixteen of *The Pakistan Penal Code*, 1860 (PPC)—of offences affecting the human body and life—with a Pakistani brand of the Islamic law of *qisas* and *diyat*. The supplanted law not only substituted one punishment with another, but also radically altered the whole complexion and comprehension of the offence of murder. The present law permits the *wali* (legal heirs)¹⁴ of a

¹⁴ Section 299(i) of The Criminal Law (Second Amendment) Ordinance, 1990 (hereafter the Ordinance of 1990), see Appendix C.

murdered person to waive their right to *qisas*¹⁵ at any time with or without any compensation,¹⁶ or to compound their right of *qisas* on accepting *badl-i-sulh* (consideration for settlement). It also declares that certain murderers will not be subjected to *qisas* at all.¹⁷ This conceptualisation of the offence of murder was alien to the notion of crime that the *Pakistan Penal Code, 1860*, had given rise to and was based upon.

The 'new' law¹⁸ also demands the courts to interpret its provisions in accordance with the injunctions of Islam as laid down in the Quran and Sunnah.¹⁹ However, it must be pointed out that this new law was laid out before judges who were in fact trained in the Western legal tradition and that in addition to the courts, the entire system of the administration of criminal justice in which the new law had to function was based on the common law legal tradition left by the British. This book explores how the courts and the administration of criminal justice have responded to the changes introduced by the new law.

Under the old law, offences against persons were prosecuted as crimes against the State, irrespective of the complainants or of the legal heirs giving up the prosecution of their complaint. However, the 1990 Law greatly diminished the State's responsibility as public prosecutor. Under this law, if the parties in a murder case arrive at a compromise, the role of the State is reduced to merely monitoring whether the compromise proceedings are fair and uncoerced by the accused party, and to assist the courts on the points of law involved in the case.

Having taken part in a large number of cases in which compromise took place, I have been able, as a State representative, to appreciate the constraints of the parties entering into such compromises. In many of these cases, the aggrieved families approached the State Council and requested it to oppose the compromise proceedings in court, even though they had themselves formally agreed to compromise. This, allegedly, was often because they could no longer put up with the pressure and threats of the offender's party and had therefore succumbed to their offer of compensation. Given the situation, they sought the

¹⁵ Section 309, *ibid.*

¹⁶ Section 310, *ibid.*

¹⁷ Sections 306 and 307, *ibid.*

¹⁸ Throughout this book, the term 'new law' signifies the law of *qisas* and *diyat* that is in vogue in Pakistan, whereas 'old law' is used to denote the 'secular' law of culpable homicide and murder contained in the *Pakistan Penal Code, 1860*.

¹⁹ Section 338-F, the *Ordinance of 1990*.

State's help to get the accused punished for the offence(s) committed. Unfortunately, the new law was not helpful in such cases.

In the case of *Abdul Ghafoor v. State*,²⁰ I appeared before the Divisional Bench of the Multan High Court on behalf of the State. Even though the legal heirs of the deceased had granted the convict *afw* (pardon), the Court sentenced the accused to ten years' rigorous imprisonment. The convict, Abdul Ghafoor, had murdered Mohammad Ashraf, a police officer, during a raid by the police party to recover illegal firearms from his premises. The State was unable to protect the victim's family, even though he was a government official and was killed in the line of duty, and they were forced to pardon the accused without any compensation or blood-money in order for the convict to be released from prison, despite committing such a heinous offence. The court heard the final arguments in this case on 9 June 1997 and announced its ground-breaking judgment in June 2000, having taken three years to ponder the State's assertions that in view of the gravity of the crime, the offender must be punished despite the pardon granted by the deceased's family. Whilst the legal heirs gave in, the State did not. Consequently, the accused was sentenced.²¹

However, on several occasions the State was unable to take action due to the constraints of the law. In the case of *Mohammad Iqbal etc. v. The State*,²² the High Court acquitted both murder convicts (one who was absconding at the time) in view of the pardons granted by the deceased's family, which in the case of the absconding convict was granted in absentia. Both convicts had succeeded in pressurising the heirs of the deceased to accept a compromise and thus escaped punishment for their crimes. Numerous similar cases took place during the period researched for this study, and continue to do so; and it is such cases that inspired this programme of research of the *qisas* and *diyat* law of Pakistan.

²⁰ 2000 PCrLJ 1841.

²¹ It is important to note that that the Court's decision was in consonance with Imam Malik's position under the traditional Islamic law, which states that in the interest of public order, the state could impose a *tazir* punishment even where the legal heirs of a deceased person had accepted blood money or granted pardon. However, the Maliki law was not referred to in the judgment. For more on Maliki law, see Tanzil-ur-Rahman, *Islami qavanin: hudud, qisas, diyat va tazirat*, Lahore, 1998, p. 310, wherein he refers *Mawahibul Jalil*, vol. 6, Egypt, p. 268; also see Abd al-Rahman Jaziri, Urdu trans., Munzur Ahsan Abbasi, *Kitab al-fiqh Ala' al-Madahib al-Arba'ah*, Lahore, 1985.

²² PLJ 1997 CrC (Lah) 1122.

I argue that the declaration of certain kinds of murder as a civil 'wrong' or 'private affair' has encouraged its commission and has led to an increase in its occurrence, particularly in such a complex social order as that of Pakistan. It will be argued that Pakistani *qisas* and *diyat* law goes against the very notions of crime and punishment prevalent in contemporary societies, in which society is seen to be an organic whole and individuals do not identify merely as members of their tribes and clans. Thus, when a crime such as murder is committed, it affects society as a whole and not just the specific unit of family, tribe or clan. Under such circumstances, it is evident that a murderer should be punished in the interest of society, whether or not the heirs of the victim are ready to prosecute the offender.

As the title indicates, this study is concerned with the practice of Sharia law in Pakistan and the introduction Islamic criminal law of culpable homicide and murder in Pakistan. It is thus essential at this stage to briefly survey the meanings, definitions, sources and development of Shariah and the theories that concern its application.

1.2 THE SHARIAH: ISLAMIC LAW

At present, the term 'Islamic law' is defined as a synonym for the Arabic term 'Shariah'.²³ The term is also loosely used to denote *fiqh*,²⁴ which means 'jurisprudence' in Islam.²⁵ The word 'Shariah' originates from the root '*shar*', which as a noun means 'the path or the road leading

²³ However, in an intriguing article Khalafallah claims that the phrase 'Islamic law' was unknown among Muslims before the nineteenth century. See Haifaa Khalafallah, "The 'Islamic Law': Rethinking the Focus of Modern Scholarship", *Islam and Christian-Muslim Relations*, vol. 12, no. 2, 2001, pp. 143–52. For more standard association between the two, see *The Cambridge Dictionary*, which defines Sharia as the body of Islamic religious law (2001, p. 1542); the *Macmillian Oxford Dictionary*, which defines it as the traditional system of Islamic law (2002, p. 1305), and the *Oxford Advanced Learner's Dictionary*, defining it as the system of religious laws that Muslims follow (2005, p. 1396).

²⁴ *Fiqh* literally means 'understanding' and 'comprehension'.

²⁵ Yvonne Yazbeck Haddad and Barbara Freyer, eds., introduction to *Islamic Law and the Challenges of Modernity*, Oxford, 1992. Ziba Mir Hosseini also argues that Muslims do not normally distinguish between Shariah and *fiqh*, especially at the popular level (Ziba Mir Hosseini, *Marriage on Trial: A Study of Islamic Family Law*, London, 2000, p. 5). For a detailed discussion of *fiqh* as Shariah, see B. Johanson, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh*, Leiden, 1997.

to water' (i.e., 'a way to the very source of life'),²⁶ and as a verb 'shara' means 'to chalk out or mark out a clear road to water'. Perhaps these were the intrinsic connotations of the word which inspired the early jurists of Islam to use it to denote a method which leads to the sources of Islam. However, the term is more commonly employed by traditional Islamic scholars,²⁷ jurists,²⁸ researchers and sectarian leaders of Islam to justify their brand of Islamic law, their interpretations of the injunctions, and a set of rules as 'the Shariah' itself.²⁹ The term thus became a synonym for Islam, and hence for ordinary Muslims, Shariah is not regarded as a means to an end, but rather as an end in itself.

This leads us to a crucial question: what then, is Shariah, or Islamic law? Western and modern Islamic scholars seem to have reached a consensus that Shariah is indeed the jurists' law or jurists' understanding of the canonical law from the original sources of Islam, the Quran and Sunnah.³⁰ Thus, as Aharon Layish argues, "Shariah is neither a product of legislative authority nor a case-law for that matter in the Western

²⁶ See word root (shar) Bayrut in Ibn Manzur, Muhammad ibn Mukarram, ed. *Lisanul al-arab*, Vol. 8, 1955; also see a very good elucidation of the term by Fazlur Rehman in *Islam*, 2nd edition, Chicago, 1979, p. 100.

²⁷ The use of the terms 'traditionalist' and 'modernist' is based on M. Cherif Bassiouni's theses, wherein he claims that there now exists a schism among Muslim scholars as to whether Islam in general and the Shariah in particular are dynamic or static. He identifies scholars who argue that Shariah is not static as 'modernists', and those who claim that everything has already clearly been laid down and there is no need to reconsider any of the rules of Shariah as 'traditionalists'. Without agreeing or disagreeing with the argument about the schism and the classification of Islamic scholars into these two broad groups, I use the terms in this same sense. For details, see M. Cherif Bassiouni, "A Search for Islamic Criminal Justice: An Emerging Trend in Muslim States" in *The Islamic Impulse*, ed. B.F. Stowaser, London and Washington, D.C., 1983, pp. 245-54.

²⁸ A famous Egyptian Islamic jurist, Abdul Qadir Oudah, also claims that Shariah is a "divine revelation". See Abdul Qader Oudah, *Criminal Law of Islam*, 3 vols., trans. S. Zakir Ejaz, vol. 1, Karachi, 1987, p. 15.

²⁹ See Mahmasani, *Falsafat at-tashir fi al-islam*, wherein he claims that "in short Islamic law is a divine system of laws in its sources"; also see Abu-al-Ala Moududi, *The Islamic Law and its Constitution*, 3rd ed., Lahore, 1963. Mohammad Taqi Rahbar also argues that the laws and socio-juridical regulations which are part of Islamic culture are based on divine knowledge and wisdom, rather than human understandings of divine wisdom. See Mohammad Taqi Rahbar, *Punishment of Theft in Islamic Penal Code*, trans. Alaedin Pazargadi, Iran, 1982, p. 5. Also see Graeme Newman, "Khomeini and Criminal Justice: Notes on Crime and Culture", *The Journal of Criminal Law and Criminology*, vol. 73, no. 1, 1982, pp. 561-81; Mohammad Taqi Rahbar, *op. cit.*, 1982, p. 5.

³⁰ N.J. Coulson, *A History of Islamic Law*, Edinburgh, 1964; Ignaz Goldziher, *Introduction to Islamic Theology and Law*, trans. Andras and Ruth Hamori, Princeton, 1981; Joseph Schacht, *An Introduction to Islamic Law*, Oxford, 1964; Mohammad Hashim Kamali, "Sources, Nature and Objectives of Shariah", *The Islamic Quarterly*, vol. 33,

connotation of the word”.³¹ It is instead a product of the handiwork of *fuqaha* (jurists), and *muftis* (legal consultants) of the second and third centuries A.H.³² or eighth and ninth centuries A.D. These scholars were neither trained in the methods of developing law, nor were they part of an establishment entrusted with the task of structuring Islamic law for application in an Islamic State. Rather, they were fascinated and inspired by the teachings of Islam and wanted to devote their lives to discovering and comprehending the texts, meanings and rationales of the injunctions of Islam. For them, Islamic law was thus a vital part of Islam and they spent their lives elucidating the injunctions laid down in the the two primary sources readily available to them: the Quran and Sunnah.

1.2.1 *The Quran*

The Quran is unanimously accepted as a fundamental source of Islamic law. However, it can be argued that if it is a *source* of law, the law must then be *deduced* from it. Thus, the Quran in itself is not a code of law, as some *ulema* suggest;³³ rather, it is *huda* (guidance). This approach is logical, since out of the 6235 verses in the Quran, there are only a few that deal directly with legal matters.³⁴ However, other verses enjoin the maintenance of certain standards and values that are appreciated by Allah, and it is in this manner that the Quran principally sets the norms and bases for Islamic law.³⁵ As such, the Quran becomes the first

1989, p. 215; Wael B. Hallaq, *The Origins and Evolution of Islamic Law*, Cambridge, 2004; Abdur Rahman I. Doi, *Shariah: The Islamic Law*, London, 1984.

³¹ Aharon Layish, “The Transformation of Sharia from Jurists’ Law to Statutory Law in the Contemporary Muslim World”, paper presented at the Ecole des Hautes Etudes en Sciences Sociales, Paris, 1999, pp. 85–113.

³² ‘AH’ refers to ‘After *Hijra*’. *Hijra* is the term used for the migration of the prophet from Mecca to Medina in the year 662 A.D.; it marks the beginning of the Islamic calendar.

³³ See Chapter 2 in Kamali, *Principles of Islamic Jurisprudence*, Cambridge, 2003.

³⁴ According to one count, Niazi claims that about 70 verses pertain to family law, 80 to trade and finance, 13 to oaths, 30 to crimes and sentencing, 10 to constitutional and administrative matters, 25 to international law and prisoners of war and the rest (over 400) pertain to *ibadat* (worshipping God); see Imran Ahsan Khan Niazi, *Islamic Jurisprudence*, Islamabad, 2000, p. 161. To learn about the text of these verses of the Quran, see Abu Bakr Ahmad ibn Ali al-Jassas al-Razi, *Ahkam al-Quran*, 2 vols., Lahore, 1989; Tahir Mahmood, “Law Code in the Holy Quran” in Tahir Mahmood, ed., *Criminal Law in Islam and the Muslim World: A Comparative Perspective*, Delhi, 1996, pp. 3–38.

³⁵ For instance, see Q. 61:2 where the Quran asks, “O you who believe, why do you say the thing which you do not carry through”; in another verse, Q. 5:1, it exhorts Muslims, “O you who believe, fulfil your undertakings”.

and original source of the formulation of Shariah and contains the rules by which the Islamic system of criminal justice is to be structured. As Bassiouni says, the Quran in this regard “does not set forth a complete system of criminal justice, but it does contain the elements necessary for the construction by believers of a system of justice capable of being responsive to the needs of the society of a given place and time”.³⁶

1.2.2 *The Sunnah*

The Sunnah (literally meaning ‘beaten path’ or ‘custom’) is regarded as the second source of Islamic law. According to Nasir, the prophet himself used this source in the form of the customary law of Arabia (the *urf* or ‘usages’³⁷), which was present before the revelation of the Quran. This was used later to establish rules where the Quran was silent and also to interpret the revelation³⁸ itself.³⁹ Perhaps this is the reason why the Sunnah is considered complementary to the Quran and also supplements the Quranic injunctions.⁴⁰ Fisch very clearly explains that “the Islamic law was both a consequence of and a reaction against pre-Islamic law”.⁴¹ However, others such as Khadduri claim that so far as Muslim jurists are concerned, Islamic law is unrelated to pre-Islamic

³⁶ Bassiouni, “A search for Islamic criminal justice: an emerging trend in Muslim states” in B. Stowasser, ed., *The Islamic Impulse*, Washington, D.C., 1987, p. 250.

³⁷ Iqbal also confirms that pre-Islamic usages of Arabic were kept intact by the prophet in some cases and modified in others. Such usages, he suggests, must now be distinguished and their legal import be reassessed; see Mohammad Iqbal, *The Reconstruction of Religious Thought in Islam*, 3rd ed., Lahore, 1996, p. 136.

³⁸ For instance, the courts in Pakistan interpreted Q. 2:178 and 179, which deal with the application of *qisas*, keeping in view the practice of *th’r* (vendetta) prevalent among the Arabs; see also William Thomson, “Islam and the Early Semitic World”, *The Muslim World*, vol. 39, 1949, pp. 35–63 and especially pp. 43–5.

³⁹ Nasir reinforces this assertion and provides an example: “a woman complained to him (the Prophet) that her husband, using the pre-Islamic formula called *zihar*, linked her to the back of her mother, and she asked the prophet for an Islamic ruling. The prophet said he had not been told the divine ruling on this but thought she became unlawful to her husband.” Later, a verse (Q. 58:1) was revealed, which commanded such husbands to perform specific expiation before they could resume marital relations with such wives. See Jamal J. Nasir, *The Islamic Law of Personal Status*, 3rd ed., London, 2002, p. 3. Also, the application of the punishment of *rajm* (stoning to death) to married persons who indulged in sex outside their marriage was based on the Sunnah prevalent at the time of the prophet, since the Quran itself does not prescribe such a punishment.

⁴⁰ Kamali, *Principles of Islamic Jurisprudence*, 2003, p. 508; Nasir, *The Islamic Law of Personal Status*, p. 3.

⁴¹ J. Fisch, *Cheap Lives and Dear Limb: The British Transformation of the Bengal Criminal Law, 1769–1817*, Wiesbaden, 1983, p. 8.

law and abrogated all the legal systems that preceded itself, the last divine law.⁴²

Notwithstanding, once the *fiqh* was shaped and its formation designed and sources worked out, the Sunnah began to signify the sayings (*hadith*) and accounts of the prophet's deeds.⁴³ Both have binding authority in the law of Islam as they were inspired by God (*ilham*) and as such the Sunnah is seen as being the second revealed source.⁴⁴ The four major Sunni schools of thought—Hanafis, Malikis, Shafies and Hanbalis (followers of Imams Abu Hanifa, Malik, Shafi and Ahmad bin Hanbal respectively)⁴⁵—and the Shias⁴⁶ essentially build their arguments on the basis of these two primary sources of Islamic law. The Constitution of Pakistan in fact recognises only these two sources and together they are used as a touchstone to examine whether laws are Islamic or un-Islamic.⁴⁷

The prophet is reported to have said before his death, "I leave two things among you. You shall not go astray so long as you hold on to them: the book of God and my Sunnah".⁴⁸ In fact, however, there is much disagreement about the technical meanings of Sunnah.⁴⁹ Some jurists include the practice of the companions (*sahabah*) as part of the Sunnah,⁵⁰ whereas *Shia ithna Ashria* include the actions and assertions

⁴² Majid Khadduri, *The Law of War and Peace in Islam: A Study In Muslim International*, London, 1979, p. 19.

⁴³ For a scholarly discussion of the meanings and structure of the concept of *Sunnah*, see Chapter four in Fazlur Rehaman, *Islam*, Chicago, 1979; to study the text of *hadith* see Al-Haj Maulana Fazalul Karim, English trans. of *Mishkat-ul-Masabih*, Lahore, 1960; and to learn about the science of the *ahadith*, see its introduction by Fazlul Karim. See also Chapter 3 in Kamali, *Principles of Islamic Jurisprudence*, 2003.

⁴⁴ See Nasir, *op. cit.*, p. 3.

⁴⁵ Imam Abu Hanifa, 80–150 AH/699–767 A.D.; Imam Malik, 93–179 A.H./712–795 A.D.; Imam Shafii, 150–204 A.H./767–820 A.D.; and Imam Ahmad bin Hanbal, 164–241 A.H./780–850 A.D.

⁴⁶ The followers of Ali separated from the mainstream Sunnis when Abu Bakr became the first *caliph* and became more visible during Ali's war with Muawiya. As a system, it became known as the Jaffrey School since it was founded by their sixth Imam, Imam Jafar-as-Sadiq (80–140 A.H., 699–765 A.D.). For details, see S. Husain M. Jafri, *Origins and Early Development of Shi'a Islam*, London, 1979; and Jawdat K. al-Qazwini, *The Religious Establishment in Ithnaashari Shiism: A study in Scholarly and Political Development*, PhD dissertation, SOAS, University of London, 1997.

⁴⁷ See article 227 of the 1973 Constitution.

⁴⁸ Ibrahim ibn Musa Shatibi, *al-Muwafaqat fi usul al-ahkam Muwafaqat*, vol. 3, Cairo, 1922, p. 197.

⁴⁹ Imran Ahsan Khan Nyazee, *Islamic Jurisprudence: Usul al-Fiqh*, Islamabad, 2000, p. 163; also see Kamali, *op. cit.*, 2003, p. 60.

⁵⁰ *Idem*, Nyazee.

of their twelve Imams.⁵¹ It is worth noting that some contemporary (nineteenth and twentieth-century) scholarly work on the Sunnah calls for it to be studied from another angle. For instance, Moulana Ubaidullah Sindhi argues that during his lifetime the prophet taught others how to apply divine revelation to the circumstances of the time.⁵² Iqbal also argues that the Sunnah was indicative of the method in which the prophet interpreted his Revelation.⁵³

1.2.3 Other sources of Islamic law

Nadvi asserts that except the Quran and Sunnah, there are no other unanimous sources of Islamic law.⁵⁴ However, there are a number of other 'secondary' sources, which are commonly accepted as having helped in the development of Islamic law. These are, in order of priority: *ijma* (consensus of legal opinion); *qiyas* (analogy); *ijtihad* (independent reasoning); *maslaha* (public and private interest); *istihsan* (juristic preference); and *uruf* (custom and assuagement).⁵⁵ These sources also contributed to the development of Islamic law.⁵⁶

1.3 THEORIES OF ISLAMIC LAW

According to al-Mawaradi (972–1058), the *Amir*⁵⁷ in an Islamic Government is bound to carry out ten injunctions, of which the most relevant are that:

he must guard the *deen* as it was established in its original form and about which the first generations of *Ummah* are agreed [and] he must establish

⁵¹ Murteza Mutahhari, *Jurisprudence and its Principles*, trans. Muhammed Salman Tawheedi, Basat Foundation, n.d., p. 16.

⁵² Abd-us-Salam Qidwai Nadvi, "The Sharia and Exigencies of the Time", *Islamic and Comparative Law Quarterly*, vol. 1, 1981, pp. 8–15, especially p. 10.

⁵³ Iqbal, *op. cit.*, p. 136.

⁵⁴ Nadvi, in Hakim Abdul Hamid, "An Introductory Note", *Islamic and Comparative Law Quarterly*, vol. 1, 1981, pp. 5–7, especially p. 7.

⁵⁵ For a very insightful discussion on the sources of Islamic law see Niazi, *Islamic Jurisprudence*, 2002.

⁵⁶ For a brief but comprehensive history of the development of Islamic law, see David Pearl and Werner Menski, *Muslim Family Law*, 3rd ed., London, 1998; for a detailed study see Wael B. Hallaq, *The Origins and Evolution of Islamic Law*, Cambridge, 2004; see also Mawil Izzi Dien, *Islamic Law: From Historical Foundations to Contemporary Practice*, Edinburgh, 2004.

⁵⁷ *Amir* means 'ruler'. It includes various high offices in a Muslim State, including *Imam*, or *Khalifah*.

the *Hadd* punishment in order to protect what Allah, may He be exalted, has made inviolable from being violated and prevent the rights of His Slaves from being abused.⁵⁸

Once the *Amir* carries out these commands, writes al-Mawaradi, he would have established the judiciary for the administration of justice in the society. He maintains that seven attributes are required to qualify as a judge in an Islamic State. A person must be a free male Muslim of just character. He must have knowledge of Shariah and comprehend its basic principles. He must not only have deep knowledge and understanding of the Quran and authentic Sunnah, but must possess the knowledge of the interpretations arrived at by the first generation, both regarding what have they agreed upon and what they differed on, and of the Analogy.⁵⁹ On the basis of this knowledge, he can make judgments in cases placed before him.⁶⁰ For al-Mawaradi, the preservation of *deen* as it was during the time of the prophet and in the first generations is an obligation of the ruler, and the application of *hadd* punishment is a necessary part of that course.

Shah Wali Allah Dehlavi (1702–62) revolted against this classical theory of preserving the Islamic law in its original form and stated that:

generally speaking, the law revealed by a prophet takes especial notice of the habits, ways, and peculiarities of the people to whom he is specifically sent. The prophet who aims at all-embracing principles, however, can neither reveal different principles for different peoples, nor leave them to work out their own rules of conduct. His method is to train one particular people, and to use them as a nucleus for the building up of a universal Shariah. In doing so, he accentuates the principles underlying the social life of all humankind, and applies them to concrete cases in the light of the specific habits of the people immediately before him. *The Shariah values (Ahkam) resulting from this application (e.g., rules relating to penalties for crimes) are in a sense specific to that people; and since*

⁵⁸ *Deen*, which is also spelt *din*, is the Arabic word for religion. The term 'first generation' is used for the companions of the prophet or those who survived the prophet. *Ummah* means a people, a nation, or a sect. The word appears forty times in the Quran in different connotations. Now, the word often refers to the people of Mohammad or those who follow Mohammad. See Al-Mawaradi, *Al-Ahkam as-Sultaniyyah*, trans. Asadullah Yate, London, 1996, p. 100.

⁵⁹ Analogy is considered the fourth source of Islamic law among a majority of the Islamic Schools of thought.

⁶⁰ Al-Mawaradi, *op. cit.*, p. 100.

their observance is not an end in itself they cannot be enforced strictly in the cause of future generations (emphasis added).⁶¹

Abul Ala Maududi (1903–79) stipulates that society must be reconstructed on the basis of *marufat* (virtues) and be cleansed of *munkarat* (vices) before punishments under Islamic law can be applied. The Shariah, he argues, is an organic whole. He complains that people pick out injunctions of the Shariah at random, remove them from their specific contexts, analyse them in the context of modern legal systems and then condemn them as being inappropriate for present-day situations. What they fail to see, he argues, is that no part of the structure can be picked up and applied arbitrarily to other systems, since it forms an organic part of a distinct and self-contained system of life. The word ‘Islamic’ refers to a complete scheme of life and hence can neither be comprehended nor enforced separately.⁶² To elaborate, he argues:

there are some people who take a few provisions of the Islamic Penal Code out of their context and jeer at them. But they do not realize those provisions are to be viewed with the background of the whole Islamic system of life covering the economic, social, political and educational spheres of activity. If all these departments are not working, then those isolated provisions of our [Islamic] penal code can certainly work no miracles.⁶³

He further argues that Islamic law can only be applied once society is constructed on the basis of Islamic principles and there would be no need for lawyers in such a society. He believes that inestimable harm has been done to the cause of law and justice by making law a profession, and deciding that only experts of law such as *muftis* may assist the court in elucidating points of law.⁶⁴

Mohammad Asad (1900–92) further argues that the objective of an Islamic State cannot be achieved by simply introducing *hijab*⁶⁵ for

⁶¹ Shah Wali Allah, *Hujjat Allah al-Balighah*, vol. 1, Cario, 1322 AH, Urdu trans. Maulana ‘Abd al-Rahim, Lahore, 1961; quoted by Iqbal, *op. cit.*, p. 36.

⁶² Abul Ala Maududi, *The Islamic Law and its Introduction in Pakistan*, trans. Khurshid Ahmad, Lahore, 1970, pp. 19–20. Najib Mahfouz argues along somewhat similar lines, claiming that Shariah is an integral whole and that until we change our society and style of living and root out the causes of sin, the application of Islamic punishments will uncover contradictions and differences in Shariah. See Najib Mahfouz, “Debate on the Application of the Shariah in Egypt” in John J. Donohue and John L. Esposito, eds., *Islam in Transition: Muslim Perspectives*, New York, 1982, p. 239.

⁶³ *Ibid.*, 21.

⁶⁴ *Ibid.*, p. 62.

⁶⁵ *Hijab* is the covering of women’s faces and bodies.

women and applying Shariah punishments. Asad exhorts that we start thinking afresh by studying the laws and their implications in order to reconstruct the laws of Islam. He writes:

we have stopped thinking about these matters [development of new laws] for a good century and have merely relied on what previous generations of Muslims thought about Islam. In consequence, our current theology (*kalam*) and canonical jurisprudence (*fiqh*) now resemble nothing so much as a vast old clothes shop where ancient thought garments, almost unrecognisable as to their original purport, are mechanically bought and sold, patched up and resold, and where the buyer's only delight consists in praising the old tailor's skill.⁶⁶

His thesis is that what may be reasonable according to people of a particular period may not be so for later generations, on account of the change in premises. He disputes the argument that all subjective conclusions of previous *fuqaha*⁶⁷ (legal scholars) are valid absolutely or for all times to come. Asad also tells us we must stop believing that Islam was better understood six centuries ago, and argues that this belief has caused the deformation of many concepts. Thus, the laws we have inherited from medieval Islam ought not to be applied in their ossified form; indeed, to do so would further damage the ideals of Islam and bring confusion to society.⁶⁸

Mohammad Iqbal (1857–1938)—poet, philosopher, political thinker and architect of the idea of Pakistan—also seemed dissatisfied with enforcing laws formulated centuries ago within the present structure. He stands by Muslim liberals who want to reinterpret the foundational legal principles of Islam in light of their own experiences and the changed requirements of modern life.⁶⁹ While relying on the history of the development of Islamic law in the first century, when at least nineteen schools of thought had appeared, Iqbal stresses the broad and assimilative spirit of Islam and states:

with the expansion of conquest and consequent widening of the outlook of Islam, these early legists had to take a wider view of things and to study the local conditions of life and habits of new peoples that came within the fold of Islam. A careful study of the various schools of legal opinion, in light of the contemporary social and political history, reveals

⁶⁶ Muhammad Asad, *Our Laws*, London, 1993, p. 11.

⁶⁷ Singular: *faqeeh*.

⁶⁸ *Ibid.*, pp. 24–5.

⁶⁹ Mohammad Iqbal, *op. cit.*, 1996, p. 134.

that they gradually passed from the deductive to the inductive attitude in their efforts of interpretation.⁷⁰

Therefore, according to Iqbal's theory, when applied in different countries and in different environments, Islamic law must take into account the indigenous and prevalent customs, conditions and habits of the people. Intriguingly, none of these jurists or scholars of Islam actually explain what the Shariah is.

1.4 ISLAMIC CRIMINAL LAW

Islamic criminal law is a component of Islamic law which deals only with defining crimes (*jarimah*) and prescribing punishments, and which relies on all the primary and secondary sources of Islamic law.⁷¹ This reliance on the sources brings into its fold all the essential complexities, complications and controversies that have emerged regarding the definition and structure of Islamic law. For example, a given action may be lawful (according to Shariah) in one school of thought but unlawful (against the Shariah) in another; hence, a perpetrator might be determined innocent or liable to punishment depending on the approach taken.⁷²

Muslim scholars generally agree that crimes or offences are defined in Islamic law as both *jinayat*⁷³ and *jarima*, and punishments as *uqubat*.⁷⁴ Although every *jarima* and *janaya* must also be a sin, i.e., a disobedience of God's command, the reverse is not always true. Disregarding God's command concerning the performance of any particular ritual or a more general command, such as backbiting,⁷⁵ does not incur State punishment. However, disregarding God's command when it is stipulated that such an action will incur punishment results in that action being defined as a crime or offence in addition to being a sin. For

⁷⁰ Ibid., p. 131.

⁷¹ Mohammad ibn Ibrahim Ibn Jubeir, "Criminal Law in Islam: Basic Sources and General Principles" in Tahir Mahmood, ed., *Criminal Law in Islam and the Muslim World: A Comparative Perspective*, Delhi, 1996, pp. 41–55.

⁷² E.g., *muta* (a kind of temporary marriage) is valid among Shias, yet null and void according to the four Sunni schools of thought. The repercussions of having sexual relations without valid marriage are enormous, and the couple would be liable to punishment of *zina* (see Nasir, *op. cit.*, 2002, p. 61).

⁷³ Singular: *janaya*.

⁷⁴ Singular: *uquba*.

⁷⁵ Q. 49:12; Q. 104:1.

example, consensual sexual intercourse outside the marriage bond is a grave sin and those who commit it thus also become liable to severe punishment from the State.

In the Quran, Allah proscribes only certain acts and prescribes the punishment for those who perpetrate them. The Quran does not, however, provide the definition of crime or the procedure to be adopted to prove an offence, except in the case of *zina*,⁷⁶ where it fixes the number of witnesses required. The quality of evidence is also dealt with in very general terms in the Quran, wherein it states: “let not witness withhold their evidence when it is demanded of them”;⁷⁷ “and never conceal evidence for he who conceals it has a sinful heart”;⁷⁸ and ‘take the evidence of two just men’.⁷⁹ The prophet interpreted and invoked those punishments and applied them to those who flouted Quranic injunctions.⁸⁰ The same is true of the orthodox caliphs,⁸¹ who also tried to define and apply Quranic penal laws while considering the exigencies of their times and according to their comprehension of Islamic criminal law and its ends. For example, the second caliph Umar (r. 634–44) suspended the Quranic punishment for theft during famine.⁸² He also fixed punishment for drinking, an ordinance which the prophet had not issued.⁸³

The structure of criminal law and criminal justice of Islam was built by the jurists during the 7th and 8th centuries. In doing so they construed the verses of the Quran, the Sunnah of the prophet and the *sahaba* (companions of the prophet), including the orthodox caliphs, in the context and perspective of the demands of their times. They catego-

⁷⁶ Q. 24:4,5.

⁷⁷ Q. 2:282.

⁷⁸ Q. 2:283.

⁷⁹ Q. 65:2.

⁸⁰ In case of theft, it is reported that the prophet fixed the value of the stolen item for the purposes of the infliction of the punishment: amputation of a hand; see Mohammad Iqbal Siddiqui, *The Penal Law of Islam*, Lahore, 1985, p. 125.

⁸¹ *Khulfa-i-Rashidun*: rightly-guided caliphs.

⁸² See Mawil Izzi Dien, *Islamic Law: From Historical Foundations to Contemporary Practice*, Edinburgh, 2004, p. 6.

⁸³ See Siddiqui, *op. cit.*, p. 117; also see the intriguing dissenting note of Justice Agha Ali Haider in *Nosher Rustam Sidhwa v. The Federation of Pakistan*, PLD 1981 FSC 253.

rised Islamic criminal law under three separate terms: *Hudud*,⁸⁴ *Qisas*⁸⁵ and *Tazir*.⁸⁶ It is commonly understood that *hudud* laws prescribe fixed punishments for between five and seven types of crimes, depending on the particular school of thought.⁸⁷ Pakistani law, following the majority view, recognises five crimes as *hudud* offences:⁸⁸

- 1) *zina*, or sexual intercourse outside marriage. If the persons are already married, the punishment is *rajm* (stoning to death); otherwise, it is one hundred stripes.
- 2) *qazf*, or a false accusation of *zina*. The punishment for this is eighty stripes.
- 3) *sariqa*, or theft. The punishment for this is the cutting off of a hand.
- 4) *haraba*, or highway robbery. For robbery alone, the punishment is the cutting off of a hand and the feet, whereas robbery with murder incurs the punishment of death.
- 5) *khamr*, or drinking. The offender is served with eighty stripes.

Qisas laws are generally not dealt with under *hudud*.⁸⁹ *Tazir* punishment is applied in all other offences which fall neither in the category of *hudud* nor in *qisas*.

A closer examination of *hudud* laws reveals that, contrary to public understanding, they not only prescribe the punishment of certain crimes but also deal with the definitions and procedures of proving the offence. For instance, the law of *hudud*, which prescribes the punishment for theft, also demands that the value of a stolen item should be

⁸⁴ *Hudud* (also written *Hudood*) is plural of *hud*. This is a category of crime for which punishment has been prescribed in the Quran and Sunnah as the right of Allah; individuals and community have no authority to annul them. For a brief introduction of *hudud* crimes, see Aly Aly Mansour, "Hudud Crimes" in M.C. Bassiouni, ed., *The Islamic Criminal Justice System*, 1982, p. 195.

⁸⁵ *Ibid.*, p. 203.

⁸⁶ Mohammad Bin Mahfodz, "The Concept of Tazir in Islamic Criminal Law", *Hamdard Islamicus*, vol. 16, Karachi, 1994, pp. 5–12. Also see Mohammad Salim El-Awa, "Ta'azir in the Islamic Penal System I and II", *Journal of Islamic Comparative Law*, vol. 6, 1976, pp. 41–59.

⁸⁷ The seven crimes under the category of *hud* punishment are: adultery, false allegation of adultery, drinking, theft, bloodshed and plunder, apostasy and rebellion. Those who claim there are five do not include drinking in *hudud*, and those who count seven include the offence of *baghi* (see Bassiouni, "Crimes and Criminal Process", *ALQ*, vol. 12, no. 3, 1997, pp. 269–86).

⁸⁸ For the definition of *hudud* crimes in four Sunni schools of thought, see Abu Zahra, *al-Jarimah wa-al-uqubah fi al-fiqh al-islami*, Cairo, n.d.; also see Abdul Qader Oudah, *Criminal Law of Islam*, 3 vols., transl. S. Zakir Ejaz, vol. 1, Karachi, 1987.

⁸⁹ See chapter nine in Abdur Rahim, *Muhammadan Jurisprudence*, Delhi, 1911.

of a given minimum value, that it should be stolen from *hirz* (a safe place) and that the theft should be proved by two ‘just’ male witnesses who volunteer for evidence. Should these requirements not be fulfilled, the *hadd* punishment is not applicable.⁹⁰ If an offence of theft is not proved in strict accordance with Islamic law, the court may still punish the accused under *tazir*.⁹¹ However, as the punishment under the repealed law can easily be construed as a punishment under *tazir*, the incorporation of *hudud* law of theft has failed to make effective changes to the criminal justice system of Pakistan. This explains why, since the *hudud* laws began to be applied in Pakistan in 1979, not a single person could be punished under *hadd* despite there being an enormous number of thefts committed each year.⁹²

1.4.1 *The law of qisas and diyat*

As mentioned earlier, the division between public and private crimes is blurred in Islam, and they sometimes intermingle with each other. Nyazee claims that in *qisas*, two types of rights—the right of Allah and the right of the individual—are mixed, but the right of the individual is predominant.⁹³ Bassiouni, like Oudah,⁹⁴ does not address these subtleties and states from the start that *qisas* crimes are considered to be violations of the rights of individuals.⁹⁵ This explains why Abdur Rahim,⁹⁶ Schacht⁹⁷ and Anderson⁹⁸ use the term ‘tort’ (civil wrong) to describe the law of culpable homicide and murder in Islam. On the other hand, Zakaullah Lodhi, a senior Pakistani advocate and author, argues that “the power of private pardon and of pecuniary compensation in cases of murder conferred by verse 178 of chapter II of the Quran stands modified by verse 33 of chapter V in the condition when the Islamic State has become strong enough to effectively suppress private vendettas...

⁹⁰ Cf. Siddiqi, *op. cit.*, p. 125; for the application of these provisions in practice see *Ghulam Ali v. The State*, PLD 1986 SC 741.

⁹¹ Tanzil ur Rahman, *op. cit.*, pp. 361–62; see also Abd al-Rahman Jaziri, Urdu translation, Munzur Ahsan Abbasi, *Kitab al-fiqh Ala’ al-Madahib al-Arba’ah*, Lahore, 1985.

⁹² Asma Jahangir, *Hudud Laws: A Divine Sanction?* Lahore, 1990, p. 32.

⁹³ Imran Ahsan Khan Nyazee, *General Principles of Criminal Law: Islamic and Western*, Islamabad, 1998, p. 60.

⁹⁴ Oudah, *Criminal Law of Islam*, vol. 1, 1987, p. 205.

⁹⁵ See Bassiouni, “A Search for Islamic Criminal Justice”, p. 250.

⁹⁶ Abdur Rahim, *Muhammadan Jurisprudence*, Delhi, 1911, p. 351.

⁹⁷ Joseph Schacht, *An Introduction of Islamic Law*, Oxford, 1964, p. 187.

⁹⁸ J.N.D. Anderson, “Homicide in Islamic Law”, *BSOAS*, London, 1951, p. 811.

Now the fate of a murder-convict”, he maintains, “would not entirely be left to the *ipsi dixit* of his private accuser because the State is the proper and necessary party to the prosecution”.⁹⁹ He further argues that in this day and age, a private pardon in good faith can only save the life of a prisoner if it is granted by the State, and that it cannot entitle the culprit an acquittal from all other punishments short of death that the State might consider necessary to impose in the advancement of the public interest, “because a murder does affect a public order, which has now become the direct concern of the Islamic State”.¹⁰⁰ Along somewhat similar lines, Kamali asserts that:

all rights in Islam, as the Mailki jurist al-Qarafi pointed out, consist primarily of the Right of God, which are in turn exercised and represented by the community of believers and their lawful Government. We may conclude, therefore, that all crimes consist of the violations of the limits of God, the *hudud* Allah, and that the community and its leadership is within its rights to take all necessary measures to defend their common interests against criminality and violence without the need to draw hard and fast divisions between the public and private interests.¹⁰¹

Kamali further suggests that “we may also say that there remains no urgent need for distinguishing the Right of God from the Right of man, nor of *hudud* crimes on this basis alone, from other offences that are equally if not more threatening to public security and interest”.¹⁰² His argument is based on his thesis that the categorisation of offences into *hudud* appears to have served a particular purpose; that in relation to certain crimes it took the law out of the scope of tribal justice and conveyed a clear message that such crimes are not open to negotiation, compromise or pardoning. He stresses that the basic rationale underlying the early distinctions have been substantially eroded due to historical changes in the shape and fabric of societies; for example, urbanisation on a massive scale, modern communications and methods of government, and so on. Although criminality is still a serious threat to the foundation and structure of modern society and civilisation,

⁹⁹ Zakaur Rehman Khan Lodi, “Modernity of Penal Justice of Islam”, *Islamic Culture*, vol. 41, no. 1, Hyderabad, 1967, pp. 154–71, especially p. 166. For a version of this in Maliki traditional Islamic law, see Tanzil ur Rahman, *op. cit.*, Lahore, 1998, p. 310; also see Abd al-Rahman Jaziri, *op. cit.*

¹⁰⁰ *Ibid.*

¹⁰¹ Mohammad Hashim Kamali, “Punishment in Islamic Law: A Critique of the *Hudud* Bill of Kelantan, Malaysia”, *Arab Law Quarterly*, 1998, p. 232.

¹⁰² *Ibid.*, p. 233.

“there is no compelling argument to confine these only to a handful of specified or unspecified crimes”.¹⁰³

Nevertheless, such approaches have yet to gain credence in Muslim society. As we have just examined, the Islamic law of culpable homicide and murder (as it has been interpreted by the medieval scholars of Islam) traditionally suffers from major conflicts and tensions, namely, conflict between the interests of individuals and society, and tension between the traditional interpretation of the law and the exigencies of contemporary society. There is a textual tension in the law as well. For example, the Quran declares that “there is life for you in *qisas*”,¹⁰⁴ whereas *ulema* are unanimous that the prophet had said, ‘it is more meritorious to pardon the culprit’.¹⁰⁵ One verse of the Quran declares that killing an innocent person is akin to killing the entire human race,¹⁰⁶ whereas another verse only grants a deceased’s person’s heirs the right to pardon the offender.¹⁰⁷ The textualist approach to the meanings of these verses has given rise to a dichotomy of interests between the heirs of the deceased and the State, in case of the murder of an innocent human being. This tension increases when one looks at the conduct of the companions of the prophet, i.e., those whose acts and words are supposed to be looked upon by all Muslims as inspiration and guidance to assist them in following Shariah.

The works of the three principal historians of Islam—Ibn-Saad,¹⁰⁸ Tabari¹⁰⁹ and Ibn Khuldun¹¹⁰—which provide a foundation for subsequent works on Islamic history—record the circumstances surrounding the death of three of the prophet’s companions, who were also successive caliphs. The three incidents, described below, illustrate that even during these early stages of the construction of *qisas* law, the principles applied seem to be in conflict with each other. Hence, we are left with many unanswered questions.

¹⁰³ *Hudud*, *ibid.*, p. 234.

¹⁰⁴ Q. 2:177.

¹⁰⁵ Anderson, *op. cit.*, 1951, p. 812.

¹⁰⁶ Q. 5:32.

¹⁰⁷ Q. 2:178.

¹⁰⁸ Muhammad Ibn Sad, ca. 784–845, *Kitab al-tabaqat al-kabir*, Urdu trans. Ali Salman, Nafees Academy, Karachi, 1990, p. 187.

¹⁰⁹ Muhammad ibn Jarir Tabari, *Ta’rikh Tabari*, Urdu trans. M. Ilyas, Nafees Academy, 1991.

¹¹⁰ Abd al-Rahman ibn Muhammad Ibn Khaldun, *Tarikh-i ibn Khaldun*, Urdu trans. Inayat Allah, Sheikh, Nafees Academy, Lahore, 1960.

The first example relates to the death of Umar (r. 634–44 A.D.), the second caliph, who was attacked by Abu Luolo Firoz, a Persian Christian slave. The latter was caught and killed *on the spot* by those around Umar, even before the latter died himself. Enraged with revenge, Umar's son—Ubaidullah bin Umar—killed *three* other persons: Abu Luolo's younger daughter (who claimed to be a Muslim, according to Tabarai), Hurmuzan (a Muslim), and Jafina.¹¹¹ Ubaidullah bin Umar was forgiven by the third caliph, Usman, who in his capacity as the head of State and as *wali* (heir) of all Muslims, paid the blood-money for Harmuzan from his own pocket.¹¹² Usman's decision in this case was termed '*tatil al-hudud*', or 'suspension of God's commands', by Aisha and Ali, i.e., that it had the effect of nullifying *hudud*.

When Usman himself was murdered, the strong demand for *qisas*, or vengeance, came *not from his legal heirs* but from Muawiya and Aisha, who were not his direct descendants. The demand was put before Ali, who had by then become the *wali-al-muslimeen* (guardian of all Muslims) as the fourth caliph of Islam. Later on, the demand to identify the culprits was transformed into a political issue resulting in a bloody war, the first civil war of Islam (later termed *fitna*), between two factions of Muslims. The war was fought on the slogan "*iqamat kitab Allah bi-iqamat hududih*" (stand for the book and the limits prescribed therein), so that it would result in the application of *hudud* Allah.¹¹³

The question of remission *was not considered at all* by Usman's heirs or their political supporters. Ali's pleas were unheeded and a war was waged to enforce *qisas* on the murderers of Usman. When Ali was killed, *his assailant was not killed until Ali died*. His murderer, Ibn-i-Muljim, was murdered in *qisas*.

When we look at the detail of these three incidents, some very important questions arise. Can an offender be put to death before the death of victim? Who has the right to grant pardon: the State or the

¹¹¹ For detailed motives on the attack on Umar, see the books referred to in the three preceding footnotes; see also Shams-ul-Ulema Allama Shibli Numani, *Life of Umar the Great*, trans. Jamil Qureshi, Oxford, 2004.

¹¹² Article on Al-Hurmuzan in *Encyclopedia of Islam*, 2nd ed.

¹¹³ In the traditions related to *fitna* (mischief), Aisha is reported to have frequently appealed to the prophet's companions to stand for *iqamat al-hudud* (application of *hudud*), as not punishing Usman's murderers means *tatil, ibtal al-hudud* (nullifying the *hudud*). See G.R. Hawting, "The Significance of the Slogan 'la hukma illa lillah' and the Reference to the 'Hudud' in the Traditions about the Fitna and the Murder of Usman", *BSOAS*, vol. 41, no. 3, 1978, pp. 453–63.

legal heirs (*wali-al amr*)? Who has the right to demand *qisas*: the legal heirs or the public? What is meritorious: *qisas* or remission? The law of *qisas* and *diyat*, in general, and Pakistani law of *qisas* and *diyat*, in particular, do not fully deal with these questions when they are raised in light of the practices of the *sahaba*.

1.4.2 *Pakistani law of qisas and diyat*

The study of the Pakistani law of *qisas* and *diyat* is especially interesting as it cannot simply be termed as the 'jurists' law' in its pure form; rather, it is part of legislation enacted by Parliament. Although it is allegedly based on the principles of Shariah, it is in fact a 'law' in the more conventional sense in that its pros and cons were debated in Parliament. Some of its principles may be based on human understanding of divine law, but generally speaking, it is an outcome of a process formulated by secular law and based on democratic norms of a modern nation-state. Thus, it is a human endeavour to legislate for the people of the State. Each provision of this law was laid before parliamentary members in order to evaluate its applicability to the contemporary society of Pakistan. Consequently, some of the concepts that form an essential part of the Islamic law of *qisas* and *diyat* were abandoned. For instance, the important concepts of *aqila*¹¹⁴ and *qassama* (repeated oaths), which are central to the law of *qisas* and *diyat* among all the major Islamic schools of thought, were not adopted. Thus, as Hallaq argues, the exercise of power by the Legislative Assembly to lay down Islamic law in the modern nation-state represents a significant shift of authority from the *ulema* to an (elected) legislative body, which is comprised of ordinary men who would originally have been the followers (*taqlid*).¹¹⁵ This practice could actually be seen as being an *ijtihad* by the Parliament, although without strictly following the principles of *ijtihad*.¹¹⁶ Or perhaps it is simply the 'westernisation' of Islamic laws.

¹¹⁴ *Aqila* technically stood for the tribal group to which a culprit belongs.

¹¹⁵ Cf. Hallaq, "Can the Shariah Be Restored?" in Yvonne Yazbeck Haddad and Barbara Freyer Stowasser, eds., *Islamic law and the Challenges of Modernity*, Oxford, 1992, pp. 21–55.

¹¹⁶ M. Sagir Hasan Masumi, "Ijtihad through Fourteen Centuries", *Islamic Studies*, vol. 21, no. 4, 1982, pp. 39–69; also see Dr. Tanzil ur Rehman, "Ijtihad and its Role in the Modern Times", *PLD Journal*, 1980, p. 33; and Justice Zakaullah Lodhi, "Ijtihad in the Process of Islamization of Laws", *PLD Journal*, 1980, p. 21.

Ihsan Yilmaz tells us that “Pakistan is one of the laboratories of the contemporarisation of Islamic laws that provides many examples of the interaction of religious and local customary traditions”.¹¹⁷ He argues that the process also provides “grounds for extremely instructive debate about the role of the modern state *vis-à-vis* the scope of Islamic legal reform”.¹¹⁸ While agreeing with Yilmaz’s point, this study shows that this process of ‘contemporarisation’ is still at an early stage in Pakistan. An examination of the law of *qisas* and *diyāt* in its present shape (as passed by Parliament) proves that textualists and traditionalists held control of the modern process of the legislation, i.e., when Parliament considered the new law. Modern Muslim thinkers, lawyers and scholars, who were mindful of the demands of contemporary society, formed the minority and thus lost the battle of structuring the new law so as to make it more responsive to such contemporary demands.

In practice, the Pakistani law of *qisas* and *diyāt* has failed to realise what the proponents of the law had claimed it would achieve.¹¹⁹ It has added to uncertainty and disbelief in the law and undermined the State’s efforts and authority in relation to controlling the crime of murder. Its introduction into the criminal justice system has increased confusion regarding the legal status of culpable homicide and murder in Pakistan. One cannot but question why, if it is a crime to kill someone in Pakistan, the murderers can win acquittal despite being proven guilty; why the law states that, in certain cases, murder is not liable to *qisas*, and why, in certain cases in which *qisas* is relevant, it cannot be applied?

1.5 LITERATURE REVIEW

Bibliographical studies on Islamic law by various scholars of the twentieth and twenty-first century confirm that Islamic criminal law has been a relatively neglected area of study.¹²⁰ Such studies show us that

¹¹⁷ Ihsan Yilmaz, “Law as Chameleon: the Question of Incorporation of Muslim personal Law into the English Law”, *Journal of Muslim Minority Affairs*, vol. 21, no. 2, 2001, p. 300.

¹¹⁸ *Ibid.*, p. 300.

¹¹⁹ See Chapter Two.

¹²⁰ Doreen Hinchcliff, “Islamic Law” in Diana Grimwood-Jones, ed., *Middle East and Islam: A Bibliographical Introduction*, Bibliotheca Asiatica 15, Switzerland, 1979; Dreck Latham, “Islamic Law” in *Middle East and Islam: A Bibliographical Introduction*, Bibliotheca Asiatica 20, Switzerland, 1979; see also bibliography Chapter 24 in J. Schacht, *An Introduction of Islamic Law*, 1974.

Western scholarship paid significant attention to either Islamic Law as a whole or to the specific area of Personal Law, while ignoring other components of Shariah, e.g., the law of property, ownership, tort, contract, commercial, procedural, administrative, fiscal, constitutional and criminal law. It can be argued that this, to some extent, undermines the West's understanding of Islamic law.¹²¹

Western academia's interest in studying Islamic criminal law began to develop with the application of Islamic punishments (in most cases, *hudud* laws) by the governments of various Islamic states,¹²² either to legitimise their rule or in response to public demand for the enforcement of Islamic order within those states. This phenomenon, which emerged in the 1970s, is known in the academic world as 'Islamic revivalism'.¹²³ It was during or after this tide of reassertion that Islamic criminal law was applied, or at least efforts were made towards its application, in Pakistan, Iran,¹²⁴ Libya,¹²⁵ Sudan,¹²⁶ United Arab Emirates¹²⁷ and Malaysia.¹²⁸

Recently, Rudolph Peter has examined Islamic criminal law in his *Crime and Punishment in Islamic law*.¹²⁹ In this extensive research,

¹²¹ Cf. the introduction to Frank E. Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia*, Leiden, 2000.

¹²² I have employed this term to mean all those states in which Muslims are the majority and whose rulers are also Muslims, i.e., not just those which profess in their constitutions or names to be Islamic States.

¹²³ See Asghar Ali Engineer, "Islamic State: A Postscript" in *The Islamic State*, New Delhi, 1980; John Esposito, introduction to *Islam: The Straight Path*, 3rd ed., New York, 1998; Matthew Lippman, "Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law", *Boston College International and Comparative Law Review*, vol. 12, no. 1, 1992, pp. 29–62, and p. 291.

¹²⁴ On application of Islamic criminal law in Iran, see Firouz Mahmoudi, "On Criminalization in Iran: Sources and Features", *European Journal of Crime, Criminal Law Justice*, vol. 10, no. 1, 2002, pp. 45–53.

¹²⁵ On the application of criminal law of Islam in Libya, see Ann Elizabeth Mayer, "Reinstating Islamic Criminal Law in Libya" in Daisy H. Dwyer, *Law and Islam in the Middle East*, New York, 1990, pp. 100–15; Mayer, "Legal System of Modern Libya: Enforcement of Islamic Penal Laws" in Tahir Mahmood, ed., *Criminal Law in Islam and Muslim World*, New Delhi, 1993.

¹²⁶ To appreciate the procedure and nature of the application of Islamic criminal law in Pakistan, Iran, Sudan and Libya, see Rudolph Peters, "The Islamization of Criminal Law", in *Die Welt des Islam*, vol. 34, 1994, Leiden, p. 264.

¹²⁷ Butti Sultan Butti Ali Al-Muhairi, "Islamization and Modernization within the UAE Penal Law: Shari'a in the pre-Modern Period", *ALQ*, 1995, p. 287; also see Jill Crystal, "Criminal Justice in the Middle East", *Journal of Criminal Justice*, vol. 29, 2001, pp. 469–82.

¹²⁸ See Abdul Razak, *The Administration of Muslim Law in Malaysia*, MPhil Dissertation, University of Kent, 1978.

¹²⁹ Peters, *op. cit.*

Peters not only examines the principles and doctrines of Islamic penal law developed in the early tradition of Islamic law, but also explores how this law worked “on the ground” in the pre-modern era, focussing on the application of Islamic criminal law in the Ottoman Empire. In this probing and incisive study, Peters admits that Islamic law does not conform to the notion of laws that are found in present-day common and civil law systems, i.e., a uniform and unequivocal formulation of the law. Instead, he argues that Sharia is “a scholarly discourse consisting of the opinions of religious scholars, who argue on the basis of text of the Koran, the prophetic *hadith* and the consensus of the first generations of Muslim scholars, what the law should be”.¹³⁰ While briefly examining the dispensation of justice during Muslim rule in the fourteenth century, he points out that even during this era, trial of an accused by the courts presided by *qazis* was not a general rule, and there is some historical evidence to suggest that the *qazis* did not have authorisation to dispense criminal justice.¹³¹ He further says that even when a *qazi* was granted jurisdiction to hear the criminal cases, the powers were restricted only to the trial of *hadd* offenses. According to Peters, the lack of powers of *qazi* courts was apparently due to the fact that the rules and procedures which were created to apply in *qazi* courts were developed for civil litigation between two private parties who would approach the courts to have their disputes adjudicated. *Qazis* were neither empowered to investigate a complaint¹³² nor did they have sources to get it investigated by any other agency. Thus, Peters argues, the office of prosecution did not exist in Islamic law—a claim that is also supported by Abdel Omer Sherif.¹³³

Examining the Islamic law of homicide and bodily harm, Peters asserts that the most striking feature of this law is the principle of private prosecution. The claim of the victim or his estate are regarded as claims of men and not as claims of God. He claims that three basic principles govern the Islamic law of homicide:

- (a) the principles of private prosecution, (2) the principle that redress consists in retaliation or financial compensation; [and] (3) the principle of

¹³⁰ Ibid., p. 1.

¹³¹ Ibid., p. 11.

¹³² Ibid.

¹³³ Abdel Omar Sharif, “Generalities on Criminal Procedure under Islamic Sharia” in Mohammad Abdel Haleem, Adel Omar Sherif and Kate Daniels, *Criminal Justice in Islam*, London, 2003.

equivalence, which means that retaliation is only allowed if the monetary value of the victim is the same as or higher than that of the perpetrator.

Expounding on the principle of equivalence, he says under this principle a person may not be sentenced to death for killing a person of a 'lower monetary value'.¹³⁴ Peters maintains that despite major Quranic reforms in the pre-Islamic law of murder and homicide, this part of the law retains many "archaic traits".¹³⁵

Given the importance of the re-emergence of Islamic criminal law in modern Muslim nation-states, in a thorough analysis of the implementation of Islamic criminal law in the pre-modern period which is laced with myriad examples of the practice of Islamic penal law in the Ottoman legal system, Peters briefly but systematically surveys the reintroduction of Sharia penal laws in Libya, Pakistan, Iran, Sudan and Northern Nigeria. He argues that the reintroduction of Islamic criminal law provides three main advantages to the elites of these States:

it confers an Islamic legitimacy to their rule; it provides them a tool of suppression, and it introduces a way of dealing which, in many regions, is closer to the public notion of popular justice.¹³⁶

He distinguishes the application of Islamic criminal law in these countries with the operation of Islamic Criminal law in Saudi Arabia, Qatar, and Yemen which were not affected by the nineteenth century's Westernisation of their indigenous Islamic laws. However, he points out that there are some signs of modernisation of law in Yemen and Qatar, such as the codification of laws in Yemen and the enactment of statutory laws in Qatar. He claims that codified Yemeni criminal law very much resembles the law prevailing in countries where Islamic criminal law has been reintroduced. However, in Qatar, he says, whilst a constitution and a penal code are not part of the statutory law, unmodified Sharia still plays a significant role in the application of Islamic criminal law.¹³⁷

In the conclusion of his comprehensive study, Peters observes that most States that have reintroduced Sharia-based penal laws are also signatories to the human rights conventions, and that their penal laws

¹³⁴ Peters, *op. cit.*, p. 39.

¹³⁵ *Ibid.*, p. 40.

¹³⁶ *Ibid.*, p. 144.

¹³⁷ *Ibid.*, p. 143.

violate human rights principles on a number of issues. He suggests that:

since abolition of Sharia criminal law in the countries where it has been recently introduced is no option, the solution must be sought within the Islamic framework, for instance by reinterpreting the textual source or by going back to the abundance of opinions found in the classical work on jurisprudence with the aim of selecting those that are most in conformity with the demands of modern society.¹³⁸

Interestingly, the states that substituted Islamic penal laws for penalties provided by previous ‘secular’ codes¹³⁹ did not conduct any systematic studies of the consequences of the application of Islamic criminal laws in contemporary societies, nor did academics in those countries project their scholarship to examine the consequences of the application of Islamic penalties on their respective crimes. This is perhaps understandable, due to the fact that in general—as mentioned earlier—for Muslim rulers and for the masses the application of Islamic law was an end in itself, as it was the means with which to please God. Therefore, there was no need (one can imagine) to examine the effects of the application of Islamic punishments in contemporary society. Nevertheless, no penal law can ever be fully appreciated without studying its effects upon crime and society as a whole. Bassiouni’s book, *The Islamic Criminal Justice System*, was probably written with this in mind, and also came out in response to the increasing criticism of the application and the effects of Islamic penal laws and the affected countries¹⁴⁰ by intellectual circles in the West.¹⁴¹ Paul Auchterlonie, in his selection of the bibliography on Islamic law published in 1986,¹⁴² commented that Bassiouni’s book was the first comprehensive book on the subject in English. In both the introduction to and his article in the book,¹⁴³ Bassiouni advocates

¹³⁸ Ibid., p. 190.

¹³⁹ I.e., those enforced during colonial times and which were essentially based on Western laws.

¹⁴⁰ For instance, see Rashida Patel, “Punishment of Zina—APWA points out flaws”, *Dawn*, 8 August 1983; Anita M. Weiss, ed., *Islamic Reassertion in Pakistan: The Application of Islamic Laws in a Modern State*, New York, 1986; Fahed Al-Thakeb and Joseph E. Scott, “Islamic Law: An Examination of its Revitalism” in *British Journal of Criminology*, vol. 21, 1981, pp. 58–69.

¹⁴¹ Bassiouni, ed., *The Islamic Criminal Justice System*, London, 1982. The book is basically a collection of research papers read in a conference on the protection of Human Rights in the Islamic Criminal Justice System, held in Syracuse.

¹⁴² Ibid.

¹⁴³ Ibid., pp. 3–45.

a return to the fundamentals of Islam, namely, the Quran, the Sunnah and the practices of the *Khulafa-i-Rashidun*: Abu Bakr (d. 634), Umar (d. 644), Usman (d. 656) and Ali (d. 661). He argues that the development of a vast literature on Shariah following the period of *Khulafa-i-Rashidun* (634–661) caused confusion and contradiction in Islamic legal thought.¹⁴⁴ He asserts that the system of criminal justice based on the practices of the prophet and *Khulafa-i-Rashidun* could be applied to contemporary times, as it would be perfectly in harmony with the modern requirements of society. Bassiouni's chief concern, then, is the 'classical' Islamic system of criminal justice and that too, as Ann Elizabeth Mayer points out, "within the context of a putative ideal Islamic State".¹⁴⁵

Mayer strongly disputes Bassiouni's assertion that it is the first comprehensive book on the Islamic criminal justice system and questions its author's expertise in Islamic law.¹⁴⁶ She is right in the sense that the book cannot be called a "comprehensive work on the Islamic criminal Justice System". Nevertheless, it is only fair to acknowledge that it was the first consolidated set of articles to touch on various important matters of the Islamic criminal justice system. Prior to Bassiouni's book, while a few published works dealt with selected issues of Islamic criminal law,¹⁴⁷ no single book contained all the significant matters relating to Islamic criminal law, e.g., the sources of Islamic criminal law, the penalties applied under the law, the procedure to administer the Islamic criminal justice system, or the rights of the accused and the victim, along with the evidence required to prove offences.

Subsequently, Abdul Qadir Oudah's treatise, *al-Tashri al-jinai al-Islam Muqaranan bi al-Qanun al-Wadl*,¹⁴⁸ which is a comparative study of Islamic and modern law in the context of Egyptian law, was translated from Arabic into English. Oudah's thesis stands in sharp contrast with Bassiouni's argument. He asserts that the Shariah (Islamic law) revealed

¹⁴⁴ Ibid., pp. 4–5.

¹⁴⁵ Ann Elizabeth Mayer, "Review of Cherif Bassiouni, ed., *The Islamic Criminal Justice System*", *The American Journal of Comparative Law*, vol. 31, 1983, p. 366.

¹⁴⁶ Ibid., pp. 361–68.

¹⁴⁷ For instance, see S.M. Zwermer, *The Law of Apostasy in Islam*, New York, 1916; J.N.D. Anderson, "Homicide in Islamic Law", *BSOAS*, vol. 13, 1951, pp. 811–28; Riyadh Maydani, "Uqubat: Penal Law", Chapter 9 in Majid Khadduri and Herbert J. Liebesny, eds., *Law in the Middle East: Origin and Development of Islamic Law*, vol. 1, Washington, D.C., 1955.

¹⁴⁸ Oudah, *op. cit.*, Karachi, 1987.

fourteen hundred years ago is “a masterpiece of divine creation” that needs no improvement.¹⁴⁹ His study of Islamic law is based on the works of four Sunnite schools of thought. He then makes a comparative study of modern law and Islamic law that he describes as “a comparison between an ever-changing law and immutable ancient law”.¹⁵⁰

Oudah supports the ‘medieval’ classification of crimes into *hudud*, *qisas* and *diyat*, and *tazir*. The key factors that determine the classification of these crimes, he states, are the element of pardoning the accused,¹⁵¹ taking into account mitigating circumstances¹⁵² and the requirement of strict proof in proving the offences.¹⁵³ Having categorised the offences as crimes against society (*hudud*) and crimes against the individual (*qisas* and *diyat*), Oudah further explains that punishments for *hudud* offences are not allowed to be altered by the victim or community because the crime destroys the peace and order of society as a whole. Offences relating to *hadd* are included among crimes that are detrimental to communal interest, even though most of them cause personal loss to individuals, as in the case of larceny or the false charge of adultery. Treating a crime as a *hadd* offence does not mean that the element of personal loss or harm is not acknowledged; rather that the collective interest is given preference over individual interest. Therefore, forgiveness of the individual cannot affect the crime or its punishment.

Oudah’s study is based on the assumption that despite its ‘hoariness’, the Shariah—as it has been constructed by the medieval jurists of Islam—is far superior to modern law.¹⁵⁴ His work is thus more a

¹⁴⁹ Ibid., vol. 1, p. 2.

¹⁵⁰ Oudah, *op. cit.*, p. 3.

¹⁵¹ In cases of offences under *hudud*, pardon is not admissible. An aggrieved person, a head of state or a judge or *qazi* has no authority to grant pardon in such cases. However, in cases under *qisas* and *diyat*, the victim or the legal heirs of the victim can pardon the accused and even forgo their right of *diyat*. A head of state or *qazi* has no power to condone the crime of falling under *qisas* and *diyat*. So far as offences under *tazir* are concerned, a head of state enjoys ample authority to absolve the criminal or remit the penalty.

¹⁵² Circumstances cannot affect the nature and quantum of punishment for any offences committed under *hudud* or *qisas* and *diyat* law, whereas in the case of crimes under *tazir*, circumstances do affect the nature and quantum of the penalty. In such cases, the court enjoys the power to pass a minimum sentence and even stop the execution of punishment.

¹⁵³ According to the Shariah, two witnesses are required to prove offences falling under *hudud* laws. The exception is adultery, in which case four witnesses are essential to prove its commission. However, in the case of offences under *tazir*, punishment can be meted out on the evidence of even one witness.

¹⁵⁴ Ibid., p. 2.

manifestation of his faith in Islamic criminal law than an attempt to develop the ways and means of developing and reconstructing 'medieval' interpretations of Islam in the light of present day realities.

Joseph Schacht deals with Islamic penal laws in his masterpiece on Islamic law,¹⁵⁵ and having examined the Islamic concept of crime and punishment, he concludes that there is no general concept of penal law in Islam. Schacht uses modern western criminal jurisprudence and its notions to evaluate Islamic criminal law. He then criticises Islamic criminal law on the ground that the concepts of guilt and criminal responsibility are not fully developed and that the concept of 'mitigating circumstances' and the 'theory of attempt and complicity of occurrence' are thus missing from the system of Islamic criminal justice. However, since Schacht measures Islamic criminal law with tools that derive from western conceptions of criminal justice, the former can be justified and upheld only if it conforms to the standards of the latter.

Coulson has already pointed out this development in modern Islamic legislation.¹⁵⁶ The 'Islamic' law of *qisas* and *diyat*, as it operates in Pakistan, does indeed acknowledge the concepts of guilt and criminal responsibility. Theories of 'attempt', 'complicity of occurrence' and even 'mitigating circumstances' are applied while punishing the accused under *tazir*. Therefore, Schacht's work does not relate to an example of modern Islamic practice.

The system of Islamic criminal justice and the laws concerning *qisas* and *diyat* have also been the subject of Mohammad Iqbal Siddiqi's study.¹⁵⁷ According to him, Islamic criminal law holds the balance of justice perfectly as it takes into account all conditions and circumstances with regard to an offence. Islamic criminal law, Siddiqi argues, takes into consideration both the compulsions and constraints of criminals and the communal interest against which an act of aggression is believed to have taken place. Therefore, punishment under Islam has all the components of modern punishment: the effects of deterrence, reformation and retribution.¹⁵⁸ Siddiqi argues that the application of Islamic punishments to a society will result in the eradication of crime and cites the example of Saudi Arabia to support his argument.¹⁵⁹ However, in

¹⁵⁵ Schacht, *op. cit.*, 1964.

¹⁵⁶ Coulson, *op. cit.*, 1964, p. 12.

¹⁵⁷ Siddiqi, *op. cit.*, 1985.

¹⁵⁸ *Ibid.*, pp. 22-4.

¹⁵⁹ *Ibid.*, p. 42.

propounding this point of view, Siddiqi neither provides any empirical data nor discloses the sources on which he bases his observations of crime rates. Furthermore, he focusses solely on the deterrent effect of Islamic law and ignores a host of factors that give rise to crime, e.g., societal factors such as poverty, security and so on. He also fails to take into consideration the many versions of Islamic criminal law that exist. Finally, in dealing with the law of *qisas*, Siddiqi only presents Quranic verses and does not consider the subsequent development of the law in the 'classical' or 'medieval' phases of Islam, or indeed its subsequent growth.

The issue of punishment under Islamic law and the law concerning *qisas* and *diyat* has also been addressed by Mohammad S. El-Awa.¹⁶⁰ Although his primary focus is *The Egyptian Penal Code, 1983*, the study also takes into account the development of the law from the 'classical' to the 'medieval' period and documents different approaches that underlie the theory and philosophy of punishment in Islamic law. El-Awa presents the views of major Sunni schools of thought and of contemporary scholarship on various issues. According to the Hanafi and Hanbali schools, explains El-Awa, the accused in a murder case should be killed with a sword (irrespective of the weapon of his crime), whereas according to the Maliki, Shafie and Zahiri schools, the accused should be killed in the same manner as he killed his victim (in keeping with the principles of equality). El-Awa writes that the punishment of death should be carried out in a way that causes the least possible pain.¹⁶¹

Even though El-Awa deals with the issue of *qisas* against a group for the killing of a single person, *qisas* against a Muslim for killing a non-Muslim, and *qisas* against a father for killing his son,¹⁶² he fails to consider the issue of compromise and pardon in the case of intentional murder in a contemporary social context. He also ignores the question of whether or not the offence of murder committed in the context of contemporary society should be considered a private affair or a civil wrong, i.e., an offence against society and State. Furthermore, his study does not consider the application of Islamic penal law by the civil law-based legal set-up in Egypt.

¹⁶⁰ Mohammad S. El-Awa, *Punishment in Islamic Law: A Comparative Study*, Indianapolis, 1982.

¹⁶¹ *Ibid.*, p. 72.

¹⁶² *Ibid.*, pp. 78–83.

Abdullah Ahmed An-Naim¹⁶³ examines the complexities of administering Islamic criminal law in modern heterogeneous societies and states that “[w]ith regard to procedural and practical aspects of criminal law, Shari’a is extremely rudimentary and informal”.¹⁶⁴ He complains that those who support the complete revival of Shariah criminal law have resorted to “anachronistic projections of modern principles of criminal justice back into a legal order in which they were completely unknown”.¹⁶⁵ Further, he does not support the eclectic use of material from the works of early Islamic jurists without justifying the importance of accepting the ruling of one jurist over another’s. Al-Naim argues for reviewing Islamic criminal law from the perspective of the interests of society; that the law of *jinayat* should be reconstructed to suit the contemporary social order and the needs of the modern nation-state.¹⁶⁶

However, An-Naim does not consider some important questions, such as who will reconstruct the Shariah, how reforms may be effected, and what would be the legal sanction behind these reforms. Although he points out the weaknesses in the system of Islamic criminal justice as developed after the ‘classical’ period, he only deals with these issues summarily. These problems need to be seen in the context of the actual application of Islamic criminal laws. Abuses of the law and the problems of its administration need to be examined before suggestions suitable to specific situations can be made. Every society may need to amend ‘Islamic’ laws in accordance with its own demands; the reconstruction of an immutable system of law finds no justification. A basic foundation may be constructed on the common canons of law that are universally recognised and that contain the essential ingredients of every system of justice, e.g., equality before law, due process of law and the principle of natural justice. However, each society should be allowed to work out any details pertaining to the making and administration of law by taking into account its own cultural traditions.

In spite of the gravity of the crime of murder and the peculiar treatment of a murderer in the Islamic law of *qisas* and *diyat*, Western scholarship has paid scant attention to this subject. A good comparison by two scholars in Australia examines the Islamic law of *qisas* (its appli-

¹⁶³ Abdullahi Ahmed An-Naim, *Towards an Islamic Reformation: Civil Liberties, Human Rights, and International Law*, New York, 1990.

¹⁶⁴ *Ibid.*, p. 105.

¹⁶⁵ *Ibid.*, p. 118.

¹⁶⁶ *Ibid.*

cation and method of sentencing) *vis-à-vis* the murder law of the West, especially under Australian law.¹⁶⁷ Having presented their comparison, the authors suggest that Muslim scholars reinterpret the law to restrict the role of the victim's heirs who live outside the Muslim world. The authors do not argue for the general reconstruction of criminal law in the Muslim world since their specific focus is the murder of foreigners in the Islamic State of Saudi Arabia. However, some Muslim scholars have unequivocally suggested similar reforms in the application of the law within a wider context. In line with our earlier discussion, they claim that the principles of Islamic criminal law provide room for the reinterpretation of the law of *qisas* while taking into consideration the interests of society.¹⁶⁸ Other studies that deal with the law of *qisas* and *diyāt* tend to either offer a textual interpretation of law¹⁶⁹ or elaborate the law according to various schools of thought.¹⁷⁰

The Pakistani law of *qisas* and *diyāt* was examined by Daniela Bredi in *Annali Di Ca' Foscari* in 1992.¹⁷¹ Other than a factual error at the beginning of the paper which claims the law was first promulgated by the Nawaz Sharif Government,¹⁷² the article provides a good section-by-section analytical comparison of the defunct and new laws of culpable homicide and murder as placed in the Pakistan Penal Code. He argues that the new law of *qisas* and *diyāt* is actually a modernized version of the Hanafi school's doctrines of *qisas* and *diyāt* law. It is modernised inasmuch as it does not recognise the distinctions of Muslim, *zimmi* (non-Muslim living in an Islamic State), *mustamin* (protected) and

¹⁶⁷ Hossein Esmaeili and Jeremy Gans, "Islamic Law across Cultural Borders: The Involvement of Western Nationals in Saudi Murder Trials", *Denver Journal of International Law and Policy*, vol. 28, no. 2, 2000, pp. 145–74.

¹⁶⁸ See Zakaar Rehman Khan Lodhi, "Modernity of Penal Justice of Islam", *Islamic Culture*, vol. 41, no. 1, 1967; Kamali, "Punishment in Islamic Law: A Critique of the *Hudud* Bill of Kelantan, Malaysia", *ALQ*, 1998, pp. 203–34.

¹⁶⁹ Mahfodz Mohamed, "The Concept of *Qisas* and Islamic Law", *Islamic Studies*, 1982, vol. 21, no. 2, Islamabad, 1982, pp. 77–88; Sayed Sikandar Shah, "Homicide in Islam: Major Legal Themes", *ALQ*, 1999, pp. 159–68; Dr. Ebrahim Ghodsi, "Murder in the Criminal Law of Iran and Islam", *The Journal of Criminal Law*, 1998, pp. 160–69; Ahmed I. Ali, "Compensation in Intentional Homicide in Islamic Law", *Journal of Islamic and Comparative Law*, vol. 9, 1980, pp. 39–54.

¹⁷⁰ J.N.D. Anderson, "Homicide in Islamic Law", *BSOAS*, vol. 13, 1951, pp. 811–28; Schacht, article on *Katl*, *Encyclopaedia of Islam*.

¹⁷¹ Daniela Bredi, "Considerations about the Promulgation of the Pakistan Ordinance on *Qisas* and *Diyāt* (No. VII of 1990)", *Annali di Ca' Foscari*, vol. 31, no. 3, 1992, pp. 135–60.

¹⁷² The law was promulgated during the interim government of Mustafa Jatoi; see Chapter Three.

harbi (belligerent).¹⁷³ In line with the argument presented earlier, Bredi shows that on the issue of pardoning the culprit of intentional homicide, the Pakistani law of *qisas* and *diyat* did not follow *Hanafi* doctrines, according to which there can be no compromise in the case of an intentional homicide. He rightly concludes that the Pakistani law of *qisas* and *diyat* might have followed the theory of categorisation of Islamic penal laws, but it betrays the spirit of the Quranic injunctions since the right of society in the case of murder is not appreciated in the ‘new law’.¹⁷⁴

There are three more studies dealing with laws provided in the Pakistan Penal Code that merit some discussion. The first is a PhD dissertation submitted to the University of London by Shaukat Ali in 1957.¹⁷⁵ Showing excellent foresight, Ali examined provisions of the *Pakistan (Indian) Penal Code 1860* in relation to Islamic penal laws, exploring what provisions would require amendments if the Code were to be Islamicised. He also suggested the mechanism for the introduction of Islamic law into the *Pakistan Penal Code* so as to make the latter consonant with the injunctions of Islam without the wholesale abrogation of its provisions.

Ali argues that most Muslims believe their laws are derived from the Quran and *hadith*, much as the Romans believed their jurisprudence rested on the Twelve Decimviral Tables and the English ascribe the origin of their law to immemorial unwritten traditions.¹⁷⁶ He claims that despite their utmost ingenuity in filtering what they found in the Quran and Sunnah, Islamic jurists had to search elsewhere for the principles on which they based the structure of Islamic law, which necessity compelled them to erect. He further claims that “if one looks at the Quran one will find that the few legal texts it contains are not set out with legal precision or certainty; they are the incidental decisions by the prophet on some problems on which he was forced by the circumstances to pronounce his opinion”.¹⁷⁷ According to Ali, such

¹⁷³ It is worth noting, however, that his findings about Hanafi law are based only on an English translation of the *Hedyah*.

¹⁷⁴ Daniela Bredi, ‘Considerations about the promulgation of the Pakistan Ordinance on *Qisas* and *Diyat*’.

¹⁷⁵ Mohammad Shaukat Ali, *Possible Amendment of the Pakistan Penal Code to Bring it into Conformity with the Shariah*, PhD dissertation, University of London, 1957.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*, p. 3.

decisions “could not have provided for the ever changing and ever renewed complexity of human relations for all time to come”, and thus the jurists, while pretending to interpret the injunctions, had in fact freely legislated in those areas or gaps left in the text.¹⁷⁸ He argues that whatever may be said about the work of jurists on other branches of Islamic law, their contribution in the development of legal principles applicable to criminal law has been inadequate.¹⁷⁹

Ali’s opinion is based on his examination of the application of Islamic criminal law in India. He surveys various decisions pronounced by *qazis* and traces their sanctity with Islamic laws. He then looks into the changing perceptions of crime and punishment in the early nineteenth century, when the British took over the rule of India. Ali asserts that in enacting the Indian Penal Code, the British incidentally drew most of their principles from English criminal law, and so questions whether in doing so, they acted contrary to the Quran and Sunnah. Interestingly, he concludes that they did not. He bases his argument on the proposition that if earlier jurists could borrow from foreign sources (in particular, from Roman law), modern jurists could similarly rely on principles developed by the more advanced European systems.¹⁸⁰ He further concludes that under the doctrine of *siyasa* and *tazir*, the Pakistan Penal Code, 1860 serves the best interests of the community.

The second study concerns crime and punishment in Islam and is written by a retired judge of the Supreme Court of Pakistan, Justice Muhammad Sharif.¹⁸¹ After examining the development of Islamic penal law in Islam, Sharif argues that “it is the right of the State to prescribe conditions under which the act of killing may be atoned for by payment of indemnity with the concurrence of the parties concerned. Any other view would result in great abuse and may produce anarchy.”¹⁸² He argues that the Penal Code, 1860 was not un-Islamic inasmuch as it safeguarded the same interests as Islamic criminal law preserves; i.e., person, property, honour, State, religion, public peace and tranquillity, and decency or morals.

The third study is carried out by Mohammed Hanif at the University of London and examines the history of the administration of Islamic

¹⁷⁸ Ibid., p. 6.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid., p. 516.

¹⁸¹ Muhammad Sharif, *Crime and Punishment in Islam*, Lahore, 1972.

¹⁸² Ibid., p. 35.

criminal law in Muslim India and then in British India.¹⁸³ Having surveyed the law of murder and homicide according to the four Sunni schools of thought, as stated in the *Hedaya* and the *Fatawa-i-Alamgiri*, and then examined the Pakistan Penal Code, he concludes that the law of homicide and murder as contained in the Code is not in conflict with the fundamental teachings of the Quran and Sunnah, “though it may be contrary to the opinions of the Muslim jurists in some respect”.¹⁸⁴ He strengthens his argument by pointing out that Islamic criminal law seems to be silent as far as details are concerned; that there are gaps which need to be filled because Islamic law had long remained only in books and did not develop. According to Hanif, although Islamic law was definitely superior to English common law at the time of prophet Muhammad, but the latter has since developed with the various revolutions that have taken place in England.¹⁸⁵

The above literature on Islamic criminal law, the law of *qisas* and *diyat* and the Pakistani law of *qisas* and *diyat* proves at least one point: that the advantages and disadvantages, strengths and limitations of law cannot be evaluated only by judging textual errors, conflicts and lack of imagination. Instead, the law should be judged on the way it controls the crime for which it is formulated and the effectiveness with which it does so. Could the change in Pakistan’s law of murder and homicide law achieve the desired aim of effectively controlling the crime of murder? This book is an attempt to answer this question.

1.6 RESEARCH METHODOLOGY

In addition to analysing a vast number of reported cases pertaining to *qisas* and *diyat* law, which comprise the bulk of Chapter Five, I have conducted wide-ranging field research in Pakistan during 2002–3 in order to examine the introduction, application (Chapters Two and Three) and effects of the application (Chapter Four) of the law of *qisas* and *diyat* in the criminal justice system of the country. In order to obtain primary information regarding the initiation of the Islamisation process by General Zia and the motive behind his engagement in this movement,

¹⁸³ Mohammad Hanif, *The Law of Homicide in Pakistan*, PhD Dissertation, University of London, 1979.

¹⁸⁴ *Ibid.*, p. 591.

¹⁸⁵ *Ibid.*

I also conducted detailed interviews with some of the people who were involved in this process in one way or another. Also interviewed were members of *Majlis-i-Shoora*¹⁸⁶ and the parliamentarians of subsequent Assemblies (1985, 1993, 1995 and 1997) who took part in debates on the Islamisation of laws in the country. Several extensive discussions were held with politicians, traditionalist *ulema*, modernist *ulema*, academics, social scientists, and retired judges of the High Courts and the Supreme Court. A number of reports and similar types of sources were collected while visiting Quaid-i-Azam Archives in Islamabad and the National Archives of Pakistan. In addition, the private libraries of Khalid Ishaq and Barrister Ejaz Batalvi were visited and relevant material regarding the process of Islamisation of laws was collected.

A careful investigation was carried out in order to examine the *qisas* and *diyāt* law and to understand various aspects, such as how the process was initiated, who was involved, what sources were considered, who was consulted, how many drafts of the law were prepared, what objections were raised by the opposition and other organisations and what the opinions of different ministries were. Also considered in this investigative process were the questions of why it took ten years to implement the judgments of the Peshawar High Court Shariat Bench and the Federal Shariat Court, and why the law was not enforced through Ordinances until 1997, while the normal period of validity for an ordinance issued by the Federal Government (under article 89 of the *1973 Constitution*) is only four months. The material was extracted from National Archives of Pakistan, the Secretariat Library, the President's Secretariat Library, the National Centre Library, the Library of the Islamic Research Institute, the Library of the Secretariat of Law and Parliamentary and Human Rights Affairs, the Library of the Secretariat of the Federal Shariat Court, the Library of the Supreme Court, the Library of the Lahore High Court, the Library of the Lahore High Court Rawalpindi Bench, the Library of Lahore High Court Multan Bench, the Library of the Islamic Research Institute, the Library of the Institute of Policy Studies Islamabad, the Library of the Islamic University in Islamabad, the Library of the Ministry of Religious Affairs and the Library of the Ministry of Interior.

In order to examine the effects of the change of the law on the criminal administration of justice and on society, empirical data was obtained

¹⁸⁶ Federal Council constituted by Zia in 1983 (see Chapter Two).

from police stations and the hierarchy of criminal courts of the country. The jurisdiction of the Lahore High Court, Multan Bench—Multan and Dera Ghazi Khan Divisions—was selected as the sample area for the study. The two divisions are composed of ten districts: Multan, Khanewal, Vehari, Pak-Patten, Sahiwal, Lodhran, Dera Ghazi Khan, Rajan Pur, Layyah, and Muzzafar Garh. The selected domain represents the diversity of cultures that make up Pakistan today. My standing as an advocate of the High Court and position as an Assistant Advocate General Punjab at the Multan Bench of the Lahore High court (from 1996–2000) greatly helped me in being able to follow case studies, interview government officials, lawyers, clients, accused, convicts and their families and to obtain data from different government agencies.

The police and court records selected for examination covered a time span of twenty years (1980–2000). In order to examine the effects of the change of the law on the crime of murder and the criminal administration of justice, I accumulated data relating to the crime of murder for the ten years preceding the application of the new law (the Criminal law [Second Amendment] Ordinance, 1990), i.e., from 1980–90, and for the ten years following, from 1990–2000. The statistics gathered from the annual police records of ten districts for the period 1980–2000 show the numbers of murder cases registered at the police stations, persons killed, persons accused, cases sent up for trials, cases cancelled or remaining untraced, accused convicted and those acquitted.

The crime statistics relate to incidents as originally recorded by the police, although police officials concede that the figures do not show the true level of crime, since some crimes go unreported. Generally speaking, however, the likelihood of an offence being reported is proportional to its gravity, and hence in the case of murder, under-reporting or under-recording is very unlikely. Therefore, the police records are trustworthy and reasonably accurate so far as the figures of the crime of murder are concerned. However, this does not seem so when it comes to manifesting the cases sent up for trial or the results of trial (both conviction and acquittal), since many of the draftsmen confided to me that they tended to ‘massage’ figures in order to show the efficiency of the police. In order to ascertain an authentic rate of conviction and acquittal at trial, I thus examined the consignment registers of District and Session courts, prepared under the rules and instructions of the High Court, which provide accurate data pertaining to the rates of conviction and acquittal of accused charged for murder in the trial courts. The problem with the consignment registers, however, was that they did

not provide any information regarding the cases wherein the accused were acquitted on the basis of compromise between the murderer and the legal heirs of a victim. Data relating to such compromises were instead obtained from District Attorneys' offices and the Office of the Solicitor of Punjab, Lahore.

If the accused in a murder case is sentenced to death by a trial court, a reference must be made to the respective High Court for confirmation of the sentence, as must any appeal against such judgment. Prior to hearing the reference, the High Court examines the case to determine whether or not the offence is coupled with any other Islamic offence. If the accused has also been charged by the trial court for any other offence under *hudud* law (e.g., zina, adultery, rape, theft, drinking), the case is forwarded to the Federal Shariat Court for hearing. Therefore, to collect data on conviction and acquittal at the appeal level, I examined the High Court and Federal Shariat Court records. In order to appeal to these Courts' judgments, an accused or complainant party must file a petition for leave to appeal, called a Constitutional Petition for Leave to Appeal (CPLA), which is then heard by the relevant Bench of the Supreme Court of Pakistan. Most of the CPLAs arising from the judgments of Lahore High Court Multan Bench are filed and heard at the Lahore Bench of the Supreme Court. If leave is granted, the case is sent to Islamabad for the final hearing at the principal seat of the Supreme Court. In order to verify the true and final rate of conviction and acquittal at the Supreme Court level, I hence examined records of both the Supreme Court Lahore Bench and the principal seat at Islamabad.

Under sections 307 and 309 of the *qisas* and *diyat* law, the murderer can enter into a compromise with the legal heirs of the victim at any stage, even after a Supreme Court verdict. Either party can file a petition before the prison superintendent to stay the execution in view of the compromise reached between them. Once the execution is stayed, the compromise proceedings are initiated before the relevant court. In order to determine the number of compromise petitions that were filed in this manner, I visited the prisons of Multan and Dera Gazi Khan Divisions.

In order to assess the effects of the new law on society, I met a number of families of both victims and accuseds. The investigation officers were interviewed and proceedings of investigations—from the initial stage of recording a First Information Report to sending the case for trial—were witnessed. The trials themselves were observed and the

lawyers conducting the trials were interviewed. Similarly, participant observation was carried out at the appellate level. I myself appeared before the appellate courts along with the lawyers of certain clients to observe the proceedings of compromise and stay of the execution of sentence. In addition, detailed interviews were conducted with every District Attorney, Superintendent of Police and District and Session Judge in the selected areas.

Finally, an organised questionnaire was distributed among 1000 lawyers in ten districts. The questionnaire was delivered by hand (in three districts) and by post (in seven districts). Of the total number of lawyers approached in this manner, 700 responded.

In order to determine the rate of murder, conviction and acquittal as a proportion of the population, I examined the census reports of districts. The population reports of every district were procured for this purpose from the Institute of Population Studies at Islamabad (the only place from which they are available). The total crime rate of murder in Pakistan and Punjab during the twenty-year period considered was also looked at to gain a better understanding of the overall issue. The analysis of all this material forms part of Chapter Five of this study.

CHAPTER TWO

LEGAL AND THEORETICAL FOUNDATION OF THE QISAS AND *DIYAT* LAW IN PAKISTAN

INTRODUCTION

Intriguingly, the foundation of the new law of murder and culpable homicide, allegedly based on the Sharia principles of *qisas* and *diyat*, was not laid in the Legislative Assembly of Pakistan. Instead, from 1980 to 1989 the law was pondered over, discussed, dissented, weighed and finally approved by judges of the *Shariat* courts, on whose insistence it was ordained by the State in 1990. It was only enacted by the Parliament in 1997.¹ The Islamic law of murder and homicide, i.e., the law of *qisas* and *diyat*, was initially discussed in the *Shariat* Bench of the Peshawar High Court in the case of *Gul Hassan Khan v. the Government of Pakistan*.² This was the first case wherein the court held that the penalties prescribed in chapter XVI of the Pakistan Penal Code (henceforth 'PPC') with respect to offences against the human body (in particular, under section 302 of the code) are un-Islamic inasmuch as such offences were not made excusable by pardon or on the payment of '*diyat*'; a non-pubert can be subjected to '*qisas*'.³

The Islamic and secular versions of the two laws of murder and homicide were reviewed by the Federal Shariat Court (henceforth FSC) of Pakistan in the case of *Mohammad Riaz etc. v. The Federal Government of Pakistan*.⁴ In a majority judgment, the Full Bench reiterated the decision rendered in *Gul Hassan's* case and further explicated the reasons as to why the law contained in the PPC pertaining to homicide, murder and bodily injuries was against the injunctions of Islam.

Finally, the *Shariat* Appellate Bench (henceforth SAB) of the Supreme Court of Pakistan dealt with the State's objections to the Islamic law of *qisas* and *diyat* as it had been spelt out by the lower courts, i.e., the

¹ See Martin Lau, *op. cit.*, pp. 43–58, especially p. 50.

² PLD 1980 Peshawar 1.

³ *Ibid.*

⁴ PLD 1980 FSC 1.

Shariat Bench of the Peshawar High Court and the FSC. The SAB also dealt with the State's reservations—as to the applicability of the law in modern times—that were expressed in the appeals filed by the Federal Government against the judgments of the Shariat Courts⁵ in *The Federation of Pakistan v. Gul Hassan Khan*.⁶ The Court found the State's objections to be devoid of any basis and concluded that the injunctions of Islamic law were up-to-date, beneficial for society, capable of fulfilling present-day demands and in line with the mandates of the Constitution.

This chapter examines the opinions of several judges of the higher judiciary of Pakistan on the Islamic law of *qisas* and *diyat* as expressed in the abovementioned three judgments. The central argument of this chapter is that despite a general consensus among the judges of the higher judiciary—that the law pertaining to culpable homicide and murder provided in the PPC is un-Islamic—they could not agree as to what the Islamic law of culpable homicide and murder actually was. Proceeding with this critique, this chapter will attempt to identify the sources of their opinions within the framework of Islamic law as interpreted by various Islamic jurists and commentators of the Quran. The study brings into focus the divergent approaches and conflicting opinions of the judges in the three different courts in their understanding of the Islamic law of *qisas* and *diyat*, through highlighting the varying opinions and perceptions in their judgments.

It is argued that the judges, in their appraisal and declaration of the Islamic law of *qisas* and *diyat*, did not exclusively follow the injunctions of Islam as laid down in the Quran and Sunnah, since they were bound under the very constitution by which they were created. It is further argued that inasmuch as they did follow those injunctions, they predominantly followed the selective interpretations of the Quran and Sunnah as rendered by certain traditional scholars of the four Sunni schools of thought. In doing so, they did not give proper consideration to any interpretations of the Quran and Sunnah which may have been against their own sets of conventional beliefs or their own limited knowledge pertaining to Islamic criminal law.

⁵ Shariat Bench of the Peshawar High Court and the Federal Shariat Court of Pakistan; for details see PLD 1980 Peshawar 1.

⁶ PLD 1989 SC 633.

It is also argued that the judges did not pay appropriate attention to opinions of those scholars who have challenged the traditional structure of Islamic criminal law (in particular, the Islamic law of *qisas* and *diyat*) while remaining within the ambit of Islamic law and who have presented an interpretation of the law which seems more compatible with the demands of contemporary society. The study concludes that the courts were over-zealous to declare authoritatively what the Islamic law of *qisas* and *diyat* is and that by doing so, they went beyond the jurisdiction conferred upon them, i.e., to declare a law to be un-Islamic. It would be helpful at this stage to cite the cases that are relevant to the above.

2.1 THE FIRST CASE:

GUL HASSAN KHAN V. GOVERNMENT OF PAKISTAN

Gul Hassan Khan, a condemned prisoner under section 302 of the PPC (hereinafter ‘section 302’), had approached the Peshawar High Court for a declaration⁷ that section 302, the schedule of the Code of Criminal Procedure, 1898 (CrPC),⁸ which was relevant to section 302, sections 401, 402, and 403⁹ of the CrPC and laws relating to mercy be declared repugnant to the injunctions of Islam. His main contentions were:

- 1) that the punishment of *qisas* was completely remittable under the laws of the Quran and Sunnah, whereas the impugned sections of the CrPC and PPC did not allow composition of such an offence; and
- 2) that under section 302, the punishment of *qisas* could be exacted even on a minor, which is against the injunctions of Islamic law.

Gul Hassan’s petition was attached to another *Shariat* petition,¹⁰ filed by Noor Alam Khan who sought a similar declaration from the court, that the law of murder in Pakistan which precludes the parties to

⁷ For more on *Gul Hassan Khan vs. The Government of Pakistan*, see Shariat Petition no. 7 of 1979 and PLD 1980 Peshawar 1.

⁸ The schedule of the CrPC provided that the offence was not bailable, not compoundable and punishable by death or imprisonment for life. See M. Mahmood, “CrPC” in *The Major Acts*, Lahore, 1978, p. 53.

⁹ Generally speaking, these sections (later amended) dealt with the powers of the Provincial Government and the President to suspend, remit and commute sentences with or without conditions. For details, see sections 401 and 402 of the PPC. Section 403 was later amended by the *Criminal Law (Amendment) Act, 1997*. For details, see Act II of 1997, *Criminal Law (Amendment) Act, 1997*. PLD 1997 CS 326.

¹⁰ Shariat Petition no. 13 of 1979.

compound the offence of murder be declared as being against Islamic law. So as to decide these two petitions together, the court formulated four issues, of which two are relevant to this study. These are discussed in detail below.

2.1.1 *The issues*

The two relevant issues formulated by the Peshawar High Court, were: (1) was the penalty prescribed by the Pakistan Penal Code for murder repugnant to the injunctions of Islam? And (2) could a person who was a minor at the time of the murder be subjected to *qisas*?

2.1.1.1 *The Quran as a Touchstone*

While formulating the issues mentioned above, the Shariat Bench of the Peshawar High Court promptly held:

[we] entertain no doubt whatsoever that the holy Quran, 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 the human body can be disposed off on the basis of a *pardon* or *on payment of ‘diyat’* by the person affected, if he is alive, and in case he is dead, by his heirs (emphasis added).

To support the above quoted ruling, the Court relied on translations of the four relevant verses of the Quran.¹¹ The translations and inter-

¹¹ (1) Q. 2:177—O ye who believe! the law of equality is prescribed to you in cases of murder: the free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude, this is a concession and a Mercy from your Lord. After this whoever exceeds the limits shall be in grave penalty; (2) Q. 2:178—In the Law of Equality there is (saving of) Life to you, o ye men of understanding; that ye may restrain yourselves; (3) Q. 4:92—Never should a believer kill a believer; but (if it so happens) by mistake (compensation is due): If one (so) kills a believer, it is ordained that he should free a believing slave, and pay compensation to the deceased’s family, unless they remit it freely. If the deceased belonged to a people at war with you, and he was a believer, the freeing of a believing slave (is enough). If he belonged to a people with whom ye have treaty of Mutual alliance, compensation should be paid to his family, and a believing slave be freed. For those who find this beyond their means (is prescribed) a fast for two months running: by way of repentance to Allah: for Allah hath all knowledge and all wisdom; (4) Q. 5:45—We ordained therein for them: “Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal.” But if any one remits the retaliation by way of charity, it is an act of atonement for him self. And if any fail to judge by (the light of) what Allah hath revealed, they are (No better than) wrong-doers. Translation rendered by Abdullah Yousaf Ali, *The Glorious Kur’an: Translation and Commentary*, Lahore, 1937.

pretations of the Quran that the Court cited were all carried out by scholars originating from the subcontinent¹² that held identical views on the meanings and interpretations those verses. However, three other prominent translators of the Quran—Sir Syed Ahmad Khan (1817–98), Ghulam Ahmad Pervaiz (1903–55), and Mohammad Asad¹³ (1900–92), who also had strong ties with the subcontinent,¹⁴ were completely ignored. These three translated the verses differently and held views contrary to the four translators cited by the court. Inexplicably, their translations and interpretations were not only ignored by the courts, but also the parties did not cite their version on the verses pertaining to *qisas* and *diyat* law.

To provide some context for the first verse quoted regarding *qisas*,¹⁵ the court reproduced the history of the practice of *qisas*¹⁶ in traditional Arab society as given by selected commentators of the Quran. To substantiate its point of view, the court referred to the situation regarding homicide in Arab society that existed before the advent of Islam, as depicted in the commentaries of the Quran. The court translated (from Urdu into English) a passage by Shah Abdul Qadir Dehlavi, written in the margins of his Urdu translation of the Quran, which reads:

...in the 'Jahiliya period' i.e., before the advent of the holy prophet, the custom was that if a person from a noble family was killed, the thirst

¹² Shah Rafi-ud-din Mohadis Dehlavi (1750–1818), Moulana Mohammad Ashraf Ali Thanivi (1859–1941), Moulana Abul Ala Maududi (1903–79), Moulana Mohammad Shafi (1919–79) and Abdullah Yousaf Ali (1872–1953).

¹³ Mohammad Asad was a converted Jew (named Leopold Weiss at birth) born in Ukraine. He came to India in 1932, where he met the poet-philosopher Muhammad Iqbal (1876–1938), who persuaded him to stay in India and work to elucidate the intellectual premises of the future State of Pakistan. In India, he replaced "Mohammed" Marmaduke Pickthal (1875–1936), best known for his English translation of the Quran, and became the editor of *Islamic Culture*. Following the partition of India in 1947, he was appointed as director of the Department of Islamic Reconstruction in Pakistan. In 1949, he was appointed head of the Middle East Division of the Foreign Ministry of Pakistan. For more information, see Mohammad Asad, *The Road to Mecca*, New York, 1954, p. 55; see also Martin Kramer, ed., *The Jewish Discovery of Islam: Studies in Honor of Bernard Lewis*, Tel Aviv, 1999.

¹⁴ *Ibid.*

¹⁵ See footnote 11.

¹⁶ For an historical account of homicide in pre-Islamic Arabia, see A.K. Irvine, "Homicide in pre-Islamic South Arabia", *BSOAS*, vol. 30, no. 2, Fiftieth Anniversary Volume, 1967, pp. 277–92; Muhammad Said Qadiri Hanafi Dakkani, *Tafsir-e Ahmadi*, 2 vols., Agra: Matba-e Murtada, 1915, pp. 265–95; Mohammad Ibn Ibrahim al-Hewesh, "Murder and Homicide in Islamic Criminal Law: Textual Foundations" in Tahir Mahmood, *op. cit.*, 1996, pp. 151–63; Mohamed S. El-Awa, *op. cit.*, 1982, pp. 69–71.

for revenge would not be quenched by killing the murderer; rather, they would avenge themselves by killing their opponents in twenties and hundreds. They would demand the life of a free man for a slave and of a male for a female. To restrict this practice, God ordained that if a free man murdered some one, then revenge be taken from that one alone and if the murderer was a slave, that slave be put to death.¹⁷

It will be beneficial at this stage to briefly examine the prevalent customs of Hijaz¹⁸ pertaining to the law of homicide before the advent of Islam and the practices that followed the revelation of the Quranic injunctions.

Although information on the legal and social attitude towards delicts against individuals in pre-Islamic Arabia is scant,¹⁹ various commentators of the Quran²⁰ have described the pre-Islamic practices in relation to crimes against the human body within the context of the revelation of Q. 2:178. These give the specific background relating to the revelation of the verse, in addition to explaining the general context *vis-à-vis* Arab customs relating to homicides, as quoted by the courts at that time. For instance, Ibn Kathir cites a report by Said ibn Jubair that the verse was revealed with reference to fighting which had broken out shortly before the advent of Islam between two Arab clans and which had led to widespread bloodshed on both sides. Among those killed were several slaves and women, but the dispute was not settled until much later, by which time both clans had embraced Islam. Excessive claims were made by both clans, demanding that a free man be killed for a slave and a man for a woman. They could not reach a settlement until the above verse was revealed. This verse was in fact superseded by Q. 5:45, revealed at a later date, and according to Ibn Kathir, Imam

¹⁷ Here, this refers to ignorance. *Jahiliyyah* refers to the pre-Islamic paganism that existed in Arabia. See Dr. Abu Abdullah Abu-Eshy Al-Maliki and Dr. Abdul-Latif Sheikh-Ibrahim, *A Dictionary of Religious Terms*, Riyadh, 1998, p. 26.

¹⁸ This is an area that forms part of present-day Saudi Arabia.

¹⁹ M.J.L. Hardy, *Blood Feuds and the Payment of Blood Money in the Middle East*, Leiden, 1963, p. 13; Adolf Grohmann, *Arabien*, Handbuch der Altertumswissenschaft, III, 1.3.3.4, Munich, 1963.

²⁰ For instance, see Allamah Aba Jafar Muhammad ibn Jarir al-Tabari, *Jami al-Bayan*, Cairo, 1912; Imam Fakhr al-din al-Razi, *Mafatih al-Ghayb*, Cairo, 1872; Abu Bakr al-Jassas al-Razi, *Ahkam al-Quran*, Istanbul, 1920; Allamah Jalal al-Din al-Suyuti, *al-Durr al-Manth-ur fi al-Tafsir bil Mathur*, Tehran, 1957; Allamah Mahmud al-Alusi, *Ruh al-Maani fi Tafsir al-Quran al-Azim wa al-Sab al-Mathani*, Bayrut, n.d.; Muhammad Husayn al-Tabatabai, *al-Mizan: An Exegesis of the Quran*, Tehran, 1983; Abu Ali al-Fadl ibn al-Hasan al-Tabarsi, *Majma' al-bayan fi tafsir al-Qur'an*, Bayrut, n.d.; Sayyid Qutb, trans. M.A. Salahi, *In the Shade of the Qur'an*, London, 1979.

Malik also supported this later version.²¹ However, the court neither touched on the issue of the abrogation²² nor looked into why Imam Malik held the opinion.

Interestingly, relying on the same historical context of the revelation of Q. 2:178, Sir Syed approached the injunctions pertaining to the law of *qisas* provided in the Quran in a rather different way. Sir Syed Khan,²³ who was educated in both Western and Islamic legal traditions, states that verse 178 contains three separate commands:

- 1) it upholds the *qisas*, or just retribution;
- 2) it abolishes the practice of receiving blood money, as was customary in the period of *jahiliya*;²⁴ and
- 3) it clarifies that the agreements concluded among the tribes about homicides carried out before the advent of Islam were intact.

Referring to *Tafsir al-Kabir*²⁵ and *Maalim al-Tanzil*, Sir Syed writes:

when different tribes professed Islam there were some individuals among them who had killed the members of the other's tribe and the revenge of those murders was yet to be taken, as it was usual in the tribal Arab society. In revenge, the tribal people, who were powerful and considered

²¹ Ibn Kathir, *Tafsir Ibn-i-Kathir*, vol. 2, Urdu, Noor Muhammad Karkhana Tijarat Kutb, Karachi, 1982, p. 27.

²² Abrogation is commonly used as the English translation of the Arabic word *nasakh*, which literally means 'obliterate' or 'annulment'. Interpreting the Quran and Sunnah or the commands of Shariah, the doctrine of abrogation is employed and results in the suspension, replacement or annulment of one Shariah ruling by another, provided that the latter is of subsequent origin and that the two rulings are enacted separately from one another. See Mohammad Hashim Kamali, *op. cit.*, 1991, p. 203. For two conflicting views on the doctrine of abrogation, see Maulvi S.A.Q. Hussaini, "An-Naskh", *Islamic Literature*, vol. 5, 1952, pp. 5–18 and Shaikh Abdul Subhan, "An-Naskh", *Islamic Literature*, vol. 10, 1952, pp. 19–29. Also see Abu Ubaid al-Qasim b. Sallam, K. [kitab] *al-nasikh wa-l-mansukh*, ed. with a commentary by John Burton, London, 1987. Q. 2:178 was revealed in year two of the *hijra* before *Ramadhan*. Q. 4:94, wherein a distinction between deliberate and accidental killing was made, came in years 3–5 after *hijra* wherein the application of *qisas* in killing per chance was abolished. This *ayah*, or verse, was revealed between the treaty of *al-Hudaybiyya* and the capture of Mecca. Joseph Schacht, articles on 'katal' and 'kisas', *Encyclopaedia of Islam*, new ed., pp. 766–72, Leiden, 2002.

²³ To see works on Sir Syed, see M.H. Razvi, ed., *Sir Syed Ahmad Khan: A Select Bibliography*, Aligarh, 1971; C.W. Troll, *Sayyid Ahmad Khan: A Reinterpretation of Muslim Theology*, Karachi, 1978.

²⁴ This practice in the era of *jahiliya* was also referred to by the court, when quoting the translation of Shah Abdul Qadir, at p. 5 of the judgment.

²⁵ Al-Razi, Fakhr al-Din (1149–1209), *al-Tafsir al-kabir* (The Great Commentary), 32 vols., Cairo, al-Matba'ah al Bahiyyah al-Misriyyah, 1938 (Al-Razi's commentary on the Quran was completed by his pupil al-Khuwayyi).

‘civilized’, used to kill a free man for the murder of their slave. They would kill a freeman of the other tribe in lieu of the murder of their woman. They would kill two men of the murderer’s tribe in place of the killing of one of their tribal members. Furthermore, a custom in which the heirs could pardon the blood of their murdered one(s) without compensation and sometimes with *diyat* was also in practice.²⁶

He maintains that the first two commands in verse 178 deal with these practices of *jahiliya*. He argues that the first command—“O ye who believe! Retaliation is prescribed for you in the matter of the murdered”—was a complete sentence and the ruling does not have a rider clause, thereby meaning that regardless who is murdered and who the murderer is (man or woman, free or slave), *qisas* shall be exacted. He further argues that this mandatory *qisas* must have been burdensome for persons who had professed Islam recently and had the custom of forgiving the murderer as well as taking blood money, which is why Allah in the next verse (verse 179) ordained: “in the law of equality there is (saving of) life to you, o ye men of understanding; that ye may restrain yourselves”. Sir Syed claims that this verse supports the view that there is only one command in the Quran with regard to intentional murder, i.e., a life for a life. He deplores the fact that the practice of pardoning intentional murder in lieu of compensation (or even without compensation) did not cease to exist, despite the above Quranic command, due to some weak *ahadith* of the prophet.

Sir Syed further asserts that the third command in the verse—“and for him who is forgiven somewhat by his (injured) brother, prosecution according to usage and payment unto him in kindness, this is an alleviation and a mercy from your Lord”—deals with agreements regarding blood money that were concluded before the parties became Muslim. The Quran in this part of the verse honours agreements, in respect of homicides, concluded before the people became Muslims, thereby allowing the fulfilment of promises in which one person may have forgiven the other or that were regarding the payment or receipt of some value. Sir Syed emphasises that murder is not a crime that can go unaccounted if one embraces Islam.

However, bloodshed was commonplace in the period of *jahilyah* and slaughtering stations were set up to revenge murderers; thus, in order to remit those disputes, the agreements regarding the acquittal

²⁶ Sir Seyed Ahmed, *Tafsir-ul-Quran*, Lahore, 1989, p. 279.

from *qisas* that had been concluded during *jahilyah* were kept intact in the early days of Islam. He writes that one cannot, on the basis of this verse, argue that Islam also allowed pardoning and receiving *diyat* in cases of intentional murder. Furthermore, the rules pertaining to unintentional murder do not have any bearing on intentional murder and thus “fixing of *diyat* or taking blood-wit in cases of homicide by mischance is not unjust”.²⁷

Ghulam Ahmad Pervaiz²⁸ claims that a murderer under this verse should be considered to have done wrong, not against a particular person, but against society as a whole. He states that:

[i]n this verse the Quran stresses that while awarding punishment, the basic principles of justice and equity should be kept in view and no distinction should be made between the great and the humble. What is to be considered is not the status of the person murdered or the murderer, but the principle of justice according to which all human life is equally valuable.²⁹

Pervaiz notes that murder can be with or without intent and maintains that in the former the punishment is death, not ransom money, whereas in the latter, the punishment is payment of money as compensation, as ordained in Q. 4:92.³⁰ If the heirs of the murdered person should wish to forego the money or a part thereof (voluntarily or out of goodwill), they have the right to do so under Q. 17:33.³¹ According to Pervaiz, it is necessary in this event that the wrong-doer comply with the terms of the agreement faithfully and with good grace. He alleges that in prescribing lesser punishment for inadvertent murder, the Creator and Sustainer has been lenient so that people’s potentialities may continue to grow.

²⁷ Sir Syed Ahmad Khan, *Tafsir-ul-Quran*, Lahore, 1987, p. 283 (my translation).

²⁸ Ghulam Ahmad Pervaiz was a well-known Pakistani Islamic thinker, writer and founder of the *Idara Tulu-i-Islam* (Institute of the Dawn of Islam) and an associate of Mohammad Iqbal and Muhammad Ali Jinnah, the ideologue and architect of Pakistan, respectively. He was a prolific writer who wrote a number of books on Quranic teachings, the most renowned being *Ma’arif-ul-Quran* in eight vols.; *Lughat-ul-Quran* in four vols.; *Mafhoom-ul-Quran* in three vols.; *Tabweeb-ul-Quran* in three vols.; *Nizam-e-Rabubiyat*; *Islam A Challenge to Religion*; *Insaan Ne Kiya Socha* (History of Human Thought); *Tasawwaf Ki Haqiqat*; *Saleem Ke Naam* in three vols.; *Tahira Ke Naam*; *Qurani Faislay* (Quranic judgments) in five vols. and *Shahkar-e-Risalat* (the biography of the second Caliph Hazrat Omar—may God be pleased with him), all published by Tulu-i-Islam, Lahore.

²⁹ Ghulam Ahmad Pervaiz, *Maarif-ul-Quran*, vol. 4, 1979, p. 32.

³⁰ See footnote 11.

³¹ *Ibid.*

However, Pervaiz argues that any person who acts high-handedly or unfairly once an agreement has been concluded should be punished severely.³² Asad translates Q. 2:178:

O you who have attained to faith! Just retribution is ordained for you in cases of killing: the free for the free and the slave for the slave, and the woman for the woman. And if something [of his guilt] is remitted to a guilty person by his brother, this [remission] shall be adhered to with fairness, and restitution to his fellow-man shall be made in a goodly manner. This is an alleviation from your Sustainer, and an act of His grace. And for him who, none the less, wilfully transgresses the bounds of what is right, there is grievous suffering in store: (179) for, in [the law of] just retribution, O you, who are endowed with insight, there is life for you, so that you might remain conscious of God!³³

Asad does not translate *qisas* as “the law of equality”; rather he terms it as “just retribution”, which perhaps signifies that he is not in favour of killing the murderer in the same manner in which the deceased was murdered. Sir Syed and Pervaiz also maintain that *qisas* does not mean that the killer should be subjected to the same brutalities he inflicted upon the deceased. When defining the meanings of *qisas*, Sir Syed writes:

some people thought the meanings of *qisas* were that the way in which a murderer killed a person should be adopted in killing the murderer. The verse does not confirm this. Rather it states that the murderer should be put to death. *Qisas* means the working of two people in the similar way, as Arabs say, “some one followed some one”. People of Shariah have defined *qisas* as dealing with some one as he dealt with the other. However, such simile does not exist in the meanings of this verse, because here the word *qisas* is used along with the words ‘*fil qutla*’ as killed. Resultantly, it means equality is maintained in taking life not in the method of taking life.³⁴

He further argues that maintaining equality in the method of killing—e.g., by smashing his head, burning him alive, or drowning him in water—so that the murderer should also be subjected to these acts is not correct. The thinking of those *ulema* that this entails equality is erroneous, since to replay those acts in a manner such that retribu-

³² Ghulam Ahmad Pervaiz, *Lughat-ul-Quran*, Tolu-i-Islam Trust, Lahore, p. 64.

³³ Muhammad Asad, *The Message of The Quran Translated and Explained by Muhammad Asad*, Dar Al-Andalus, Gibraltar, 1980, p. 122.

³⁴ Sir Syed Ahmad Khan, *Tafsir-ul-Quran*, Lahore, 1987, p. 284.

tion would be equal in act and effect (as committed by the murderer) is virtually impossible. The verse only emphasises that the substance, i.e., killing, should be carried out.

Similarly, Pervaiz writes:

Qisas does not mean to inflict punishment on the offender; rather it means to pursue the criminal in such a way that he does not remain unpunished. It means that in the Quranic System, no crime shall remain untracked. The Quran calls for a flawless and firm system of investigation, a means of providing security and safety of the social living.³⁵

Furthermore, in distinction to Abdullah Yousaf Ali, who translates *qatla* as ‘murder’, Asad translates the term as meaning ‘killing’.³⁶ Therefore, in his commentary on this verse, he maintains that the word killing covers all possible cases of homicide—premeditated murder, murder under extreme provocation, culpable homicide, accidental manslaughter, and so forth³⁷—and it is thus obvious that the taking of a life for a life (implied in the term ‘retaliation’) would not in every case correspond to the demands of equity. This has been made clear, for instance, in Q. 4:92, where legal restitution for unintentional homicide is dealt with. With regard to compensation, Asad writes:

“[A]nd he to whom [something] is remitted by his brother”. There is no linguistic justification whatsoever for attributing, as some of the commentators have done, the pronoun “his” to the victim and, thus assuming that the expression “brother” stands for the victim’s “family” or “blood relations”. The pronoun “his” refers, unquestionably, to the guilty person, and since there is no reason for assuming that by “his brother” a real brother is meant, we cannot escape the conclusion that it denotes here “his brother in faith” or “his fellow-man”—in either terms, the entire community is included. Thus, the expression “if something is remitted to a guilty person by his brother” (i.e., by the community or its legal organs) may refer either to the establishment of mitigating circumstances in a case of murder, or to the finding that the case under trial falls within the categories of culpable homicide or manslaughter—in which cases no capital punishment is to be exacted and restitution is to be made by the

³⁵ Ghulam Ahmad Pervaiz, *Lughat-ul-Quran*, vol. 3, p. 32.

³⁶ To examine the major differences in the two translations, see Muzaffar Iqbal, “Abdullah Yusaf Ali and Muhammad Asad: Two Approaches to the English Translation of the Quran”, *Journal of Quranic Sciences*, vol. 11, no. 1, 2000, p. 107.

³⁷ In his article “Homicide in Pre-Islamic South Arabia”, Irvine also maintains that there was probably no distinction drawn there between deliberate and accidental homicide; see A.K. Irvine, “Homicide in Pre-Islamic South Arabia”, *BSOAS*, vol. 30, no. 2, Fiftieth Anniversary Volume, 1967, pp. 277–92.

payment of an indemnity called *diyyah* (see Q. 4:92) to the relatives of the victim. In consonance with the oft-recurring Qur'anic exhortation to forgiveness and forbearance, the "remission" mentioned above may also (and especially in cases of accidental manslaughter) relate to a partial or even total waiving of any claim to indemnification.³⁸

Thus, Asad argues, the pardoning by a fellow man in the case of an intentional murder can only have the effect of mitigation and nothing more. Even in such a case, pardoning by the victim's family would not suffice. Forgiveness should come from the whole community, perhaps by a representative of the community, i.e., the State. However, this does not mean that the State takes charge of the case exclusively, but that it takes into consideration the victim's family interest as well as that of the community.

The court, often citing "jurists of Islam",³⁹ overlooked the general principles of the Quran and Sunnah, which were the only criteria they had to examine the law. The court, citing *Maarif-o-Massail*, stated that murders are of three types: *Amd*, *Shub-i-Amad* and *Khata*. One wonders why the court cited a third of type of murder in Islam when it was not mentioned in the Quran and Sunnah. The court did not explain, when referring to the opinion of an *aalim*, why it had referred to or relied only on his opinion and left aside the views of other *ulema*. This can perhaps be viewed as a factional approach, which may have encouraged other judges, higher courts or other powerful sections of the society to behave similarly and adopt the view of a scholar of their own faction and enunciate the law accordingly. For example, according to al-Jassas (d. 370 A.H.) of the Hanafi School of thought, there are five classes of homicide in Islam.⁴⁰ The Shafii, Hanbali, Zaydi⁴¹ and Shia⁴² schools recognize only three kinds of homicide,⁴³ whereas the Maliki and Zahiri

³⁸ Muhammad Asad, *The Message of The Quran Translated and Explained by Muhammad Asad*, Dar Al-Andalus, Gibraltar, 1980, p. 122.

³⁹ For instance, see PLD 1980 Peshawar 1, pp. 3 and 10.

⁴⁰ (1) Deliberate (*amd*), (2) quasi-deliberate (*shabh al-amd*), (3) accidental (*khata*), (4) equivalent to accidental (*jari majra al-khata*), and (5) indirect (*bisabab*). See Ahmad ibn Ali Jassas, *Ahkam al-Qur'an*, Istanbul, 1916.

⁴¹ Muhammad Salim Awwa, *Punishment in Islamic Law: A Comparative Study*, Indianapolis: American Trust Publications, 1982, p. 74 and the sources cited therein.

⁴² Muhaqqiq al-Hilli and Jafar ibn al-Hasan, *Shara'i' al-islam fi al-fiqh al-islami al-ja'fari*, Najaf, 1969.

⁴³ Deliberate, quasi-deliberate and accidental; see *ibid*.

schools maintain there are only two.⁴⁴ If the Court chose to lay down that there are three classes of homicide in Islam, it should have given reasons not only for adopting the point of view of a particular school of thought, but also for not accepting the others' points of view.

2.1.1.2 *Sunnah as a touchstone*

The reliance on Sunnah literature⁴⁵ by the Court in such a casual way, blithely ignoring classical and modern studies on the subject of determining the authenticity of *ahadith*, further shows that it was too eager and impassioned to declare as un-Islamic the punishment and the law of homicide and murder as embodied in the PPC. While procuring support for their already-formed opinion from the Sunnah and relying on *ahadith*, their attentions shifted from 'jurists' to 'traditionists'⁴⁶ of Islam. The problem here was more complex than the judges envisaged. The constitutional provision that empowered the Shariat Court to declare any law un-Islamic reads:

The Court may either of its own motion or on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government, examine and decide the question whether or not any law or provision of law is repugnant to the injunctions of Islam, as laid down in the Holy Quran and Sunnah of the Holy Prophet, hereinafter referred to as the Injunctions of Islam.⁴⁷

It is doubtful whether the court had any authority to declare a law as being against the injunctions of Islam only on the basis of Sunnah. It

⁴⁴ Deliberate and accidental; see Dr. Tanzailur Rehman, *Islami Qawaneen: hudud, qisas, diyat, wa tazirat*, Lahore, n.d.

⁴⁵ On Sunnah, see Jalal al-Din al-Suyuti, *Tadrib al-Rawi*, ed. A.A. Latif, 1st ed., Cairo, 1959; Muhammad b. Abdullah al-Hakim, *Marifah Ulum al-Hadith*, ed. Muazzam Husain, Karachi, 1967; Ignaz Goldhizer, *Muslim Studies*, vol. 2, 1971; Joseph Schacht, *op. cit.*, 1950; M.M. Azami, *On Schacht's Origins of Muhammadan Jurisprudence*, Oxford, 1996; Alfred Guillaume, *The Traditions of Islam*, New York, 1980; G.H.A. Juynboll, *Muslim Tradition: Studies in Chronology, Provenance and Authorship of Early Hadith*, New York, 1983; Mazhar Kazi, *A Treasury of Ahadith*, Jeddah, Saudi Arabia, 1992; Andrew Rippin, *Muslims: Their Religious Beliefs and Practices*, New York, 1990.

⁴⁶ The people who compiled the traditions of the prophet and patriarchal caliphs. The term is also used to denote the people who strictly follow tradition in opposition to Ahl-Rai; see Al-Hajj Maulana Fazlul Karim, *An English Translation of Mishkat-ul-Masabih*, vol. 1, Lahore, 1979, pp. 52–78. For a detailed and interesting discussion on the conflicts of *ahl al-ray* and *ahl al-hadith*, see Coulson, *op. cit.*, 1969, pp. 3–5; Abdur Rahim, *op. cit.*, 1911, pp. 20–32; see also David Pearl and Werner Menski, "The Historical Development of Muslim Law", *Muslim Family Law*, 3rd ed., London, 1998, pp. 3–28.

⁴⁷ Article 203–D of the 1973 Constitution (emphasis added).

is of course possible to do so in Islamic theology,⁴⁸ and Parliament may also formulate laws on the basis of the Quran and Sunnah jointly or separately. However, the FSC was granted powers only to determine if the law is against both the Quran *and* Sunnah. My opinion is that the Shariat Court could not lay down a law or declare a law un-Islamic if that law is described in only one of the sources or is against the injunctions laid down in either the Quran or Sunnah. This power is retained by the Legislative Assembly for itself. The framers of the phrase “the Quran and Sunnah” must have been mindful of the complications that could arise if the court were equipped with the powers to declare a law un-Islamic on the basis of one source only. Furthermore, as argued by Lau, “the aim was not to introduce the Islamic law in toto but to remove un-Islamic elements from essentially secular legislation”.⁴⁹ It can also be argued that the reason the courts were equipped with the jurisdiction to declare secular laws un-Islamic by using the two religious sources exclusively was that the legislature knew that restricting the courts’ usage of sources to the Quran and Sunnah would also restrict their jurisdiction over legal issues in general. This is because these only provide a collection of piecemeal rulings on particular issues⁵⁰ and thus it is unlikely that they would be legally sufficient to declare most secular laws as being un-Islamic.

Mohammad Iqbal suggests that in view of the uncertainty concerning the accuracy and authenticity of *hadith* literature and the strong relevance attached to the time and event associated with any given *hadith*, the Sunnah may only be useful if it is used as “indicative of the spirit in which the prophet himself interpreted his revelation”.⁵¹ Iqbal argues that this was the reason that Abu Hanifa, who had a keen insight into the universal character of Islam, made no particular use of the traditions.⁵² Abdur Rahim, in his famous work *Muhammadan Jurisprudence*, also states that “Imam Abu Hanifa, who lived at a time when the precepts and usages of the prophet were fresh in the memories of the successors of the companions, and came into contact with almost all the great

⁴⁸ See generally Coulson, *op. cit.*, 1969; Schacht, *op. cit.*, 1964; Nasir, *op. cit.*, 1986; Kemal A. Faruki, *Islamic Jurisprudence*, 2nd ed., Karachi, 1975; Kamali, *op. cit.*, p. 97; Wael B. Hallaq, *The Origins and Evolution of Islamic Law*, Cambridge, 2004.

⁴⁹ Martin Lau, *The Role of Islam in the Legal System of Pakistan*, PhD Dissertation, London, 2002, p. 33.

⁵⁰ See Coulson, *Conflicts and Tensions in Islamic Jurisprudence*, Chicago, 1969, p. 3.

⁵¹ Iqbal, *op. cit.*, Lahore, 1968, p. 137.

⁵² *Ibid.*

traditionalists of the age, is reported to have accepted only seventeen or eighteen of them as genuine”.⁵³

Another very interesting point raised by Rahim, which has not been dwelt upon by Sunni Islam, is that the most revered compiler of *ahadith*, Imam Bukhari (who is looked upon with great respect by the Hanafis) was strongly opposed to the doctrines of Abu Hanifa. Imam Bukhari laboured hard to prove by the traditions he recorded in his collection that the views of the Hanafi School on many legal issues were wrong, insofar as they were against the sayings and practices of the prophet.⁵⁴ Intriguingly, however, Bukhari’s interpretation is followed by the majority of Hanafis as the most authentic book in Islam after the Quran, and they interpret the doctrines of Imam Abu Hanifa by relying on the *ahadiths* reported in Bukhari.

Since the Court could not find any provision from the Quran that forbids the application of punishment to minors, it had no option but to fall on selective *ahadith* from the bulk of *hadith* literature in order to give a ruling on the issue of the culpability of minors. Thus, Justice Abdul Hakim Khan wrote: “again it stands concluded by authority that ‘*qisas*’ cannot be exacted from a murderer if he has not attained the age of puberty.”⁵⁵ It appears that by the ‘authority’ he means a tradition recorded in *Nissai*⁵⁶ and *Abu Daud*,⁵⁷ which reads: “three persons are immune (from *qisas*) (one being) a child, till he gets night discharge” (i.e., puberty).

The court further supported their ruling by quoting *Fatwa Alamgiri*,⁵⁸ which states, “in our view, intentional action of a non-pubert and his accidental action are equal. In both the cases ‘*diyat*’ is payable.”

⁵³ Abdur Rahim, *op. cit.*, 1911, p. 32.

⁵⁴ *Ibid.*

⁵⁵ PLD 1980 Peshawar 1, p. 13.

⁵⁶ *Sunan of al-Nisai* is a collection of *ahadith* by Abdur Rahman Ahmed bin al-Nisai (793–882). This collection is selected from his earlier compilation *Sunan-i-Kubra* and is now considered to be one of *sihah sitta* (the six authentic). For details, see Fazlul Karim, *An English Translation of Mishkat-ul-Masabih*, Lahore, vol. 1, 1979, pp. 52–78; also see John Herbert Harington, *An Elementary Analysis of the Laws and Regulations Enacted by the Governor General in Council at Fort William in Bengal, for the Civil Government of the British Territories under that Presidency*, 3 vols., vol. 2, Calcutta, 1805–1817, p. 225.

⁵⁷ *Sunan Abu Daud* was compiled by Abu Daud (782–854); see *ibid.*

⁵⁸ *Fatwa e Alamgiri* of Aurangzeb (1707) is a comprehensive set of imperial regulations as well as a collection of legal opinions in the *fiqh* tradition drawn primarily from the *ulema*. The compendium is a well-respected digest of Muslim law, which has been acknowledged as the most authentic and comprehensive digest even in Muslim countries

From *Kameliya*, the court quotes:

I have been asked, what is the penalty for the intentional murder if committed by a minor? Murder by him makes *diyat* payable by his *aqila* (kinsmen). It is in *Al-Nutuf* that when a non-pubert murders there is no *qisas*.⁵⁹

The third ruling of the Court was that it is not only the absence of the compromise provision in section 302 PPC that makes it un-Islamic, but also that the provisions relating to imprisonment in the cases of homicide and murder are un-Islamic. The Court relied upon a *hadith* reported in *Mishkat* at page 302, which reads: “when some one suffered from the damage of blood of injury, then he has only three options, not the fourth, he may exact *qisas*, forgive the culprit or compound on the *diyat*”.⁶⁰ Thus, the court ruled: “*qisas*, *diyat*, or pardon are the only three options which are available for the disposal of a murder case by a court”.⁶¹

Realizing that such rulings would be too vulnerable in modern times and could be easily and extensively abused by criminals, as well as being unacceptable to the Government and the public, the court reproduced other *ahadith* with which it could prove that if a minor murderer is not liable for *hadd* and *qisas* punishments, he/she could be punished under *tazir*.

2.1.1.3 *The Issue of Tazir*

Saleem el-Awa traced the etymological meanings of *tazir*⁶² from *Mukhtar al-Sihah*⁶³ and states that the word derives from the verb *azar*, which means ‘to prevent’, ‘to respect’ and ‘to reform’. He says the verb has been employed in its first and second sense in the Quran in Q. 5:12,⁶⁴

such as Egypt, Syria and Turkey; see K.M. Yusuf, “The Judiciary in India under the Sultans of Delhi and the Mughal Emperors”, *Indo-Iranica*, 18, quoted in Michael R. Anderson, “Islamic Law and the Colonial Encounter in British India” in Chibli Mallat and Jane Connors, eds., *Islamic Family Law*, London, 1990, pp. 205–23.

⁵⁹ Gul Hasan Khan v. The Government of Pakistan, PLD 1979 Peshawar 1.

⁶⁰ My translation.

⁶¹ PLD 1980 Peshawar 1.

⁶² Mohamed Saleem el-Awa, *op. cit.*, 1982, p. 97. It is also defined as “discretionary punishment by a *qazi* in the form of corporal chastisement, generally the *bastinado*”, see *E.J. Brill’s First Encyclopaedia of Islam*, ed. M.Th. Houtsma et al., 8 vols., Leiden, 1987.

⁶³ *Ibid.*

⁶⁴ “[V]erily I will wipe out from you your evils...” (trans. A. Yousaf Ali).

Q. 7:157,⁶⁵ and Q. 48:9.⁶⁶ Audah suggests that it refers to chastisement prescribed for offences that do not involve *hudud*, i.e., offences for which the Shariah does not lay down specific punishments.⁶⁷ Siddiqui defined *tazir* as a punishment that deals with less serious offences. The scholars of the four Sunni schools of thought and Shia *fuqaha* have structured *tazir* differently.⁶⁸ Nevertheless, the Court, without going into the details of the structure of *tazir* construed differently by various schools of thought, held that:

if in a grave crime, ‘*Hadd*’ or ‘*Qisas*’ cannot be exacted for extraneous reasons the court can exact *tazir* even if it extends to the death penalty, provided public interest so required it. In such a case, a minor can also be punished with death. Reliance in this respect is placed on the following *ahadith* in Abu Daud.

Jabir ibn Abdullah narrated:

A thief was brought to the Prophet (peace be upon him). He said: Kill him. The people said: He has committed theft, Apostle of Allah! Then he said: Cut off his hand. So his (right) hand was cut off. He was brought a second time and he said: Kill him. The people said: He has committed theft, Apostle of Allah! Then he said: Cut off his foot. Therefore, his (left) foot was cut off. He was brought a third time and he said: Kill him. The people said: He has committed theft, Apostle of Allah! So he said: Cut off his hand. (So his (left) hand was cut off.) He was brought a fourth time and he said: Kill him. The people said: He has committed theft, Apostle of Allah! So he said: Cut off his foot. So his (right) foot was cut off. He was brought a fifth time and he said: Kill him. So we took him away and killed him. We then dragged him and cast him into a well and threw stones over him.⁶⁹

The second hadith cited by the court, was:

A Jew crushed the head of a girl between two stones, and the girl was asked, “who has done that to you, so-and-so or so-and-so?” (Some names were mentioned for her) till the name of that Jew was mentioned (whereupon she agreed). The Jew was brought to the Prophet and the

⁶⁵ “...He releases them from their heavy burdens and from the yokes that are upon them...” (trans. A. Yousaf Ali).

⁶⁶ “...[T]hat ye may assist and honour Him...” (trans. A. Yousaf Ali).

⁶⁷ Audah, *op. cit.*, vol. 1, p. 86.

⁶⁸ To compare the legal structure of *tazir* among the four Sunni schools of thought, see al-Jazairi, *kitab-ul-fiqh-ala-Madhahib-il-Arba*, and for the Shia School of thought, see Abdul Hakim Shirazi, *Tazir*, Tehran, 1978.

⁶⁹ See El-Awa, *op. cit.*, 1982, p. 97.

Prophet kept on questioning him till he confessed, whereupon his head was crushed with stones.

The court affirms, “it will be seen that this was a case of *Qatl-i-Shabb-i-amd* and ‘*qisas*’ was not due but it was exacted as *Tazir*”. Quoting the above two traditions, the court then moved on to a book of *fiqh*⁷⁰ to declare that a culprit who is not liable under *hadd* or *qisas* for one reason or another may be punished under *tazir* and therefore, that a minor could also be punished under *tazir*.

It is difficult to appreciate the real significance, relevance and consequences of the use of the two traditions quoted above, perhaps selected randomly by the court, with respect to laying down a principle of law without first analysing them dispassionately. Q. 25:73 describes the virtues of pious people and states: “who, whenever they were reminded of their sustainer’s messages, do not throw themselves upon them [as if] deaf and blind”.⁷¹ Thus, how can a court follow any tradition which is attributed to the prophet of Islam without taking into account its authenticity? If the first tradition is read carefully, an array of baffling questions arises. One wonders why the prophet ordered the cutting off of the thief’s hand in the first place. What evidence was available to the prophet to pass such an order? What was the value of the stolen thing? Where was the thing stolen from?⁷² Was the accused provided with the opportunity of defending himself? As it appears from the narration, he was not. Why did the companions object to the ruling? Under what law did the lawgiver review/amend his first order on the request of the people who were supposed to follow and not guide him? Does the flagrant misapplication of the law have any effect over the knowledge of the judge?

According to the *hadith*, the prophet in the second instance again passed the order of killing the accused, knowing that his companions had earlier objected to the order, and he then amended it. He passed the same order four times and amended it again on the request of his companions. When the accused was brought before the prophet for the fifth time and the prophet passed the order of killing him, the companions carried out the verdict. How could a person whose both hands and

⁷⁰ Ahmad ibn Abd al-Halim Ibn Taymiyah (1263–1328), *al-Sarim al-maslul Ala Shatim al-Rasul*, India, 1981.

⁷¹ Asad’s translations.

⁷² This is important since different rules apply if a thing is stolen from an unsafe place and not of a particular value.

feet have been cut commit a theft? How long would an injury such as the cutting of a bone take to heal in those days? What appears to be the case is that all this happened in the timespan of a few days to months, and that it was always the same companions who found him stealing and brought him before the prophet, since the objection and its wording was always the same. Interestingly, in the end, after putting 'the thief' to death, the companions (the people who had brought him before the prophet) cast him into a well and hurled stones over him. Under what injunctions of the Quran can a culprit be flung into a well and stoned to death? Without addressing such crucial questions that challenge the very authenticity of this tradition, was it safe for the *Shariat* Bench of the Peshawar High court to quote and rely on it to support the position that the punishment of *tazir* can be given to a recidivist?

Furthermore, the second quoted tradition does not describe whether the girl whose head was crushed was a slave or a free woman. Who were her heirs? Why were they not asked if they wished to pardon the culprit, with or without compensation? Who stoned the head of the culprit? Were they the heirs? Were they present at the scene of the execution? Why had the Jew crushed her head with stones in the first place? Was he punishing her for adultery? How safe was it for the court to rely on these traditions without satisfying itself about the questions which challenge the very authenticity of the traditions in view of the overall general character of the prophet?⁷³ Furthermore, according to Schacht, the incident actually occurred prior to the revelation of the first verse regarding *qisas* (Q. 2:178), after which the law was further developed.

This is the line of reasoning followed by Justice Zakaullah Lodhi, who, in his dissenting note (with the judgment of Justice Aftab Hus-sain), wrote that

while pressing a particular 'Hadith' into service, the particular period [in question], and the existence of Quranic directives [already revealed] until that time should always be kept in view. Since we do not have authentic records as to the facts of each case, and the time and circumstances, [each] 'Hadith' should be used with utmost caution, when legislating.⁷⁴

⁷³ To read about the moral behaviour of the prophet, see Karen Armstrong, *A Biography of Muhammad*, London, 1991; Martin Lings, *Muhammad: His Life Based on the Earliest Sources*, Cambridge 1991; F.E. Peters, *Mohammad and the Orgins of Islam*, New York, 1994.

⁷⁴ PLD 1980 FSC 46.

It is instructive to note that the issue of *tazir* was not raised by the parties, and nor was the court under any obligation under the Constitution to advise the State as to what law it could legislate if it abrogates the law in question on account of the Court's verdict. General Zia was conscious of the consequences of empowering the Shariat courts to lay down law and hence did not enable them to declare what law the State should enact if it were to replace the law declared un-Islamic; the jurisdiction of the court was limited to the extent of declaring a law unlawful.

The Court's ruling that "there is not going to be any violation of the injunctions of Islam if law provides *tazir* (e.g., imprisonment or death) in the case of recidivist" can only be seen as an attempt to pacify the State in the event of it being upset with the rest of the Court's declarations.

2.2 THE CASE OF MOHAMMAD RIAZ V. THE FEDERAL GOVERNMENT, ETC.⁷⁵

Gul Hassan Khan's case was decided on 1 October 1979, approximately six months after Zulfiqar Ali Bhutto's execution, when memories of the Bhutto trial were still fresh in people's minds. Bhutto had requested the Supreme Court in his appeal that his case be tried in accordance with Islamic law. His plea was summarily rejected by the Court.⁷⁶ Therefore, it was perhaps particularly difficult for the Zia Government at the time to concede that the law pertaining to offences of culpable homicide and murder provided for in the PPC under which Bhutto had been executed was actually un-Islamic. The Shariat Bench had decreed that its decision should be given legal effect within two months from the date of decision. Therefore, under pressure from the Shariat Bench "to expedite the process of the Islamisation of law", the State preferred an appeal against the judgment of the Shariat Bench of the Peshawar High Court.⁷⁷

On February 26, 1980, General Zia replaced the four Shariat Benches with a Federal Shariat Court (FSC)⁷⁸ in Islamabad (the capital city of Pakistan), which was composed of a chairman and four members.⁷⁹

⁷⁵ PLD 1980 FSC 1.

⁷⁶ See Chapter Three.

⁷⁷ PLD 1989 SC 633.

⁷⁸ Constitutional (Amendment) Order, 1980; PO 1 of 1980, PLD 1980 CS 89.

⁷⁹ Article 203-C of the 1973 Constitution.

All petitions filed in the Shariat Benches of the four High courts were transferred to the FSC, among which were the petitions decided with the *Mohammad Riaz* case.⁸⁰

Of nine petitions that were clubbed together, seven challenged the punishment prescribed under section 302 of the PPC as being repugnant to the injunctions of Islam as laid down in the Quran and Sunnah. These petitions also challenged some other provisions of the PPC and CrPC as being contrary to the injunctions of the Quran and Sunnah.⁸¹ The FSC Bench that heard Mohammad Riaz's case and the attached petitions was comprised of five judges. Justice Sheikh Aftab Hussain, the author of the judgment in Bhutto's case (in The Lahore High Court) and known for writing lengthy judgments, penned the main judgment while the other four judges added their separate notes.

A preliminary question, raised by the respondents as well as by the *amicus curies*,⁸² regarding the competency of the FSC to re-adjudicate the issues decided by the Shariat Bench of the Peshawar High Court, was rejected in the main judgment by Justice Hussain. Justice Salahuddin Ahmed—chairman of the Federal Shariat Court—implicitly agreed to re-evaluate the issue.⁸³ The three remaining judges held that the FSC, being a successor court of the Shariat Benches, cannot re-examine issues already adjudicated upon by the Peshawar High Court⁸⁴ and especially so when an appeal against that judgment is pending adjudication before the Supreme Court of Pakistan.

If General Zia's reign and the surrounding political environment are kept in mind, we can appreciate that at that point in time it was important and beneficial for judges to demonstrate their deep understanding of Islamic law to the Martial Law Administrator. Justice Hussain would not have been able to pen a thirty-four page judgment had he conceded that the issue had already been adjudicated upon by the Peshawar High

⁸⁰ Shariat petition nos. 15 and 69 of 1979, and 9 of 1980 from the Shariat Bench of the Lahore High Court; Shariat petition nos. 1, 12, 2 and 20 of 1979, and 7 and 4 of 1980 from the Shariat Bench of the Sind High Court; see *Mohammad Riaz etc. v. The Federal Government of Pakistan*. PLD 1980 FSC 1, p. 82.

⁸¹ *Mohammad Riaz etc. v. The Federal Government of Pakistan*. PLD 1980 FSC 1, p. 9.

⁸² Khalid M. Ishaq, senior advocate of the Supreme Court, was invited as *amicus curiae* by the FSC in all cases; *ibid*.

⁸³ Justice Salahuddin wrote, "there is no inhibition in considering this [the question of repugnancy of the provisions of the section 302] question"; see PLD 1980 FSC, p. 8.

⁸⁴ PLD 1980 FSC, p. 1; Justice Agha Ali Hyder, p. 9; Justice Zakaullah Lodhi, p. 45; Justice Karimullah Khan Durrani, p. 52.

Court (as did the majority on the Bench) and that there was no point in re-adjudicating it since the Federal Government's appeal against that judgment was itself pending adjudication. Interestingly, the majority disagreed not only with Justice Hussain's point of view on this preliminary objection, but also with his conclusions regarding prescription of the punishment for intentional homicide in Islam. Such differences are underscored and analysed in the following section.

Justice Ahmad and Justice Hussain arrived at the same conclusion after hearing the various arguments and material presented to the court by the parties involved.⁸⁵ Justice Hussain wrote:

I am, therefore, clearly of the view that the Qu'ranic text provides for two alternatives, *viz.*, punishment of retaliation and in case of *diyat* by him, [a] portion of which may be pardoned by the heirs of successor of the deceased.⁸⁶

He plainly rejected the view that there was a third alternative available to the parties, wherein the successor may grant complete pardon to the murderer. He wrote:

there are some *Ahadis* in which three alternatives are given but it is difficult to reconcile them not only with the text of the Holy Quran but also with the similar *hadis* related by the same authority.⁸⁷

Justice Hussain relied on the translation and interpretation of the Quran rendered by Maulana Muhammad Ali Jallundhri⁸⁸ (to arrive at the above conclusion), wherein while interpreting the word *Shaiee* (somewhat) in Q. 2:178, Maulana states that it means only a portion of the sentence prescribed should be abandoned and not the whole of it.⁸⁹ Justice Hussain also showed restraint in accepting the traditions attributed to the prophet and demonstrated that before relying on a given saying, he would first examine whether that particular tradition of

⁸⁵ Justice Salahuddin wrote: "As regards the nature of the Pardon permissible in the case of murder I am of the opinion that pardon of '*qisas*' on payment of '*diyat*' only is permissible. This is evident from Q. 2:178, quoted elsewhere. The majority of 'Ahadith' quoted before us also support this view. These 'Ahadis', which have already been mentioned, say that there are only two courses open to the heirs of the deceased: '*Qisas*' or '*diyat*'. These Ahadis are nearest to the said verse of the Holy Quran, which is the pertinent injunction on the Question of *Qatl-i-amd*", see PLD 1980 FSC, p. 8.

⁸⁶ PLD 1980 FSC, paragraph 57, p. 23.

⁸⁷ PLD 1980 FSC, p. 21.

⁸⁸ Maulana Abdul Majid Dariyabadi, *Translation and Commentary of the Holy Quran*, 4 vols., Karachi, 1974.

⁸⁹ *Ibid.*

the prophet should be accepted or not. He thus declined to accept the authenticity of a tradition reported by a companion, which presented two conflicting points of view pertaining to the same matter.⁹⁰

After stating this important point, Justice Hussain went on to examine the whole law of homicide and murder (along with its exceptions enumerated under section 300) on the basis of *fiqh*. He had himself (rather equivocally) stated in paragraph 12 of his judgment⁹¹ that the court's jurisdiction was limited to discovering the repugnance of a provision or a law with the Quran and Sunnah. However, he then extensively quoted *fiqh* in the last part of his judgment to suggest which changes the Government might introduce in Chapter XVI of the PPC. The Shariat Bench of the Peshawar High Court had already carried out this exercise in order to pacify a State run by an army chief, lest the decision might displease it too much.

Contrary to the ruling of the Shariat Bench of the Peshawar High Court, Justice Hussain found the sentence of imprisonment contained in the PPC to be in line with the injunctions of Islam. He disagreed with arguments by the *amicus curiae*—Khalid Ishaq—that the sentence and punishment of imprisonment are foreign to Islam.⁹² However, it is evident that Ishaq argued his position while relying on the Quran and Sunnah, whereas the Court quoted examples from other sources⁹³ to dismiss his contention, declaring finally that imprisonment is an Islamic punishment.

A different point of view was presented by Justice Zakaullah Khan Lodhi, who emphasised that the law of *qisas* and *diyat*, as provided in the Quran and Sunnah, needed to be studied in the context of the tribal culture which, according to him, at that time existed not only amongst Arabs but all over the world. Justice Lodhi insisted that Islamic law brought about changes in the prevalent customs of Arab society while taking into account the mores of that particular culture. He suggested

⁹⁰ In Paragraph 55 of his judgment, he wrote: "However, in Abu Daud, Sunan-e-Darmi and Ibn Maja the three alternatives of retaliation, pardon or *diyat* are attributed to Abu Shuriah Khazai, to whom is attributed the statement of the two alternatives in Baluhul Maram (hadis 1204). These two different statements from the same companion cannot be reconciled".

⁹¹ PLD 1980 FSC, p. 30.

⁹² Ibid.

⁹³ Ibid. The court quoted a tradition from the prophet and cited examples of caliphs who passed sentences of imprisonment. The court could not provide any injunction from the Quran or from the prophet's decisions in which the prophet passed the sentence of imprisonment.

that the law be restructured again and that this time it should take into consideration developments of the present era. He wrote:

I am thus of the view that inflicting of bodily harm to an offender should be completely eliminated from consideration, and it should be substituted by imprisonment or any other suitable mode of punishment in addition thereto as the legislature may consider proper. Even otherwise, 'equalisation' as is meant by the term '*qisas*' in terms of Shylocks 'Pound of flesh' is never possible. This verse [Q. 2:178] or any other verse on the point also does not take into account; among others, the circumstances in which any injury was caused, such as grave and sudden provocation, self-defence, and its varying degrees. . . . The field has been thus left wide open by the Holy Book itself for '*Ijtihad*'.⁹⁴

Justice Karimullah Khan Durrani, who was a member of the *Shariat* Bench of the Peshawar High Court that heard Gul Hassan's case, reiterated that he could not agree with judges who held the opinion that a complete pardon in the case of intentional homicide is not available under the injunctions of Islam. He held:

after careful study of these verses and the '*ahadith*', I have come to the conclusion that the heirs of the deceased in '*Qatl-i-Amd*' are entitled to grant total pardon to the culprit in the same manner as in '*Qatl-i-Shabh-i-amd*' and '*Qatl-i-Khata*'. They are fully entitled to forego the right of realization of the whole or a part of the amount of *diyat* in the same manner as they are entitled to forgo the right of *qisas*.⁹⁵

Thus, the FSC held, by a majority:

- 1) that the judgment of the Shariat Bench of Peshawar High Court in *Gul Hassan's case*, declaring section 302 of the PPC along with the relevant sections and schedule of the CrPC as being repugnant to the injunctions of Islam, was binding and held the field; and
- 2) that section 302 of the PPC was repugnant to the injunctions of Islam on the additional grounds that "no exemption of the death sentence has been provided for:
 - a) an offender who is insane at the time of execution; and
 - b) a parent who kills his/her son/daughter.

Both of the judgments examined above came under scrutiny by the Shariat Appellate Bench of the Supreme Court, in *Federation of Paki-*

⁹⁴ PLD 1980 FSC, pp. 46-7.

⁹⁵ PLD 1980 FSC, paragraph 83, p. 53.

stan v. Gul Hassan Khan.⁹⁶ We will examine the SAB's judgment in the next section.

2.3 THE CASE OF *FEDERATION OF PAKISTAN V. GUL HASSAN KHAN*

The pronouncement of the Supreme Court of Pakistan in this crucial case⁹⁷ has so far not been the subject matter of any inquiry by Western academics, for the simple reason that the author of the main judgment, Justice Pir Karam Shah, penned it in the Urdu language. This section analyses the Court's reasoning (as given in that judgment) behind dismissing the State's appeals against certain decisions by the two *Shariat* courts of the country, *viz.* the Shariat Bench of the Peshawar High Court and the Federal Shariat Court of Pakistan.

The SAB, through a single judgment rendered in the above case, disposed of eleven appeals⁹⁸ that had been filed against the judgments of the two Shariat Courts. Two of these had been filed by the Government—appeal number 1 of 1980 against the judgment of the Peshawar High Court, and appeal number 13/81 against the judgment of the Federal Shariat court—and the remaining nine had been filed by private parties against the judgments already mentioned.⁹⁹

The case was decided by a Full Bench of the Supreme Court, comprised of five judges.¹⁰⁰ Justice Pir Muhammad Karam Shah and Justice Maulana Muhammad Taqi Usmani had been inducted into the Shariat Appellate Court on the basis of their knowledge of Islamic theology,¹⁰¹ whereas the other three members of the Bench were trained in the

⁹⁶ PLD 1989 SC 633.

⁹⁷ *Ibid.*

⁹⁸ (1) *Federation of Pakistan v. Gul Hassan Khan*; (2) *Federation of Pakistan v. Muhammad Riaz*; (3) *Muhammad Shafi Muhammadi v. Federation of Pakistan*; (4) *Zara Shah v. Government of Pakistan*; (5) *Nisar alias Nisarai v. Government of Pakistan*; (6) *Muhammad Iqbal v. Government of Pakistan*; (7) *Amraish v. Government of Pakistan*; (8) *Amir Nazar Khan v. Government of Pakistan*; (9) *Niazoo v. Government of Pakistan*; (10) *Mohammad Ali v. Government of Pakistan*; (11) *Naikzada v. Government of Pakistan*.

⁹⁹ *Ibid.*

¹⁰⁰ Muhammad Afzal Zullah (chairman), Justice Nasim Hasan Shah, Justice Shafiqur Rehman, Justice Pir Muhammad Karam Shah, and Justice Maulana Muhammad Taqi Usmani.

¹⁰¹ Clause 3 of Article 203–F states: “[T]here shall be constituted in the Supreme Court of a Bench to be called the Shariat Appellate Bench and consisting of (a) three Muslim Judges of the Supreme Court; and (b) not more than two *ulema* to be appointed by the President to attend sittings of the Bench as ad hoc members thereof from amongst

common law and had reached their positions in the apex court of law on the basis of their experience in that field. It is surprising that the then Attorney General of Pakistan did not choose to appear before the Court and submit his assertions, given that this case was so significant in the history of Pakistan—a case over which hung the life and death of many persons involved in murder crimes.

In the eleven appeals filed by or against the Federal Government, the State was represented and defended by three ‘ordinary’ lawyers: Riazul Hassan Gillani (Deputy Attorney General), Mian Mohhammad Ajmal (Additional Advocate General, NWFP Province) and M. Nawaz Abbasi (Assistant Advocate-General, Punjab). Surprisingly, and in contrast to the FSC, the Supreme Court chose not to invite Pakistan’s most prominent criminal lawyers as *amicus curiae*, although their practical experience in criminal law could have been of enormous help to the Court in appreciating the significance of the law provided for in the PPC. The reason behind this may be that the Court knew the majority of the top criminal lawyers would neither subscribe to the SAB’s interpretation of the Islamic law of *qisas* and *diyat*, nor agree to declare the law provided in ‘Macaulay’s code’¹⁰² as un-Islamic.

Although the SAB heard the arguments on 19 January 1988 (during the Zia era), the judgment was only delivered in mid-1989, after Zia’s death in an airplane crash, when Benazir Bhutto had formed a new Government. The verdict was unanimous: the Court dismissed both of the State’s appeals and, *inter alia*, declared:

- (1) sections 299 to 338 of the Pakistan Penal Code, 1860 which deal with offences against the human body are repugnant to the injunctions of Islam, as they:
 - a) do not provide for the *qisas* in cases of *Qatl-al-amd* (deliberate murder) and *Jurooh-al-amd* (deliberately causing hurt) as is prescribed in the Holy Quran and Sunnah;
 - b) do not provide for *diyat* in case of *Shibh-ul-amd* and *Khata* of both *Qatl* (murder and *jurh* (hurt) as prescribed in the holy Quran and Sunnah;
 - c) do not provide for compromise between the parties on agreed compensation when they make *sulh* (compromise) in cases of *qatl* and *jurh*;

the judges of the Federal Shariat Court or from out of a panel of Ulema to be drawn up by the President in consultation with the Chief Justice”.

¹⁰² This is the name given in legal circles to the PPC.

- d) do not provide that the offender may be pardoned by the victim in cases of *jurh* (hurt), and by the heirs of the victim in cases of *Qatl* whereby the Court can award him a sentence of imprisonment by way of Ta'zir which may not extend to imprisonment for life;
- e) do not exempt a non-pubert and an insane offender from the sentence of death in case of murder; and
- f) do not define the different kinds of *Qatl* and *Jurh* in accordance with their respective punishments prescribed in the holy Quran and Sunnah.

[...]

- (5) Section 381 of the Code of Criminal Procedure, 1898 is repugnant to the injunctions of Islam in so far as it does not provide that the heirs of the deceased in case of murder may pardon the offender or enter into a compromise with him even at the last moment before execution of sentence, upon which execution cannot take place.

[...]

- (8) Accordingly, it is held that this decision shall take effect from 23 March 1990 whereby the provisions referred to above, to the extent that they have been held to be repugnant to the injunctions of Islam, shall cease to have effect.¹⁰³

As mentioned earlier, the judgment in this case was penned by Justice Pir Muhammad Karam Shah, who dealt with the State's pleas that were set down in the grounds of appeal in 1989 by the then Federal Government. Intriguingly, however, the judgment only discusses the grounds written in the appeals that were filed in 1979 and 1980 and makes no mention of the State's objections or arguments that it advanced during the appeal hearings. The moot point in the appeals was whether section 302 of the PPC, and sections 345 and 381 of the CrPC against the injunctions of the Quran and Sunnah. It would not be out of place here to examine the Zia Government's objections raised in the appeals against the Shariat court's decisions, along with the SAB's counter-arguments.

The first of the State's objections raised in the appeal was that the view expressed by the FSC in its judgments was against clear injunctions

¹⁰³ Only those sections that are relevant to our study, i.e., relating to the law of murder and homicide, are quoted. For details, see PLD 1980 FSC 1.

of the Holy Quran; that verses 151,¹⁰⁴ 152¹⁰⁵ and 153¹⁰⁶ of the chapter *An-aam* (Q. 6:151, 152, 153), and verses 91,¹⁰⁷ 92¹⁰⁸ and 93¹⁰⁹ of the chapter *Nisa* (Q. 4: 91, 92, 93) were not taken into consideration.

In dealing with this objection, Justice Pir Muhammad Karam Shah observed that of the three verses of the chapter *An-aam* referred to in the plea, only one (verse 151) deals with the crime of murder. He also observed that the other crimes mentioned in this verse do not have even the remotest link with the crime of murder. The relevant sentence in the verse, is “take not life, which Allah hath made sacred, except by way of justice and law: thus doth He command you, that ye may learn wisdom.”

Justice Karam Shah then observed,

[t]his part of the verse strictly prohibits taking life of another human being. This verse neither explains the various kinds of murder, nor does it explain the different sorts of bodily offences. It is unclear which sen-

¹⁰⁴ Say: “Come, I will rehearse what Allah hath (really) prohibited you from”: “Join not anything as equal with Him; be good to your parents; kill not your children on a plea of want; We provide sustenance for you and for them; come not nigh to shameful deeds. Whether open or secret; take not life, which Allah hath made sacred, except by way of justice and law: thus doth He command you, that ye may learn wisdom.”

¹⁰⁵ “And come not nigh to the orphan’s property, except to improve it, until he attain the age of full strength; give measure and weight with (full) justice; no burden do We place on any soul, but that which it can bear; whenever ye speak, speak justly, even if a near relative is concerned; and fulfil the covenant of Allah: thus doth He command you, that ye may remember.”

¹⁰⁶ “Verily, this is My way, leading straight: follow it: follow not (other) paths: they will scatter you about from His (great) path: thus doth He command you that ye may be righteous.”

¹⁰⁷ “Others you will find that wish to gain your confidence as well as that of their people: Every time they are sent back to temptation, they succumb thereto: if they withdraw not from you nor give you (guarantees) of peace besides restraining their hands, seize them and slay them wherever ye get them: In their case We have provided you with a clear argument against them.”

¹⁰⁸ “Never should a believer kill a believer; but (If it so happens) by mistake, (Compensation is due): If one (so) kills a believer, it is ordained that he should free a believing slave, and pay compensation to the deceased’s family, unless they remit it freely. If the deceased belonged to a people at war with you, and he was a believer, the freeing of a believing slave (Is enough). If he belonged to a people with whom ye have treaty of Mutual alliance, compensation should be paid to his family, and a believing slave be freed. For those who find this beyond their means, (is prescribed) a fast for two months running: by way of repentance to Allah: for Allah hath all knowledge and all wisdom.”

¹⁰⁹ “If a man kills a believer intentionally, his recompense is Hell, to abide therein (For ever): And the wrath and the curse of Allah are upon him, and a dreadful penalty is prepared for him.”

tence of the verse supports the contention of the appellant and has been neglected by the learned Federal Shariat Court.¹¹⁰

Dealing with the State's objection that the FSC did not pay any heed to the verses of the chapter *Nisa*¹¹¹ and arguing that it was due to this disregard that the court delivered a judgment which was against the clear injunctions of Islam, Justice Pir Karam Shah wrote:

reading these verses makes it abundantly clear that the first verse mentions accidental murder only and the punishments that are inflicted upon the murderer in varied situations. This verse neither mentions anything about intentional murder nor does it provide for punishment for an intentional murder. However, in the second verse, punishment in the next world has been laid down for a murderer who deliberately kills an innocent person. Does this mean that the Islamic State does not provide for any punishment for such a cruel person? How can one expect this from an Islamic system that provides for an all-encompassing way of life? Therefore, the verses relied upon by the Federal Government, challenging the decision of the learned Federal Shariat Court, do not support their contention.¹¹²

Having summarily dismissed the plea, Justice Karam Ali Shah explained that if proper attention was paid to Q. 2:178, 179,¹¹³ then the misunderstanding that the FSC's decision was against the Quran and Sunnah could be clarified. Given that the judgment was in Urdu, it is worth quoting the translation at length here:

In these verses, Allah's discussion relates to the person who deliberately kills an innocent person and the punishment to be meted out to him. In the first verse, the custom of the 'age of ignorance' is abolished. The Arab tribes were too proud of their lineal pedigrees/tribal races. If a person of a well-off and civilised tribe was killed, then the people of his tribe would not only kill the murderer but would also raid his whole family and kill as many people as they liked. Women and children would not be spared from such an attack. They would plunder their wealth and animals and consider all such atrocities to be their right. They would take pride in doing it and would eulogise such atrocities in their poetry.

Likewise, if a slave were to kill a free man, then the killing of such a slave would not quench their vengeance. Rather, they would consider the killing of such slave's master to be a matter of their right. Similarly,

¹¹⁰ *Federation of Pakistan v. Gul Hassan Khan*, PLD 1989 SC 633, p. 646.

¹¹¹ See Q. 4:83, 84, 85.

¹¹² PLD 1980 FSC, p. 647; author's translation.

¹¹³ See Chapter One, footnote 38.

if a woman were to kill a man, then killing the murderer was not seen as being enough, hence the men of her family were selected and killed and they would consider this an exercise of their right.

These ill-bred discriminations were not only prevalent in the ignorant society of Arabia; many other great cultures and civilizations were also enamoured by such an unfair influence. Such canons were clearly laid down in their law codes. In this verse of the Quran, Allah demolished all such discriminating tenets and commanded that only the murderer should be subjected to *qisas*. Only the culprit—whether a free man, slave or woman—should be punished for the crime and *qisas* shall be exacted from him or her alone.

Doing away with such base and abominable practices, Allah ordained, “*qisas* is prescribed for you for the people who are slain unjustly”. However, killing the murderer is not the only punishment that can be applied. There is another alternative; that is, the heirs of the deceased may pardon the accused for *qisas* and may also make a demand for *diyat* from the murderer. This course is explained in *ذَلِكَ تَخْفِيفٌ مِّن رَّبِّكُمْ: وَرَحْمَةٌ* “this is a concession and a Mercy from your Lord”, i.e., to grant pardon to a murderer from *qisas*. If one reflects a little on this method, one finds innumerable benefits in this command. Oftentimes it may be that one brother murders another. In such a case, if there is no course open to the family of the murdered brother except *qisas*, then the other brother (who committed the murder) will also be put to death. Hence, in this manner, a whole family would be destroyed and ruined. If the parents of these two brothers are alive, then the killing of the second son would only serve to exacerbate their grief and distress. Furthermore, if the brothers have children and both the fathers are killed, then who could imagine the tragedy and devastation the children would suffer? This is why the Shariah made the allowance that if the deceased’s heirs agree and choose to take *diyat* instead of insisting on exacting *qisas*, the brother’s life can be saved and he may then become a support for his ageing parents. Such a murderer would not only support his family, but would also become the guardian of his murdered brother’s orphans.¹¹⁴

If someone is killed in ordinary riots/disturbances and the murderer is hanged, then the enmity between the parties becomes deep-rooted.

¹¹⁴ Justice Karam Shah did not state whether this reasoning could apply if the same situation arose in a *hudud* case.

The cancer of malevolence and hatred spreads between the parties and makes their relations non-reformable. However, if a door of reconciliation is kept open and the heirs of the murdered agree to pardon the murderer, then the tension between the parties can transform into love and affection. The seeds of hatred and spite that were sown by the foolish act of a person can then be rooted out effectively. On several occasions, the real culprits are acquitted due to unreliable evidence from witnesses. When such a culprit comes back to his village or town, then the calamity again falls on the deceased's family. They decide they must certainly kill the real culprit and are thus on the look-out for an opportunity to do so. In this manner, a new chapter of destruction and devastation commences. If a concerted and coordinated effort is made between the parties, and the murderer and his kinsfolk supplicate and seek mercy from the deceased's heirs and tender apologies to them, then not only will the murderer's life be saved, but the door of mischief and violence will also be closed.

Likewise, often when people enter into compromises, these are not recognised/accepted by the court. In such instances, the murderer may resort to unlawful means in order to save himself from the gallows. Witnesses are threatened and forced to tell lies, they are cajoled during the course of cross-examination to accept such pleas that cast doubts on the culpability of the murderer, and in this manner, efforts are made to save the murderer from the gallows.

Many other vices and animosities, in addition to those mentioned above, stem from the present system; however, to discuss them here would make the judgment too lengthy. In order to cast off such noxious or pernicious effects from the parties involved and from society, Islam, which is a natural religion, opened the gate of *diyat* as well as *qisas* and thus did not close the doors of pardon and peace (*afw wa darguzr*). In its verses, the Quran persuades people to forgive and forgo. "If ye punish, then punish with the like of that wherewith ye were afflicted. But if ye endure patiently, verily it is better for the patient."¹¹⁵ "The recompense for an injury is an injury equal thereto (in degree): but if a person forgives and makes reconciliation His reward is due from Allah: for (Allah) loveth not those who do wrong."¹¹⁶

¹¹⁵ Q. 16:127; Pickthal.

¹¹⁶ Q. 42:41; Yousaf Ali.

One of the main characteristics of Islamic law is that it steadfastly holds the equilibrium and never loses control, which is a common error in human legislation. Human legislators, influenced by contemporary situations, sometimes emphasize one aspect and ignore other facets. When they come across the results of erroneous legislation, they emphasize the aspect that was left out from consideration instead of taking a middle path. The history of human legislation is prey to this excess and deficiency. However, we do not see an iota of this miscalculation in Quranic legislation.

If we study the law of bodily injuries in the Quran we find that unlawful homicide has been condemned in many verses and everlasting punishment/torture is prescribed for one who commits such a crime. They have not only been warned of the punishment in the next world, but also the deceased's heirs have been granted the right to exact *qisas* from the murderer in the same way as their nearer one was killed mercilessly. They can take revenge from the murderer and the responsibility to make arrangements for exacting *qisas* lies with the State. Allah says: "And slay not the life which Allah hath forbidden save with right. Whoso is slain wrongfully, We have given the power unto his heir, but let him not commit excess in slaying. Lo! he will be helped."¹¹⁷

By reading these verses of the Quran, a person of normal intelligence can deduce the following conclusions:

- 1) The murder of an innocent person is the gravest of sins in Islam.
- 2) Its punishment in the next world is everlasting hell.
- 3) The heirs of the murdered have complete control over the murderer to inflict *qisas* upon him and no one can restrain them from taking *qisas* from such a murderer.
- 4) If they find betterment in reconciliation and peace and forgo their right of *qisas*, then Islam permits them to do so. In such a case, they may ask for complete *diyat* and grant pardon to the accused or forgo a part of the *diyat*. They have also been empowered to forgo the whole *diyat* as well.

In light of these Quranic verses, all those verses which prescribe the death penalty for intentional murder, or declare such offences non-compoundable, or which abstain from taking *diyat* and granting pardon, are clearly against the commands of Shariah. Therefore, the majority decision of the learned Federal Shariat Court against such provisions of

¹¹⁷ Q. 17:33; Pickthal.

law is not against the injunctions of the Quran, but is in accordance with the injunctions of Islam.

While supporting his dismissal of the first ground of appeal, Justice Karam Shah's initial reliance was on verses of the second chapter.¹¹⁸ His ruling—that the verse clearly meant that only the murderer should be subject to *qisas*—was based on his juristic interpretation of the verse, which is certainly not a plain translation of the verse. The verse itself does not distinctly lay down that the murderer should be murdered. The verse alone does not enlighten us as to what would happen when a free man murders a slave or vice versa, or what course should be adopted if a man slays a woman or vice versa. Anderson states that some of the early jurists of Islam were of the opinion that a man could not be killed in *qisas* for killing a woman.¹¹⁹ The verse also does not clarify if a free man can be murdered for a killing a slave,¹²⁰ or if a believer can be murdered for slaughtering a non-believer.¹²¹ If the verse clearly “demol-

¹¹⁸ See Chapter One, footnote 38.

¹¹⁹ Anderson, “Homicide in Islamic Law”, *op. cit.*, 1951, p. 815. He further clarifies that other jurists held that *qisas* could be exacted only among the sexes by suitable adjustment of blood-money (*ibid.*). Schacht also states, with reference to the exigist of the Quran by al-Zamakhshari (538/1144 A.H.), that Umar bin Abd al-Aziz, al Hasan al-Basri, Ata and Ikrama, who are considered the representatives of the Quran, view that a man cannot be put to death by a women; see Schacht, “Kisas”, *Encyclopaedia of Islam*, new ed., pp. 766–72, Leiden, 2002. This situation is also prevalent in Modern Iran. Article 6 of the Iranian Penal Code states: “Whenever a Muslim man willfully murders a Muslim woman, he shall be liable to *qisas*, but before the execution of *qisas*, the *wali* (or heir) of the woman shall pay the murderer half of a man's *diyat*.”

¹²⁰ Except for Imam Abu Hanifa, none of the four Imams—Malik, Shafi and Hanbal—rule that a free man may be killed in retaliation for a slave. See Allama Shibli Numani, *Sirat-ul-Numan*, trans. M. Hadi Hassain, *Imam Abu Hanifa: Life and Work*, Lahore, 1972, p. 217; also see Anderson, “Homocide in Islamic Law”, p. 815. Shias also maintain that *qisas* cannot be exacted from a free man for the killing of a slave, see Ustad Syed Sadiq al Hussaini, *Islami Qanoo-i-Saza*, Karachi, 1993, p. 179. Shias rely on a tradition of Imam Jafar Sadiq, which states: “A free man shall not be killed for the slave; but he shall be beaten a severe beating and be fined the blood money of a slave. And if a man kills a woman, and the heirs of the slain (woman) want to kill him, they shall pay half of his blood-money to the man's heirs”, quoted by a-Allama as-Sayyid Muhammad Husayn at-Tabatabai, *Al-Mizan: An Exegesis of the Quran*, vol. 2, trans. Sayyid Saeed Akhtar Rizvi, Tehran, 1973, p. 327.

¹²¹ Salim el-Awa rightly asserted that it is characteristic of religious laws to consider the followers of the religion in question superior to others who do not profess this religion. On the authority of early works on Islamic laws, he writes that the majority of jurists hold that a Muslim can not be killed for slaying a non-Muslim and that the jurists take support from the verses of the Quran—that non-Muslims are not equal to Muslims—and by a tradition of the prophet, which forbade the killing of a Muslim on account of his killing a non-Muslim; El-Awa, *Punishment in Islamic Law*, p. 79; also, see Anderson, “Homocide in Islamic Law”, p. 815. Shias also maintain that a Muslim

ished all the discriminating tenets”, then one wonders why a difference of opinion still exists among jurists of Islam on all the above-mentioned propositions. They do not affirm that every murderer should be killed. They mandate that *qisas* cannot be exacted from a father for killing his progeny.¹²² They even differentiate among murderers who employ different means to commit murder.¹²³ According to various schools of thought, not all murderers are liable to *qisas*; only those who kill with specified weapons in a particular way. All of the above claim to draw their peculiar definitions and applications from the Quran and Sunnah. Had it been as clear as Justice Karam Shah stated, there would not have been so many interpretations of this verse.

As far as the discussion on the section of *diyat* is concerned, we have already elucidated the contentions of Sir Syed Ahmed Khan, Ghulam Ahmad Pervaiz and Mohammad Asad. The only point in Justice Karam Shah’s argument that is worthy of consideration is that reconciliation is praiseworthy and it roots out the seeds of hatred that are sown by the

cannot be subjected to *qisas* for killing a non-Muslim; see footnote 23; also see the Iranian Penal Code, which prescribes that a Muslim shall not be killed in *qisas* for killing a non-Muslim. In the forward of their translation of the Iranian Law of *Hudoud* and *Qasas* [Punishment and Retribution] and Provisions thereof, Masouduzzafar and Samimi Kia write: “Under the Islamic Penal System, non-Muslims living in a Muslim country have been treated equally and equal punishments have been prescribed for them, save one or two exceptions. For example, a non-Muslim is allowed to drink a liquor provided he does so in private. Another exception is that if a non-Muslim kills a Muslim, he will be liable to death sentence. But the reverse is not true. Thus the Iranian penal law does not allow a Muslim to be killed for murdering a non-Muslim”; see Masouduzzafar and Samimi Kia, *Law of Hudoud and Qasas and Provisions Thereof*, Tehran, 1983, p. iv. However, looking into the same Quran and having a deep knowledge of Sunnah, Imam Abu Hanifa rules that *qisas* should be exacted for spilling the blood of a non-Muslim; see Anderson, “Homocide in Islamic Law”, p. 815; see also el-Awa, *op. cit.*, p. 79, and the sources cited therein.

¹²² The four Sunni schools of thought are divided on this issue. The Hanafis, Shafis and Hanbalis believe that a father who kills his progeny is not liable to *qisas*, whereas the Malikis hold that the father should be subjected to *qisas* for murdering his offspring; see El-Awa, *op. cit.*, p. 81 and the sources cited therein; also see Anderson, *op. cit.*, p. 817. Shias also maintain that a father is not liable to *qisas* for killing his son (I presume this includes a daughter as well), see Ustad Syed Sadiq al Hussaini, *Islami Qanoon-i-Saza*, Karachi, 1993, p. 184 and the sources cited therein; also see Ayatullah al-Uzma as-Sayyid Mohammad Hussaini al-Shirazi, *Kitab al-qisas*, vol. 2, trans. Akhtar Abbas, Lahore, 1982, p. 129.

¹²³ See Ali ibn Abi Bakr Marghinani, *al-Hidaya*, vol. 9, Cario, 1970, p. 244; for translation, see Charles Hamilton, *The Hedaya, or Guide: A Commentary on the Mussulman Laws*, translated by order of the Governor-General and Council of Bengal, 4 vols., vol. 4, London, 1791, p. 79; also see *Mussawada Qanun-i-Qisas wa diyat*, drafted by Special committee of the Egyptian Parliament, ed. and trans. in Urdu by Mahmood Ahmad Ghazi, Islamabad, 1986, p. 19.

foolishness of the person who murders. What remains unanswered is that if reconciliation is commendable and must be allowed even in the case of premeditated murder, why is it not allowed in crimes of lesser intensity, e.g., theft, adultery, highway robbery or any of the *hudud* punishments? In these latter examples, the State (and for that matter, Islam) does not forgo the punishment which the culprit has to endure, even though the victims whose wealth is stolen or personality is damaged do sometimes agree to forgo their loss. In the case of premeditated murder, however, the loss is irreparable and caused by the killer's greed or other personal reasons for wanting to eliminate that person from the earth—and yet he/she may escape the punishment! In the case of murder, the loss is not of wealth or reputation, which can be regained, but of life, which cannot be brought back. This is an offence, which according to another verse of the Quran (Q. 4:92–93), even Allah who is The Forgiver would not forgive; only the people who might have been the deceased's beneficiaries are allowed to forgive (according to such an interpretation of the *qisas* and *diyat* law).

What is more confusing in the arguments advanced by Justice Karam Shah is that the reasons for allowing compromise in cases of deliberate murder contradict the logic of punishing the culprits in *hudud* cases,¹²⁴ even in cases of compromise. In other words, it was a weak logic of the court that contradicts mandates of the Quran.

It has been clarified earlier that there are some jurists who claim that taking *diyat* or pardoning culprits in cases of intentional homicide is not in line with a correct understanding of the relevant Quranic verses.¹²⁵ The errors of human legislation, as stressed by the Court, may also occur in the understanding and structuring of Shariah laws. In Pakistan and many other Islamic democratic countries, it is the legislature that enacts law in accordance with Shariah. Thus, the possibility of human error will always exist. When dealing with the appellant's second ground of appeal, that the FSC did not properly fathom the traditions/*ahadith* which deal with punishment of the crime of intentional murder, as recorded in Sahih Bukhari and Sahih Muslim. Justice Karam Shah wrote:

¹²⁴ For details of the categorisation of Islamic penal law into *hudud*, *qisas* and *tazir*, and an intriguing approach towards these punishments, see Fazalur Rahman, "The concept of *Hadd* in Islamic law", *Islamic Studies*, vol. 4, no. 3, 1965, pp. 236–51.

¹²⁵ Even Imam Abu Hanifa states that monetary compensation is insufficient requital in wilful killing; see Allama Shibli Numani, *Sirat-ul-Numan*, trans. M. Hadi Hassain, *Imam Abu Hanifa: Life and Work*, Lahore, 1972, p. 217.

when we turned towards those chapters of Sahih Bukhari and Sahih Muslim, we found that although the offence of murder has been condemned very effectively in the traditions mentioned there, they did not state that the deceased's heirs, should they wish to pardon the culprit and enter into compromise, are not empowered to do so [...]

The third plea relied upon by the appellant is that: While interpreting the verses of the Quran, the learned judges of the Federal Shariat Court did not take into consideration the present-day conditions of society. The commentators and jurists on whose opinion the judges of the learned Federal Shariat Court relied, also belong to the same period whose demands were different from the demands of the present-day. The society of that time was structured according to tribal associations and national unity. However, the circumstances have undergone a complete change in modern times.

One cannot but agree with this argument (of the appellant) that there is a lot of difference between the two societies: the old and the present one. The tribal association and national unity, which was the propelling force/real strength of that society, is no longer present. But how does this prove that the commands of the Quran and the sayings of the Prophet (PBUH) have become impractical and lost their utility? The commands of the Quran and the guidance of the Prophet (PBUH) are like the sun, air, and water, which although very old are, nevertheless, life sustaining. Neither have there arisen any signs of antiquity in them, nor would they arise in the future. Neither the autumn ever came over them nor would it until the last day. If we sincerely reflect upon them and equip ourselves with the qualities required to go deep into their meanings and then fathom them, we can then come to know that they are as fresh today as they were on the first day of their existence.

The question is: would not the power to grant pardon, which eliminated the evils of the early times and brought blessings and benevolence to that society, open the same doors of munificence and delight today on the parents of a murderer who is granted pardon in lieu of *diyat*, with free will by the heirs of the deceased? Would not, in this way, the animosity and adversity between the two families transform into love and compassion in modern times as well? Would the implications of this verse not then become apparent with full force in present times?

Here again, the basis of Justice Shah's arguments seems manifestly weak. The question before the court was not whether the principles of the Quran and Sunnah have lost their validity with change in time; rather, it concerned the validity of the two lower courts' deduction and the earlier jurists' interpretations of the rules from the Quran and Sunnah. The court did not appreciate the difference between the injunctions of the Quran and the Shariah. In this regard, Asad says,

as every student of Islam knows, only a part of the laws comprised in what today goes by the name of the Shariah, is derived from the injunctions laid down in a direct, unequivocal manner in the Quran or in Sunnah. By far the larger part of those supposedly Shariah laws are an outcome of the deductions and the subjective reasoning of the great *fuqaha* of our past—deductions and conclusions, to be sure, conscientiously based on the context of the Two Sources, but none the less subjective in the sense that they were determined by each *faqih's* individual approach to, and individual interpretations of, problems not laid down unequivocally, in terms of law, in either of those Two sources. Whereas the self-evident, unequivocal injunctions of both the Quran and the Sunnah are and must forever remain valid for us and cannot be subject to any amendment, no such finality and validity can legitimately be attributed to the deductions or conclusions subjectively reached by any person other than the Prophet. What to people of one period may seem reasonable inference or conclusion, frequently appears to be wrong to the people of a much later period.¹²⁶

It appears from the judgments of Justice Zakaullah Lodhi¹²⁷ and Justice Karam Shah¹²⁸ that both thought the power to remit murder in lieu of *diyat* was introduced by Islam. This view is also prevalent among other modern Muslim writers working on the criminal laws of Islam.¹²⁹ However, such views contradict the findings of other Muslim¹³⁰ and non-Muslim writers and researchers,¹³¹ who claim that the practice was prevalent among Arabs before the revelation of Q. 2:177, 178.¹³²

2.4 CONCLUSION

The constitution of Shariat Benches at each High Court in 1979¹³³ and the establishment of the Federal Shariat Court in 1981¹³⁴ were shrewd

¹²⁶ Mohammad Asad, *This Law of Ours and Other Essays*, Dar al-Andalus, Gibraltar, 1987, p. 24.

¹²⁷ PLD 1980 FSC 1, p. 44.

¹²⁸ PLD 1980 FSC 1, p. 653.

¹²⁹ For instance, see Mohammed Abdel Haleem, "Compensation of homicide in Islamic Shariah" in Mohammed Abdel Haleem *et al.*, *Criminal Justice in Islam*, London, 2003, p. 107.

¹³⁰ See footnotes 11 and 16; also see Hamid al-Ghamidi at <http://urdu.al-mawrid.org/Content/ViewArticle.aspx?articleId=95>.

¹³¹ H.R.P. Dickson, *The Arab of the Desert: A Glimpse into Badawin life in Kuwait and Sau'di Arabia*, 2nd ed., London, 1949, p. 530.

¹³² See Chapter One, footnote 38.

¹³³ Constitutional (Amendment) Order, 1979. PO 3 of 1979, PLD 1979 CS 31.

¹³⁴ Constitutional (Amendment) Order, 1980. PO 1 of 1980, PLD CS 1980 89.

political moves by General Zia, which were designed to lure the people with the prospects of setting up an Islamic system in the country. Shariat Benches at each High Court, which were termed by the general himself as “a first step towards Islamisation”, were established in February 1979, when the Government was building up the public’s mood to face the execution of their elected but deposed Prime minister.¹³⁵

Among the first few petitions filed in the Benches was one filed by Shafi Muhammadi¹³⁶ in the Shariat Bench¹³⁷ of the Karachi High Court, wherein he challenged the credibility of the approver’s evidence, along with the value of untrustworthy evidence in Islamic criminal law, for the purpose of conviction. He further demanded that the Court declare that the benefit of doubt should be extended to the accused in cases where the judges of a superior court do not agree on the culpability of the accused. Additionally, he questioned the prescription under Islamic criminal law of the death penalty for an abettor. All of these questions were linked with the trial and execution of Z.A. Bhutto.¹³⁸ In his second petition,¹³⁹ Muhammadi questioned the execution of several persons in *qisas* of just one person.¹⁴⁰ Both petitions were decided by the FSC, along with Mohammad Riaz’s case, in late 1980, well after the execution of Bhutto and his accomplices. Ironically, in these two petitions, the same judge—Justice Aftab Hussain—who had written the main judgment in Bhutto’s murder case in the Lahore High Court, declaring him guilty of murder by relying on the approver’s evidence that he had abetted the murderer, authored the main judgment of *Riaz’s* case.¹⁴¹

General Zia’s move was also unfair for two further reasons. Firstly, the constitutional amendment demanded the judges act as

¹³⁵ Zulfiqar Ali Bhutto was hanged on 4 April 1979; see Chapter Three.

¹³⁶ Shafi Muhammadi, the petitioner himself, was a lawyer and member of the Pakistan Peoples Party, founded by Zulfiqar Ali Bhutto. He was later elevated to the Sind High Court during Benazir Bhutto’s first Government (1988–90).

¹³⁷ Shariat Petition 1 (Karachi), see PLD 1981 FSC, pp. 11 and 44.

¹³⁸ Since Bhutto was executed by placing reliance on an approver’s evidence and he was charged with abetment of murder, judges in the Supreme Court were divided over the culpability of Z.A. Bhutto.

¹³⁹ Shariat Petition 12 of 1979, Karachi. In the petition Shafi Muhammadi challenged sections 337, 338, and 339 of the CrPC, along with sections 114–B and 133 of the Evidence Act 1878; see *ibid.*

¹⁴⁰ More than one person was hanged in Bhutto’s case for the murder of one person.

¹⁴¹ For details see Chapter Three.

*mujtahids*¹⁴² (scientific jurists) and do *ijtihad*,¹⁴³ without providing them sufficient training in the fields of Islamic learning. Secondly, it did not allow them access to secondary sources of Islamic law,¹⁴⁴ but only to the two primary sources—the Quran and Sunnah—and these together, not separately. There are many injunctions that are based on only one source—the Sunnah—and not on both together. For example, there is no direct injunction available from the Quran for the rules that “the killer shall not inherit”¹⁴⁵ from the deceased, or that a father cannot be subjected to *qisas*.¹⁴⁶ Furthermore, as Martin Lau has very aptly observed, “it is very difficult to reconcile references relating to the rights of the heirs of the victim to pardon the offender on one hand and power of the State to punish the accused on the other: some *ahadith* support it and some reject it”.¹⁴⁷ Therefore, the judges faced a dilemma.

¹⁴² Under Islamic Jurisprudence a *Mujtahid*, *inter alia*, must have the knowledge of the Arabic language since the text of the Quran and Sunnah were revealed in the language and *Ijtihad* can only be performed based on the Arabic text. A *Mujtahid* also needs to be knowledgeable of the Quran, the Makki and the Madini contents of the Quran, the occasion of their revelation (*Asbab al-Nuzul*) and must have a full grasp of the legal contents of the Quran. Knowledge of the *Ayat ul Ahkam* (verses regarding rules) includes knowledge of the related commentaries (*Tafsir*) with special reference to the Sunnah and the views of the *Sahabah* (raa) related to the subject at hand. The *Mujtahid* must possess an adequate knowledge of the Sunnah, especially the part relating to his *Ijtihad* and be familiar with the rulings of the Sunnah. The *Mujtahid* must also know the incidents of abrogation in the Sunnah and the reliability of the narrators of the Hadith. He must have knowledge of *Usul al-Fiqh* so that he will be acquainted with the procedures for extracting the rulings from the text and the implications. See generally Zahraa Mahdi, “Characteristic Features of Islamic Law: Perceptions and Misconceptions”, *ALQ*, vol. 10, pp. 168–96, 2000, especially pp. 185–86; Taha J. al ‘Awani, “The Crisis of Thoughts and *Ijtihad*”, *The American Journal of Islamic Social Sciences*, vol. 10, no. 2, 1993, pp. 235–37; Wael B. Hallaq, *Authority, Continuity and Change in Islamic Law*, Cambridge, 2001.

¹⁴³ Literally meaning ‘exertion’; the logical deduction on a legal or theological question by a *Mujtahid* of learned and enlightened doctor. *Ijtihad* is derived from the root word *Jahada*. Linguistically, it means striving or self exertion in any activity which entails any measure of hardship. As a juristic term, *Ijtihad* means exhausting all of one’s efforts in studying a problem by thoroughly and seeking a solution for it from the sources of the Shariah.

¹⁴⁴ For details of the primary (Quran, Sunnah) and secondary sources (*Ijma*, *qiyas*, etc.) see Kemal A. Faruki, *Islamic Jurisprudence*, Karachi, 1975; Imran Ahsan Khan Nyazee, *Islamic Jurisprudence*, Islamabad, 2000; Subhi Mahmansani, *Falsafat al-Tashri’ fi’l-Islam*, Beirut, 1952 (trans. by Farhat J. Ziadeh, *The Philosophy of Jurisprudence in Islam*, Leiden, 1961).

¹⁴⁵ Kamali, *Principles of Islamic jurisprudence*, Cambridge, 1991, p. 97.

¹⁴⁶ PLD 1980 FSC 1, p. 39.

¹⁴⁷ PLD 1980 Peshawar 1, p. 50.

The Judges of the Peshawar High Court had little or no training in the Islamic legal tradition. Their limited knowledge of the Arabic language was apparent in the choice of their material. The use of traditions pertaining to *tazir* showed that they were not aware of the theory of *naskh* (abrogation) of Sunnah and *naskh* in the Quran,¹⁴⁸ since the traditions they quoted pre-date the revelation of verses 177–178 of chapter II and dealt with the punishment given to a non-Muslim.¹⁴⁹

The courts were also too mindful of the potential political implications of their judgment. As the memories of Bhutto's execution under the "un-Islamic law" were still fresh in people's minds, the courts themselves took up the issue of *tazir* and, on the basis of far-fetched arguments, declared that the accused could be punished under *tazir* with the death penalty even though they were not liable to be punished under *qisas* and *diyat* law. Zia's Government wasted no time in filing an appeal in the SAB against these declarations on the grounds that the judges did not appreciate the correct spirit of the Islamic law of *qisas* and *diyat*. Otherwise, this would have visibly brought into question Zia's sincerity with Islam, given that he had his political opponent hanged under the un-Islamic law.

The judges of the FSC certainly attempted to take a comprehensive view of the Islamic law of *qisas* and *diyat*. However, the judgment shows that the five judges involved could not reach consensus as to the correct interpretation of the five Quranic verses that deal with the punishments described in the *qisas* and *diyat* law. They also ignored the points of view of those jurists and commentators on the Quran who held different views to more 'conventional' Muslims.

The judgment penned by the SAB also contains two major flaws. The decision was only delivered on 5 July 1989, during Benazir Bhutto's tenure (1988–90), although the Court had heard the cases during Zia's regime (1977–88), which indicates the political undertones of the judgment. The SAB's choice of material to bolster its argument was also selective. The judgment written by Justice Karam Shah shows its commitment to the Islamic faith more than it offers legal arguments from Islamic Jurisprudence in support of his assertions.

¹⁴⁸ See, Kamali, *op. cit.*, 1991, pp. 203–27.

¹⁴⁹ See Schacht, "Kisas", *Encyclopaedia of Islam*, new ed., vol. IV, Leiden, 2002, pp. 766–72.

The Court did not fully appreciate the richness of Islamic literature and diversity of opinions among classical, medieval and modern Islamic legists, commentators and jurists. Indeed, it is difficult for a court with two judges who only have rudimentary training in Islamic law to review all the material on a particular issue and subsequently issue a *fatwa*. This immensely important task should have been undertaken by Parliament, which has the resources, time and responsibility to decide and lay down an Islamic law for the State, while taking into account the peculiar circumstances of the country. Bassiouni has rightly stressed in the introduction of his book that

to understand Islam and the manner in which its criminal justice system could function in contemporary times requires a vast and deep knowledge of history and evolution of Islamic thought and practice over almost fourteen hundred years and throughout different cultures.¹⁵⁰

The three judgments described above set a course for the Government to embark on, laying down Islamic law on the basis of political expediencies, selective material and superficial approaches, when what was required most was deeper study, an analytical approach, organised research and contemporary thinking.

¹⁵⁰ M. Cherif Bassiouni, Introduction in M. Cherif Bassiouni, ed., *The Islamic Criminal Justice System*, New York, 1982, p. x.

CHAPTER THREE

THE EVOLUTION OF THE QISAS AND *DIYAT* LAW IN PAKISTAN: A BRIEF HISTORY

INTRODUCTION: AN ANALYSIS OF THE ORIGIN AND EVOLUTION OF THE LAW

In the process of the Islamisation of laws in Pakistan, *qisas* and *diyat* law occupies a special position. The law is distinctive for two primary reasons. Firstly, it is concerned with an extremely important area of criminal law, *viz.* the law pertaining to homicide and murder. Secondly, it has a chequered history which not only exposes Zia-ul-Haq's political motivations in the promulgation of Islamic laws but also demonstrates successive governments¹ lack of concern in the legislation of *qisas* and *diyat* law of Pakistan. Unlike other Islamic laws of the country, which were issued in 1979 by Zia-ul-Haq with a single stroke of his pen, the *qisas* and *diyat* law took about ten years to come into force. This chapter explores some of the reasons why the *qisas* and *diyat* law was not enacted by Zia-ul-Haq, and analyses various reports, documents and drafts of the law that were prepared during these ten years. Other material examined in this chapter includes the reports of the select committees of Zia-ul-Haq's hand-picked *Majlis-i-Shoora*² and other Legislative Assemblies, in which the drafts of the *qisas* and *diyat* law came under extensive discussion. These also offer some explanation for the delay in the formulation of the *qisas* and *diyat* law. The main argument in this chapter is that the Executive, Judiciary and Members of Parliament had differing approaches to the application of Islamic criminal law in Pakistan.

¹ Four elected governments came into power from 1981–97: M.K. Junejo (1985–88); Benazir Bhutto (1988–90); Nawaz Sharif (1990–93); and Benazir Bhutto (1993–96). None of their parliaments could enact the law, despite Superior Courts recurring Orders. There were also four interim governments, in between the dismissal of the elected government by the president and the election of the new. It was during the interim government of Ghulam Mustafa Jatoi (r. 6 August to 6 November 1990) that the Ordinance pertaining to the law of *qisas* and *diyat* was issued. The law was finally enacted during Nawaz Sharif's third term in Government (1997–99).

² The Federal Council (*Majlis-i-Shoora*) was constituted by Zia-ul-Haq in 1981 under articles 4 and 5 of The Provisional Constitutional Order 1 of 1981.

The Executive's apparent reluctance to draft the 'new law' and the Judiciary's impatience to have it enforced without delay caused tremendous tension between successive Governments and the Judiciary. Eventually, the latter prevailed and the Government was forced to promulgate the *qisas* and *diyat* law hastily, on 5 September 1990. The Government continued promulgating Ordinances pertaining to *qisas* and *diyat* law one after another for almost seven years,³ but failed to get the law passed by Parliament. The law was finally enacted in April 1997, by Nawaz Sharif's Muslim League and the sweeping majority it held in Parliament, which succeeded in pushing through the law in less than twenty minutes and without any debate on its content. The opposition parties strongly protested over the bypassing of general parliamentary rules and procedure pertaining to the adoption of a bill (e.g., time for deliberation, constitution of committees and so on) and in fact ended up boycotting the session since their protestations were not heeded by the majority. The controversial provisions that had delayed the bill for seven years thus finally found their way into law, in *The Criminal Law (Amendment) Act II of 1997*.⁴

As this chapter is primarily concerned with the emergence and evolution of *qisas* and *diyat* law of Pakistan, it explores and analyses several crucial issues. First, the Islamisation during Zia-ul-Haq's rule and the reasons that prevented him from enacting the *qisas* and *diyat* law, despite his unimpeded powers, as Chief Martial Law Administrator and (later) as President, in addition to his repeated pronouncements of establishing Islamic laws in Pakistan.

Second, the chapter explores the Executive's role and its reservations regarding the 'new law'. Third, discusses Pakistani women's perspectives on the 'new law'. The chapter also compares the two drafts prepared by the Council of Islamic Ideology under the headships of Justice Afzal Cheema and Justice Tanzilur Rehman, and shows that these in fact reflect their personal beliefs in particular schools of thought, thus leading to two different understandings of the theory and practice of *qisas* and *diyat* law in contemporary society. Finally, the chapter contrasts the 1980 draft of *qisas* and *diyat* law, which was later recommended

³ According to article 89 of the 1973 *Constitution*, the life of a Federal Government's ordinance is only four months.

⁴ *Qisas* and *diyat* law was grafted on to the body of the Pakistan Penal Code through this amendment.

by *Majlis-i-Shoora* for enforcement, with the colonial law of homicide and murder.

3.1 ISLAMISATION OF PAKISTAN DURING ZIA-UL-HAQ'S ERA (1977–88)

It has become quite fashionable in the intellectual and legal circles of Pakistan these days to charge Zia-ul-Haq with using the process of the Islamisation of laws in order to achieve his own political ends. Although there is probably not a single government in the short history of Pakistan that did not draw its mass public appeal in the name of Islam, we can not find any equivalent of Zia-ul-Haq, who not only used the name of Islam but also used a continuous process of Islamisation to legitimise his long despotic rule. Even the recent secretary of Pakistan's Law and Justice Commission,⁵ Faqir Hussain, criticised Zia-ul-Haq by saying: "*Hudud* Ordinances particularly which deal with *Zina*, were enacted as a political ploy and not for the fulfilment of any altruistic means".⁶ Other than some Western authors⁷ and *Jamat-i-Islami*⁸ sponsored writers,⁹ the majority of scholars, writers, and academics have identified Zia-ul-Haq's Islamisation as a ruse to remain in power.

The non-promulgation of *qisas* and *diyat* law by his Government supports the above view. One reason why the law was not introduced was Zia's fear that it might lead to Zulfiqar Ali Bhutto (b. 1928, d. 1979), his arch political rival, winning a clean acquittal. Bhutto¹⁰ had been deposed by Zia and subsequently charged with murder under section 302 read with sections 301, 109, 111 and section 307 of the PPC, chapter XVI.¹¹

⁵ The Law and Justice Commission of Pakistan is a statutory body, established under The Law and Justice Commission of Pakistan Ordinance, 1979.

⁶ *Dawn*, 22 October 2000.

⁷ For instance, see Charles Kennedy, *Islamization of Laws and Economy: Case Studies of Pakistan*, Islamabad, 1996; William L. Richter, "The Political Dynamics of Islamic Resurgence in Pakistan", *Asian Survey*, vol. 19, no. 6, 1979, pp. 547–57; Lawrence Ziring, "From Islamic Republic to Islamic State", *Asian Survey*, vol. 24, no. 9, 1984, pp. 931–46.

⁸ A right-wing political party founded by Moulana Moudidi.

⁹ Anis Ahmad, Introduction in Kennedy, *Islamization of Laws and Economy*; Khurshid Ahamd, *Nizam-islam in Pakistan*, Lahore, 1989.

¹⁰ Zulfiqar Ali Bhutto was elected Prime Minister of Pakistan in 1977 and deposed in a *coup d'état* by Zia-ul-Haq on 5 July 1977.

¹¹ All the sections provided in chapter XVI of the PPC deal with Offences Affecting the Human Body and Offences Affecting Life. This chapter has now been replaced with the Islamic law of *qisas* and *diyat*.

Zia-ul-Haq thus had him tried under the law of homicide and murder that had been drafted by the British during their rule over India.

3.1.1 *Zulfiqar Ali Bhutto's murder trial and Zia-ul-Haq's selective Islamisation*

A brief examination of Bhutto's murder trial is imperative at this stage since it helps us understand that Zia-ul-Haq's interest in the Islamisation of laws was limited to only those laws that could either condemn his political opponent (Bhutto) or cement his own political position. This speaks volumes about Zia-ul-Haq's political motives and insincerity towards Islam and the process of Islamisation.

3.2 THE PERIOD BETWEEN 1977–79

On 5 July 1977, Zia-ul-Haq deposed the Prime Minister, Z.A. Bhutto, and seized power as Chief Martial Law Administrator. In a public address shortly afterwards, which was delivered nation-wide, he declared that there were three objectives to his overthrow, *viz.* to restore law and order, hold fresh elections within ninety days and establish *Nizam-i-Islam* (Islamic Order) in the country.¹² The present study will only deal with the third objective since the first two are not directly relevant to *qisas* and *diyat* law.

Two days after deposing Bhutto, Zia-ul-Haq indicated to the complainant in the Nawab Mahmood Ahmad Kasuri's murder case to formally request that the public prosecutor, the Advocate General of Punjab, initiate criminal proceedings against the deposed Prime Minister Bhutto directly in the High Court.¹³ In the complaint lodged with the police at 12:30 a.m. on 11 November 1974, it was alleged that Bhutto had entered into a conspiracy with the approver,¹⁴ Masood Mahmood—then Director General of the Federal Security Force (FSF)—to

¹² Zia-ul-Haq's first address to the nation, 5 July 1977, *The Gazette of Pakistan*, Islamabad, 5 July 1977; see also *Pakistan Times*, 7 July 1977; and *The Hurmat*, Islamabad, 14 August 1983, pp. 145–52.

¹³ Syed Afzal Haider, *Bhutto Trial*, Islamabad, 1996, p. 25.

¹⁴ The term 'Approver' is neither defined nor used in the Criminal Procedure Code, 1868, but is usually applied to a person who is supposed to be directly or indirectly concerned with or privy to an offence, to whom a pardon is tendered (under section 337 of the Code) with a view to obtaining his testimony against other person(s) guilty of the offence.

have the complainant, Ahmad Raza Kasuri, eliminated through the agency of the FSF. The attack was allegedly launched on Kasuri's car and resulted in the death of his father, Nawab Mahmood Ahmad Khan. Kasuri revived the case against Bhutto by lodging a complaint in the Sessions Court, Lahore, which was heard by an additional Session Judge. The Kasuri family also filed an application in the Lahore High Court for the transfer of the case to the High Court, which was immediately accepted by the Chief Justice of that court, without providing any opportunity of hearing to the accused.¹⁵ Bhutto was arrested on 3 September 1977 as part of this same case. On 13 September 1977, he was released on bail by Justice K.M.A. Samdani of the Lahore High Court, on the ground that there was only circumstantial evidence indicating his possible involvement in the material thus far produced before the court and that further evidence had yet to be collected.¹⁶

On 17 September 1977, Bhutto was re-arrested under martial law Orders from his residence at Larkana. Nusrat Bhutto, the wife of the deposed Prime Minister, impugned her husband's detention orders issued by the Martial Law Authorities in the Supreme Court of Pakistan on 20 September 1977. In that petition, she also called in question the imposition of martial law by Zia-ul-Haq. The Chief Justice of the Supreme Court of Pakistan, Justice Yaqoob Ali Khan, admitted the petition for regular hearing and ordered to shift the detainee to Rawalpindi so that he could personally appear before the court. Zia-ul-Haq immediately brought in a constitutional amendment¹⁷ and summarily removed Justice Yaqoob from his office.

The new Bench of the Supreme Court dismissed Nusrat Bhutto's petition and legitimized Zia-ul-Haq's martial law. It also authorized Zia-ul-Haq to amend the Constitution of Pakistan. The Supreme Court employed the doctrine of necessity¹⁸ to legitimize Zia-ul-Haq's martial law. A Supreme Court judge, Justice Afzal Cheema, while towing the main line of the argument adopted by the Chief Justice of Pakistan, was the only judge who also found support for this theory from the

¹⁵ Hamid Khan, *Constitutional and Political History of Pakistan*, Karachi, 2001, p. 582.

¹⁶ *Zulfiqar Ali Bhutto v. The State*, PLJ, 1978 (Criminal Cases) Lahore 9.

¹⁷ CMLA's Order no. 6 of 1977, issued on 22 September 1977.

¹⁸ *Begum Nusrat Bhutto v. Chief of Army Staff and Federation of Pakistan*, PLD 1977 SC 657.

Quran.¹⁹ Justice Cheema had already been favoured by Zia-ul-Haq with the post of the chairman of the Council of Islamic Ideology (CII)²⁰ and then, as a judge of the Supreme Court, had been entrusted with the task of Islamisation of the laws of the State. It can be argued that it was with a view to ‘proving’ or showing his supposed knowledge on Islam that Justice Cheema deemed it appropriate to underpin the doctrine of necessity with the text of the Quran.

Afzal Haider,²¹ a senior advocate of the Supreme Court of Pakistan, who has extensively documented and analysed the Bhutto murder case, contends:

Mr. Cheema, after retirement from the Supreme Court, was assigned the duty to draft Muslim Criminal Laws so that Mr. Bhutto could be framed under the new law of *qisas*, thereby permitting the heirs of Nawab Mohammad Ahmad Kasuri to wreak his personal vengeance from Mr Bhutto in accordance with the principles of *Shariah*.²²

It is difficult to fully agree with Haider’s contention because Justice Cheema was appointed Chairman of the CII on 26 September 1977²³ and did not retire from the Supreme Court until 31 December 1977.²⁴ Proceedings against Mr. Bhutto under the provisions of the PPC, however, had already started in August 1977.

Bhutto was formally charged for the murder of Nawab Mohammad Ahmad Kasuri on 11 October 1977.²⁵ The Lahore High Court’s Full Bench convicted Bhutto for criminal conspiracy and murder and sentenced him to death on 18 March 1978.²⁶ As mentioned earlier, Justice Aftab Hussain wrote the main judgment and all the other judges agreed. The verdict went beyond Bhutto’s culpability and touched upon his supposedly un-Islamic character. His belief in Islam and its values

¹⁹ Q. 2:173: “He hath only forbidden you dead meat and blood and the flesh of swine and that on which any other name hath been invoked besides that of Allah but if one is forced by necessity without wilful disobedience nor transgressing due limits then is he guiltless. For Allah is Oft-Forgiving Most Merciful.”

²⁰ The CII is constituted for a term of three years, under article 230 of the Constitution of Pakistan (Terms and Conditions of Members) Rules, *The Gazette of Pakistan*, Extraordinary, Part II, 1974, p. 1727.

²¹ Author of *Bhutto Trial and Documents*, Islamabad, 1996.

²² Afzal Haider, *Bhutto Trial*, Islamabad, 1996, p. 39.

²³ Record seen at the office of the CII.

²⁴ Record of the Supreme Court of Pakistan, available online at: <http://www.scp.com.pk/Report%202000/formerjudges.htm> (accessed on 27 March 2002).

²⁵ General K.M. Afrif, *Working with Zia-ul-Haq: Pakistan’s Power Politics, 1977–1988*, Karachi, 1999, p. 182.

²⁶ *State v. Zulfiqar Ali Bhutto and others*, PLD 1978 Lahore 523.

were doubted and it was declared that according to the principles of Islam, he was unable to hold the post of prime minister.²⁷ These remarks speak loud and clear about the judges' mindset and also illustrate the developing trend in the judiciary to use a few sweeping examples from Islamic texts in order to support their judgments.

Bhutto challenged the Lahore High Court's judgment in the Supreme Court on 25 March 1978. The court, comprised of nine judges, began hearing this appeal on 6 May 1978. The hearing took seven months to conclude and two of the judges retired during this period. On 6 February 1979, the Supreme Court pronounced a split judgment: four to three, divided at the seams, upholding the High Court's verdict.²⁸ According to the majority view, the evidence on the conspiracy was admissible and the evidence of the approver/accomplice was reliable, and hence did not need "artificial requirement of corroboration". Consequently, they held that the case against Bhutto had been proved beyond reasonable doubt (with the minority having held the opposite view)²⁹ and upheld the death sentence that had been handed down by the Lahore High Court. It thus took sixteen months (in the Bhutto case) to reach the stages that in a 'normal' murder trial would take years.

3.2.1 *Enforcement of Hudud laws and the establishment of Shariat Courts*

On 7 February 1979, only a day after the judgment in the Bhutto case was delivered by the highest court in the land, Zia-ul-Haq made the announcement to establish an Islamic System in the Country. It can be argued that these two events were linked and that the announcement was not made until Zia felt that the possibility of challenging any court verdict were very slim. In his address to the nation on the first day of the Hijra calendar,³⁰ he said:

many a ruler did what they pleased in the name of Islam. After assuming power, the task that present Government set to was its public commitment to enforce the Islamic system.³¹

²⁷ Ibid., para. 611.

²⁸ *Zulfiqar Ali Bhutto v. The State*, PLD 1979 SC 38.

²⁹ Ibid.

³⁰ The Islamic calendar, which is based on lunar cycles, was introduced in 638 C.E.

³¹ Zia-ul-Haq, Address to the Nation, 2 December 1978, *The Gazette of Pakistan*, Islamabad, 2 December 1978; see also the *Hurmat*, Islamabad, 14 August 1983, pp. 145–52.

In taking the first step to enforce Islamic order, Zia introduced Shariat Benches³² into each of the provincial High Courts as well as in the Supreme Court (the SAB). In relation to the Shariat Benches' jurisdiction, he said, "every citizen will have the right to present *any law* enforced by the Government before the Shariat Benches and obtain its verdict whether the law is wholly or partly Islamic or un-Islamic".³³ These supposedly plain and pious announcements were nothing more than a political ploy, since the jurisdiction of the new benches was in fact very limited. When the Establishment of Shariat Benches Ordinance emerged on paper, it made clear that the definition of law

does not include the constitution, Muslim personal law, any law relating to the procedure of any court or tribunal or, until the expiration of three years, any fiscal law, or any law relating to the collection of taxes and fees or insurance practice and procedure.³⁴

The announcement was to take effect from the 12th of *Rabi-ul-Awwal* 1399 A.H., on the occasion of the birthday of the holy prophet. On this day (10 February 1979), Zia-ul-Haq again addressed the nation and announced the promulgation of five Ordinances, commonly and rather infamously known as '*hudud* laws'.³⁵ These dealt with the offences of theft, robbery and dacoity, adultery, false accusation of adultery, wine drinking and whipping, and superseded the provisions of the PPC that dealt with such offences.

3.2.2 *Non-promulgation of qisas and diyat law*

In addition to the abovementioned hudud laws, the criminal law of Islam also deals with the law of homicide and bodily injuries, known as *Bab-ul-Jinayat*. In fact, it can be argued that the qisas and diyat law is the most important part of Islamic criminal law since it deals with the loss of life and limb. According to Altaf Hussain,³⁶ Zia was pre-

³² To learn more about Shariat Benches, which were later transformed into a full-fledged Federal Shariat Court, see Chapters Two and Three.

³³ *Ibid.*

³⁴ Constitutional (Amendment) Order, 1979 PLD, 1979, CS p. 31.

³⁵ See Introduction, footnote 17, regarding the five ordinances pertaining to the establishment of Islamic criminal law, as well as PLD 1979 CS, pp. 33, 44, 51, 56.

³⁶ *Qisas and Diyat*, Lahore, 1991, p. 14. Hussain was a member of General Zia's *Majlis-i-Shoora* (Federal Council) from 1981–84, Chairman of the Selective Committee of Federal Council on *qisas* and *diyat* from 1981–82, Governor of Punjab from 1993–95, member of the National Assembly from 1990–93, and a renowned criminal lawyer.

sented with six drafts of Islamic penal laws,³⁷ including one on the law of *qisas* and *diyat*, so that he would be able to make a proclamation on the implementation of Islamic penal laws as planned on the 12th of *Rabi-ul-Awwal*. However, Zia knew that the implementation of the *qisas* and *diyat* law would affect the Bhutto trial and generate not only a public demand that he be tried under Islamic criminal law but also require it by law. He thus singled out this particular draft from the set of laws presented to him and sent it back for reconsideration and further deliberation. As Haider points out, Zia was aware that Bhutto's role in Kasuri's murder case would not attract capital punishment under the Islamic law of homicide and murder.³⁸ General Zia thus shrewdly chose the date of the announcement to establish 'Islamic Order' in the country. Furthermore, incorporation of Shariat Benches at the High Court level and the Shariat Appellate Bench in the Supreme Court only occurred after the affirmation of the High Court judgment in the Kasuri murder case by the Supreme Court. Thus, Presidential Order no. 3 of 1979, which came into force on 10 February 1979, whereby Shariat Benches were grafted and people were allowed to challenge "any law" in the Shariat Benches, had no effect on the Supreme Court judgment in the Kasuri case, which was delivered on 6 February 1979.

3.2.3 General Zia-ul-Haq becomes the president

During the hearing of the appeal, another important and interesting event took place. General Zia had earlier allowed Chaudhry Fazal Ilahi, then President of Pakistan (1973–78), to remain in office after the imposition of martial law, even though he had originally been nominated by Z.A. Bhutto and elected by his political party (Pakistan Peoples Party). However, on 16 September 1978, Zia, taking into account the speedy progress of the Kasuri murder case, asked President Ilahi to pass an Ordinance allowing the CMLA (i.e., General Zia) to appoint himself or any other person designated by him to hold the office of the President.³⁹ President Ilahi tendered his resignation the following day. On 18 September 1978, General Zia appointed himself as President of the country in contradiction to his own unqualified declaration in

³⁷ Five discussed in Kamali, *Principles of Islamic Jurisprudence*, p. 508, and a sixth, the Offences Against Human Body (Enforcement of *qisas* and *diyat*) Ordinance, 1979.

³⁸ Haider, *op. cit.*, p. 39.

³⁹ President's Order no. 13 of 1978, *President's Succession Order*, 1978.

September 1977 that he would never assume that office. He had clearly stated then, in response to a question posed by the representative of the Kehyanitar International of Tehran, that:

I think I have already made a Sherman declaration and I am ready to make it ten times over. You cannot make me the President and I shall never accept any political office. *The Sunday Times* has claimed that I was not such a simple soldier and that I was paving a way to become President of Pakistan...⁴⁰

All this was forgotten and the fear behind it was obvious; if the Supreme Court were to maintain the trial court verdict, the mercy petition (under article 45)⁴¹ would be presented to the President. It would have been extremely difficult for President Ilahi, who had been a close friend of Bhutto and trusted by his party, to reject such a petition. In fact, it was very difficult for Zia to trust anyone on this crucial issue during such a critical time. He thus assumed charge of the President so that there was no possibility of the Bhutto trial culminating in any way other than according to his desire.

3.2.4 *Bhutto's Review Petition in the Supreme Court*

On 13 February 1979, Bhutto and his co-accused filed Review Petition No 5-R of 1979 in the Supreme Court.⁴² In this petition, Bhutto challenged the judgments on various grounds, including the plea that since the process of Islamisation of laws had been invoked by General Zia and Islamic laws were enforced in the country, the verdict in his case may be examined under the principles of Islamic law of murder and homicide. Paragraph 29 of the Review Petition reads:

That, in any case, even if the conviction of the petitioner is maintained in spite of the errors and defects apparent in the majority judgment, it is a fit case where lesser punishment should be awarded for the offence falling under section 302 of the Pakistan Penal Code read with sections 109 and 111 thereof, for the reason that the petitioner is guilty of abetment and was not present at the spot at the time of the murder, that the conspiracy was to kill Ahmad Raza Kasuri and not his father who was hit by accident; that the conviction of the petitioner is based on the evidence of approvers; that there has arisen a difference of opinion between

⁴⁰ *Musawat*, Lahore, 28 September 1977.

⁴¹ The 1973 Constitution.

⁴² PLD 1979 SC 741.

the learned judges of this court as to the petitioners' guilt; that with the introduction of Islamic laws in the country with effect from the 12th of *Rabiul Awwal* 1399 A.H. (i.e., 10 February 1979) it would be anomalous to impose the death penalty for an unintentional murder, especially when the *Shariat* laws do not recognize an approver, and the witnesses have to fulfil strict qualifications as to the integrity and character before their testimony can be acted upon.

While the Supreme Court had dismissed Bhutto's appeal in a split judgment of four to three (the majority upholding the trial court's judgment), the Review Petition was dismissed with complete unanimity.

3.2.5 *The Supreme Court's Verdict*

The review petition was dismissed by the Supreme Court on 25 March 1979. The response to the appellate's plea was as follows:

*As regards the plea of Islamisation, the court categorically stated that the process of Islamisation initiated on 10 February does not include the offence of murder and even otherwise, President's Order no. 3 of 1979 clearly stipulates that pending proceedings shall continue to be governed by the old law. However, before parting with the order, the court said that though the grounds urged in review petition are not covered by the law relating to the review, these objections are relevant for consideration by the executive authorities in the exercise of prerogatives of mercy.*⁴³

Clearly, the reason for leaving out the *qisas* and *diyat* law from the set of Islamic penal laws that were to come into force on 10 July 1979 by Zia-ul-Haq was to deal with exactly this kind of situation. Had the *qisas* and *diyat* law also been ordained at that time, it would certainly have hampered the Bhutto trial proceedings and complicated issues enormously.

3.2.6 *The Mercy Petition*

The first mercy petition was filed by Sahibzada Farooq Ali⁴⁴ (PPP) on 29 March 1979, followed by another two, filed by Mian Mohammad Yasin Watoo (Acting Secretary General, PPP) and Begum Shahr-bano Imtiaz (Bhutto's step-sister). These petitions emphatically relied upon the above-quoted observation of the Supreme Court. However,

⁴³ PLD 1978 SC, para. 195, p. 779 (emphasis added).

⁴⁴ Speaker of the National Assembly 1971–77; interviewed by the author on 23 May 2001.

General Zia had expressed his views clearly in cabinet meetings and other gatherings and the summary (prepared by his staff) that addressed the main point raised in the mercy petitions was as follows:

The contention is misconceived and erroneous. According to the guiding principles, the recommendation of the court to the executive to the question of commutation of death sentence is not binding and is not meant to be honoured in every case but is to be considered keeping in view the facts and circumstances of each case and even in such cases the scope of interference by the executive is of very limited character. In view of the findings of the Supreme Court on the quantum of sentence, the advice of the Law Division and our views, no case for commutation of death sentence appears to have been made out.⁴⁵

3.2.7 *Rejection of the Mercy Petition and the Islamic law of qisas and diyat*

The summary also dealt with with the plea of granting clemency on humanitarian grounds, and stated that:

legally it is humane to kill the killer, more so when he is found so by the superior-most court. In fact, the authority that allows merciful commutation etc. of a sentence is merciless to the deceased, his heirs and his relatives. Mercy, remission or commutation is negative of justice, and the justice is not only to be done to the killer who is surviving because of legal formalities but is also to be done to the deceased who cannot be heard but whose soul looks for justice—the revenge—death for death and that in fact is the humanitarian consideration.⁴⁶

The Chief Martial Law Administrator and President of Pakistan, General Mohammad Zia-ul-Haq, who had declared himself “a *soldier of Islam*” in his first national address in 1977, did not find it appropriate to exercise his prerogative in accordance with the cannons of Islam or Islamic criminal law.⁴⁷ Therefore, he made no reference to Islam or Islamic criminal law while writing the “petition is rejected” on 1 April 1979. Even the summary that was submitted to the President was probably against the key principle of the *qisas* and *diyat* law of Islam, as will be seen later.

⁴⁵ Quoted in General K.M. Arif, *Working with Zia-ul-Haq: Pakistan’s Power Politics 1977–1988*, Karachi, 1997, p. 202.

⁴⁶ *Ibid.*

⁴⁷ Under the classical Islamic law of *qisas* and *diyat*, a person cannot be awarded capital punishment under *qisas* upon the evidence of an accomplice.

3.3 THE FORMATIVE PHASE

Article 228 of the 1973 Constitution mandates: “There shall be constituted with in a period of ninety days from the commencing day a Council of Islamic Ideology, in this part referred to as the Islamic Council”. The functions of the CII as detailed in article 230 are:

- 1) to make recommendations to *Majlis-e-Shoora* (Parliament) and the Provincial Assemblies as to the ways and means of enabling and encouraging the Muslims of Pakistan to order their lives individually and collectively in all respects in accordance with the principles and concepts of Islam as enunciated in the Holy Quran and Sunnah;
- 2) to advise a House, a Provincial Assembly, the President or a Governor on any question referred to the Council as to whether a proposed law is or is not repugnant to the Injunctions of Islam;
- 3) to make recommendations as to the measures for bringing existing laws into conformity with the Injunctions of Islam and the stages by which such measures should be brought into effect; and
- 4) to compile in a suitable form, for the guidance of *Majlis-i-Shoora* (Parliament) and the Provincial Assemblies, such Injunctions of Islam as can be given legislative effect.

The concept of the CII in the 1973 Constitution seems to have been borrowed from the Constitution framed in 1962 by President General Ayub Khan (1958–69), in which this body was named the Advisory Council for the Islamic Ideology.⁴⁸ The function of this earlier model was to examine all laws enforced in the country and bring them in line with the teachings of Islam as set out in the Quran and Sunnah. Being a secular-minded President, Ayub Khan had not invented this idea; rather, he took the format from the even earlier Constitution of 1956. In part III of the 1956 Constitution, which deals with the various Islamic provisions, it was laid down that:

the President shall appoint a commission to make recommendations as to the measures for bringing existing laws into conformity with the injunctions of Islam and as to the stages by which measures should be brought into effect and to compile, in a suitable form, the guidance of the National and provisional assemblies, for such injunctions of Islam as can be given legal effect.⁴⁹

⁴⁸ Article 199, The Constitution of Pakistan, 1962, Lahore, 1965.

⁴⁹ The Constitution of Pakistan, 1956.

This provision had its roots in the constitution of the Board of *Talimat-e-Islamiyah* (Islamic teachings)⁵⁰ set up in 1953,⁵¹ which in itself was a by-product of the Basic Principles Committee.⁵² The Board had been established to review laws proposed by the legislature and to reject them if they were found contrary to the teachings of the Quran and Sunnah.⁵³

The first Chairman of the CII, as constituted under the 1973 Constitution, was retired Chief Justice Hamood-ur-Rehman,⁵⁴ appointed by Bhutto's Government. He remained in the post from 1974–77, during which time a total of 31 proposals were submitted by the CII to the Government, although most were cosmetic in nature, for example, regarding national dress, rules of civil service and annual secret reports on the Islamic conduct of civil servants, examinations on Islamic Subjects for the public service and Friday to be a holiday, etc. However, some were more significant, such as the prohibition of alcohol, penalty of adultery, elimination of prostitution, *Zakat* and *Usher* (Islamic taxes), interest-free banking and so on.⁵⁵ Only a few were ever acted upon.⁵⁶

3.3.1 *Role of the Council of Islamic Ideology during the Zia era*

On 3 September 1977, Zia announced that the CII was to be reconstituted. It was the day that Bhutto was first arrested on the charges of murder and conspiracy to murder Nawab Kasuri.⁵⁷ Zia reconstituted the Council on 26 September 1977, appointing Justice Afzal Cheema (a sitting judge of the Supreme Court) as its chairman. It was under Justice Cheema's chairmanship that the Council first drafted the law of *qisas* and *diyat* for Pakistan. He was also the author of many other Islamic laws that were introduced during Zia's time in office, including

⁵⁰ To learn about the details of the board, see Le Leonard Binder, *Religion and Politics in Pakistan*, Berkeley, 1961, pp. 116–54.

⁵¹ *Ibid.*

⁵² The Basic Principles Committee was set up by the first Constituent Assembly of Pakistan on the day it passed the Objectives Resolutions in March 1949. It was assigned the task of formulating the federal constitution and submitting a detailed report to the Constituent Assembly on the basic provisions of the future constitution. For further details, see Khalid Bin Saeed, *The Formative Phase*, Karachi, 1985.

⁵³ G.W. Chaudhary, *Constitutional Development in Pakistan*, Lahore, 1969, p. 185.

⁵⁴ The Supreme Court records show that Justice Hammod-ur-Rehman retired from the Court on 31 October 1975.

⁵⁵ Reports of the Council of Islamic Ideology 1974–1977, Islamabad, 1977.

⁵⁶ *Ibid.*

⁵⁷ *Pakistan Times*, 4 September 1977.

the notorious *hudud* laws. Another key player in Zia-ul-Haq's team, who was active in the process of Islamisation, was Justice Tanzailur Rehman. Justice Rehman held many positions during Zia-ul-Haq's era, including that of chairman of the CII. It would be relevant at this stage to briefly examine the lives of these two influential figures, who had initially prepared the two different drafts of the *qisas* and *diyat* law based on their personal understandings of Islam, Islamic criminal law and Zia-ul-Haq's aspirations.

3.3.1.1 *Justice Cheema*

Justice Cheema (b. 1913) was elected a member of the Punjab Legislative Assembly in 1951, and later became a member of the National Assembly in 1962. He was then promoted to the West Pakistan High Court by General Mohammad Ayub Khan, then CMLA and later the President of Pakistan. Haider states that the elevation was a "well-known story of Parliamentary horse-trading".⁵⁸ Justice Cheema also served the Bhutto Government as a Federal Law Secretary, and was promoted to the Supreme Court of Pakistan on 8 October 1974.

While discussing one of his judgments, delivered in 1974 but reported in 1984,⁵⁹ Lau refers to his approach towards the status of Islamic Law as being "cautious".⁶⁰ The judgment in this—Zia-ur-Rehman's—case was passed in favour of the Government of the day (i.e., the Bhutto Government). Justice Cheema decided that the court was unable to declare a law enacted by the Government and its application corum-non-judice, due to the limited powers of the judiciary as defined in the Constitution, and worked hard to find support for his view from the Quran and Sunnah. Discussing in detail some selected verses from the Quran and the sayings of the prophet, he maintained:

The next question that arises for consideration, however, is as to what should be the mode of exercise of this delegated Divine Power as entrusted to the members of the Judiciary. It could be either exercised within the framework of the Constitution or independently of it. The first mode appears to have been universally adopted all over the civilised world wherein the jurisdiction of the Courts has been clearly defined in the

⁵⁸ Haider, *op. cit.*, p. 39.

⁵⁹ *Zia-ur-Rehman v. The State*, PLD 1986 Lahore 428.

⁶⁰ Martin Lau, "Islam and constitutional development of Pakistan" in Ian Edge, ed., *Comparative Law in Global Perspective: Essays in Celebration of the Fiftieth Anniversary of the Founding of the SOAS Law Department*, New York, 2000, pp. 293–323, especially p. 299.

Constitution and the exercise of the judicial review is confined within its four corners. A statute is declared void only if it is repugnant to the Constitution. In my view, the Objectives resolution has been purposely given no higher status in the constitution than that of unjusticiable and perambulatory provision. The expressions “principles of democracy, freedom of equality, tolerance and social justice” as enunciated by Islam to be reflected in the Constitution may be capable of different interpretations varying from time to time notwithstanding the immutability of the Divine Law.⁶¹

He then held:

Obviously, the fundamental law of the land cannot be left to the vagaries of conflicting and changing notions leading to constantly endless litigation in court for the resolution of theological controversies and polemics. Thus, the only sound principle of policy is to leave the matter to popular will reflected in the chosen representatives who can frame and also amend the Constitution subject, of course, to the Divine limitations. In my humble view, therefore, this court should exercise only such jurisdiction as has been conferred on it by the Constitution and the law, both of which can be presumed to be made by the chosen representatives of the people within the prescribed limits of the *Shariah* and in accordance with the Objectives Resolution.⁶²

Later, in 1977, Begum Nusrat Bhutto challenged General Zia’s martial law in the Supreme Court of Pakistan, her main contention being that Zia’s activities and his martial law went beyond the parameters of the 1973 Constitution, framed by the chosen representatives of the people of Pakistan. Justice Cheema, however, who had already been assigned the Chairmanship of the CII, simply passed judgment in favour of the then-Government. He sanctioned General Zia’s martial law and its Orders and allowed the General to interfere with the Constitution without any allusion to his earlier judgment in *Zia-ur-Rehman’s* case.

In the *Nusrat Bhutto* case,⁶³ Justice Cheema (now sitting in the Supreme Court) took a u-turn from his earlier assumed position when sitting in the Lahore High Court; he thus took it upon himself to see if the actions of the State were against the injunctions of Islam. He declared that since the actions of the deposed Prime Minister were against the injunctions of the Quran and Sunnah, that “to defy the

⁶¹ Ibid.

⁶² Ibid., p. 309; also see PLD 1986 Lahore 486.

⁶³ *Begum Nusrat Bhutto v. Chief of Army Staff and Federation of Pakistan*, PLD 1977 SC 657.

Constitutional authority and disregard the Constitution itself, in these circumstances, were not only permissible but also obligatory on Muslims, under the dictates of Islam". Therefore, according to Cheema, "the doctrine of individual necessity in Islam—which allows one recourse to the things and actions outlawed by it, for the preservation of religion, life, reason, progeny and property—could well be extended to the doctrine of State necessity".⁶⁴ He observed:

It is thus abundantly clear that submission to the authority of the ruler in obedience to his command does not extend to illegal and un-Islamic directives or orders. The doctrine of necessity is, therefore, attached with full force in these circumstances as explained by my Lord the Chief justice. I fully endorse his Lordship's exposition of the constitutional position in regard of the validity of the actions of the new Regime and the conditions and the limitations attached thereto.⁶⁵

The same Justice Cheema, who in 1973 was not inclined to examine the legality of any codified or substantial law on the basis of a general and un-codified rule of Islam, then (in 1978) allowed a Martial Law Administrator to override the Constitution of Pakistan on the basis of an un-codified and controversial doctrine of necessity. Having become the Chairman of the CII, he was charged with the authority to examine the laws of Pakistan and change their un-Islamic characteristics, a role he seemed to accept without any qualms.

Most researchers and writers seem to have ignored the fact that the third Order passed by the Chief Martial Administrator on 10 July 1977 dealt with the application of Islamic punishment through martial law courts.⁶⁶ Special Military Courts were authorised to punish culprits of theft, dacoity or robbery with the amputation of the hand from the wrist. Death could also be inflicted, not only by hanging but also in any such manner as directed by the court in a particular case.⁶⁷ In a reply to a question put by John Dues about the reinstatement of the strict Islamic laws, Zia expressed how he felt sorry for the West, which misunderstood Islam and its spirit. According to Zia, as long as human beings retained their nature, the need of physical punishment remained

⁶⁴ Ibid.

⁶⁵ *Begum Nusrat Bhutto v. Chief of Army Staff and Federation of Pakistan*, PLD 1977 SC 657, pp. 723–6.

⁶⁶ CMLA's Order no. 3, PLD 1977 CS 334.

⁶⁷ Ibid., articles 1(b) and 1(a) of the CMLA's Order 3.

a necessary deterrent and hence “Islamic punishments were ideal to control crime”.⁶⁸

The first task before the CII, headed by Chairman Cheema, was thus to draft the code of Islamic penal laws so that an Islamic order could be established and crime brought under control. The Chairman was empowered to appoint its members and the Council was declared an autonomous body. Although it had earlier functioned under the Ministry of Religious Affairs, with its reports being routed through the Ministry, it was now an autonomous body and hence answerable directly to the Government.⁶⁹ The Council prepared a draft of the codes of Islamic Penal Laws in seventeen months. As stated earlier, the *hudud* laws were enacted and ordained without much ado, yet the law of *qisas* and *diyat* was sent back to the law department. Justice Cheema refused to guess the reason for General Zia’s decision on this matter, although he agreed that all the drafts of laws that Zia had asked to be prepared were made available to him.⁷⁰

In the last week of February 1977, a Saudi-funded organisation, Motamar Al-Alam Al-Islami (The World Muslim Congress),⁷¹ offered Justice Cheema a position in its Pakistan branch, which he readily accepted. It seems that General Zia had not expected this sudden shift from Justice Cheema, however, and hence felt betrayed. He thus did not wait for Justice Cheema to complete his constitutional tenure of three years and instead, on 12 March 1980, declared Justice Tanzilur Rehman as the new chairman of the CII.

3.3.1.2 *Justice Tanzilur Rehman*

Justice Rehman was elevated to the Sind High Court in order to fulfil the prerequisite for the post of the chairman of the CII.⁷² He was appointed on the recommendation of A.K. Brohi advocate, a leading lawyer and confidante of Zia-ul-Haq, who was serving in the latter’s cabinet as the Minister for Religious and Minority Affairs. Justice Cheema at that

⁶⁸ President of Pakistan General Zia-ul-Haq: Interviews to Foreign Media, vol. 1, Islamabad, 1978, p. 8.

⁶⁹ *Pakistan Times* and *Dawn*, 16 May 1978.

⁷⁰ Justice Afzal Cheema, interview by the author on 27 May 2002 in Islamabad.

⁷¹ A Jeddah-based Organisation of the Islamic Conference (OIC) was founded in Makkah in 1926.

⁷² According to the constitution as it was at that time, only a person who had been a judge of the Supreme Court or High Court was eligible to become chairman of the Council [Article 228(3)(b)]. Justice Tanzilur Rehman was elevated on 5 March 1980.

time was unhappy with Zia's selective Islamisation and had become disenchanted with his job. When handing over his responsibilities, Justice Cheema advised Justice Rehman to press the President to issue the *qisas* and *diyat* Ordinance that had been held over by the CMLA office.⁷³ However, Justice Rehman relinquished the CII on 31 May 1984 with the yet unfinished business of bringing in the Islamic law of *qisas* and *diyat* and joined back with the Sind High Court. He finally retired from this High Court on 16 June 1990.

3.3.2 *The first draft of the qisas and diyat law*

Shortly after becoming the Chairman of the Council on 27 May 1980, Justice Rehman met the President and inquired about the *qisas* and *diyat* law that had been held by the CMLA office. According to him,⁷⁴ General Zia denied ever seeing the draft of the *qisas* and *diyat* law. Following his meeting with the President, Justice Rehman immediately retrieved the copy of the draft from the records of the Council and sent it to Brigadier Mohammad Younas, M.S. to the President (CMLA Secretariat), requesting him to place it before the President "for consideration and necessary action".⁷⁵ A copy of the first draft of the *qisas* and *diyat* law from the office of the CII is attached to this study as Appendix C.

3.4 THE EXECUTIVE'S ROLE

The draft prepared by Justice Cheema in fact laid down the foundation of the present-day law of *qisas* and *diyat* in Pakistan. In less than two months, the Council drafted the law that was to displace a law that had been drafted and discussed for 25 years⁷⁶ and had been in force for more than a century, *viz.* the Indian Penal Code (IPC),⁷⁷ which later became the PPC.

⁷³ Interview by the author on 27 February 2002.

⁷⁴ *Ibid.*

⁷⁵ Council's letter, no. F3 (31)/80-R-CII, date 1 December 1980.

⁷⁶ The work on the IPC began on 15 June 1835, when the First Law Commission, headed by Lord Thomas Babington Macaulay (b. 1800, d. 1859), commenced work on this Code. The Commission completed the task by 14 October 1837. The Government of India took 23 years to ponder over the law. It was only in 1860 that the Governor General in Council passed this law and enforced it.

⁷⁷ *Ibid.*

On receiving the draft from the Council, the President's Secretariat forwarded it to the Ministry of Religious and Minorities Affairs so that the latter could obtain comments and views from different government departments on the proposed law. Intriguingly, this novel course of action was only adopted in the case of this particular law. The other laws that were promulgated in 1979—*zina*, whipping, drinking and *qazaf* Ordinances—did not go through this procedure. On 28 July 1980, Amanullah Vaseer, Director General of the Ministry of Religious and Minority Affairs, sent the proposed draft Ordinance to the Secretary of the Ministry of Interior and all the Chief Secretaries of the four Provinces: Punjab, Sind, North West Frontier Province (NWFP) and Baluchistan.⁷⁸ The letter stated that the Ministry was directed by the CMLA's directorate to ask the four provincial governments to provide their views and comments on the draft Ordinance.⁷⁹

On 22 September 1980, in response to the above-mentioned letter, the Government of the NWFP sent its comments through its Law Secretariat.⁸⁰ The provincial law office observed that the definition of an adult in sub-clause (a) of section 2 was vague. The first draft had defined an adult as "a person who has attained the age of eighteen years or puberty". This was correct, as the age of puberty could vary from case to case, thus leaving scope for the divergence of opinion on this point between different courts during different stages of the same case. A definite age should essentially have been laid down for the purpose of penal laws, since the age of the accused is a deciding factor in what offence has been committed and the punishment it attracts.

The comments also suggested reconsideration of the definition of *ghair masoom-ud-dam* ("whose blood is not protected by law"). The definition of *ghair masoom-ud-dam* in sub-clause (f) of clause 2, when read with the definition of *mustamin* (i.e., a Muslim citizen of a non-Muslim State who is on lawful temporary visit to an Islamic State) in clause (k) of the section, excludes from its purview a non-Muslim citizen of a Muslim State. The reason behind these definitions would ultimately affect the definition and punishment of *qatl-i-amd* (intentional homicide). Consequently, according to the definition of *ghair masoom-ud-dam* provided in the draft Ordinance, *qatl-i-amd* of a non-

⁷⁸ Letter Reference F 12(10)DDJ/80, Government of Pakistan, Minister of Religious and Minority Affairs, Islamabad, 28 July 1980.

⁷⁹ Ibid.

⁸⁰ Law Department, Govt. of NWFP, Letter Reference, Legis: 1 (10) 80/5840.

Muslim citizen of a non-Muslim State would be liable to be punished with *qisas*, whereas a non-Muslim citizen of a Muslim State other than Pakistan would not be liable.

The Provincial Law Department very aptly pointed out that in the definition of *qatl-i-amd* under clause 4 of the draft Ordinance, the explanations and exceptions to the definition of murder under section 300 of the PPC⁸¹ had been totally ignored. There were three carefully spelt out exceptions under the erstwhile section that convert culpable homicide into murder. Amazingly, the critical, crucial and basic distinctions between culpable homicide and murder provided by the PPC (and explained further through carefully chosen illustrations) did not attract any attention from the CII.

3.4.1 *Homicide and Murder Law provided in The Pakistan Penal Code, 1860*

Almost the entire law of homicide and murder of the unamended PPC is contained in sections 299 and 300. It would be pertinent to quote and discuss these at this stage as they will come under repeated discussion. This will also help explain the law department's comments with reference to clause 4 (mentioned above) and other clauses discussed subsequently. Section 299 of the PPC states:

Homicide—Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Explanation 1: A person who causes bodily injury to another person who is labouring under a disorder, disease or bodily infirmity and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2: Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

Explanation 3: The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the

⁸¹ *Pakistan Penal Code* as it was in 1980.

death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.⁸²

Under this law, punishable homicide is known as culpable homicide, which means death through human agency. The section defines culpable homicide simpliciter. In order to bring an action under the charge of section 299 PPC, the act of the accused should cause death and it must be:

- (a) with the intention of causing death; or
- (b) with the intention of causing such bodily injury as is likely to cause death; or
- (c) with the knowledge that he is likely by such act to cause death.

Section 299 is divided into three parts. The first part refers to the act by which death is caused with the intention of causing death. The second part refers to the intention to cause such bodily injury as is likely to cause death. The third part deals with the knowledge by which the death is likely to be caused. The question as to when a person can be said to have caused death by his act is clarified in the light of explanations 1, 2 and 3 in section 299 PPC. The simpler case would be where death results directly from the act itself. Even when death results from the consequences naturally or necessarily flowing from the act, there need be no hesitancy in saying that the act caused death.

Section 300 of the PPC⁸³ states:

Murder: Except in the case hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death; or

Secondly, if it is done with the intention of causing bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or

Thirdly, if it is done with the intention of causing bodily injury to any other person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

Fourthly, if the person committing the act knows that it is so imminently dangerous that it must, in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing the death or such injury as aforesaid.

⁸² The Pakistan Penal Code, 1860, p. 271.

⁸³ Pakistan Penal Code, 1860, as it was before The Criminal Law (Second Amendment) Ordinance, 1990.

Exception 1: when culpable homicide is not murder. Culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any person by mistake or accident. The above exception is subject to the following provisions:

First, that the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly, that the provocation is not given by anything done in obedience of the law, by a public servant in the lawful exercise of the right of private defence.

Thirdly, the provocation is not given by anything done in the lawful exercise of private defence.

Explanation: Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Exception 2: Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Exception 3: Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of the public justice, exceeds the power given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill will towards the person whose death is caused.

Exception 4: Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

Explanation: It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5: Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

In the first three clauses of section 300, intention or knowledge is the essential ingredient, in the absence of which the act will not be murder. The fourth clause contemplates the doing of an imminently dangerous act in general, and the causing of any bodily harm to any particular individual. In case of intentionally causing bodily injury to a particular

person, the question whether such an act is murder has to be decided with reference to the first three clauses of the section 300. The fourth clause is designed to provide for rarer kinds of cases, such as putting in jeopardy the lives of many persons, as envisaged in illustration (d) of the section. These four clauses define the limits and, for the purpose of the code of the offence of culpable homicide, were deemed exhaustive in themselves.

After detailing the ingredients of murder, section 300 then describes exceptional cases, i.e., certain circumstances in which this offence is mitigated. However, these exceptional circumstances do not offer a complete vindication of the conduct of the accused; they simply provide fit grounds for mitigation of the sentence. In brief, these arise out of (1) provocation, (2) private defence, (3) exercise of legal powers, (4) absence of premeditation, and (5) consent.

The PPC recognises that there are situations in which anger, recklessness, negligence, a wanton depravity of mind or want of self-restraint can lead men to perpetrate deeds of commission which they then deplore in cooler or calmer moments. If kept within the legitimate bounds prescribed for them in Chapter IV of the PPC, these factors may offer sufficient justification for the offence. Beyond these bounds, however, the law refuses to discriminate between a person who committed a crime in cold blood and one who was impelled to commit it under the force of his feelings or convictions.

3.4.2 *The draft law of qisas and diyat*

The draft law of *qisas* and *diyat* did not take into account the distinctions between culpable homicide and murder or the exceptional circumstances described under section 300 of the PPC. The NWFP Government raised an objection in this regard, in its comments referring to clause 6 of the draft Ordinance. Under clause 6, only a person who actually causes hurt to the victim may be guilty of *qatl-i-amd*. Thus, any other person who may have been an active participant in the crime but, for example, misfires a shot on the victim or intentionally does not himself cause the victim to be hurt, will escape the charge of *qatl-i-amd*.

A person who conspired or abetted a murder but did not cause any direct hurt to the victim could not be charged for *qatl-i-amd* under the draft law of *qisas* and *diyat*. Zia-ul-Haq's desire to withhold enforcement of the *qisas* and *diyat* Ordinance thus seems to have been motivated by the provision described above, as well as that relating to the value of the approver's evidence and so on. The exclusion of the conspiracy to

murder from the draft Ordinance lends further support to the contention that Zia was determined that Bhutto would not escape the gallows. To put it simply, Zia did not ordain the law to ensure that Bhutto would not reap the benefits of the Islamic law of *qisas* and *diyāt*, as provided in the first draft of the *qisas* and *diyāt* law prepared by the CII.⁸⁴

It appears that there is a contradiction between clauses 6 and 8 of the draft Ordinance, so far as the person causing *ikrah-i-naqis* and the person planning and participating in causing death (but not causing actual hurt to the victim) are concerned. This contradiction also exists in clause 6 and 9 of the draft Ordinance.

3.4.2.1 *Comments of the NWFP Government*

The NWFP Government also suggested that the Federal Government reconsider clauses 13 and 15 of the draft Ordinance,⁸⁵ mentioning a number of contingencies that necessitated it. For example, it argued that cases where the right of *qisas* is compounded or devolves upon the offender as a result of the death of the *wali* of the victim should follow the trial of the accused and the judgment. Thereafter, it would be impossible for the court to proceed in the matter and it would then have to re-start the proceedings to determine which of the punishments, *qisas* or *tazir*, may be awarded, since subsequent events may warrant lesser punishment.

There was another grave contradiction between clause 13 and clause 16. Under clause 13, death for *tazir* could be sentenced even when the punishment of *qisas* was waived or compounded. The same was not possible under section 16 of the draft Ordinance, which deals with *tazir* after waiver or compounding of *qisas*.

Surprisingly, the NWFP Government advised the federal government to delete sub-clause (2) of clause 25, which dealt with the payment of *diyāt* in cases of a female murder victim. It meant that the *diyāt* of a female victim should be equal to and not half of the amount prescribed for the male victim.⁸⁶

⁸⁴ Syed Zakir Hussain Shah Advocate, member of the Council of Islamic Ideology (1991–93), interview by the author on 11 May 2004, London.

⁸⁵ Section 13 deals with cases in which *qisas* shall not be enforced (for instance, when a father kills his son or daughter, etc.), while 15 is concerned with the composition of *qisas*. The provisions have found their place even in the enactment of the law by the Parliament in 1997. See sections 307 and 310 of *The Criminal Law (Amendment) Act, 1997*.

⁸⁶ Law Department, Govt. of NWFP, Letter Reference, Legis: 1 (10) 80/5840.

3.4.2.2 *The comments of the Interior Ministry*

The Interior Ministry of Pakistan is one of the key ministries of the State. It overviews the law and order situation, and takes measures to control crime in the country. It rather unexpectedly criticised the whole scheme of law propounded by the Council in the draft Ordinance and its comments were astute and lengthy. Had these been published during Zia's period of government, they would have caused acute embarrassment. In fact, it is interesting to note that they are as relevant today, after 13 years of the application of the law, as they were at the time of their presentation (1980).⁸⁷

The Ministry courageously suggested that instead of enacting a new law, the necessary amendments in the existing penal code should be made in line with the advice of the Federal Shariat Court's decision in *Gul Hassan Khan v. State*.⁸⁸ There was no need to draft a completely new law to replace the law of homicide and murder, as provided in the PPC; rather, any un-Islamic provisions should simply be amended in order to bring them into conformity with the injunctions of Islam.

The striking features of the draft Ordinance—i.e., the provision of compounding the offence of murder and the abolition of death sentences in some cases of intentional murder—were attacked first by the Ministry. It noted that the civil liability of the murderer was given precedence over criminal liability in the draft law. The Ministry stated that “[t]his was not a right move of the CII and this would go against the interest of Pakistani society”. Mr. Irshad Khan, the joint secretary in the Ministry, further claimed that

[t]he emphasis on treating the offence of murder as a private or civil wrong and an act of injury to the heirs of the slain victim more than an offence against society is not even in accordance with the interpretation of the Quran and Sunnah.⁸⁹

In his view, the Islamic concept of *qisas* confers a right upon the heirs of the slain to seek retaliation from the Government by killing the murderer. In order to support this contention, the Ministry relied on a verse of the Quran translated by Maulana Abdul Majid Daryabadi (d. 1977):

⁸⁷ Ministry of Interior, Letter reference no. 1/8/80-JS (L), dated 30 December 1980.

⁸⁸ PLD 1980 FSC 1.

⁸⁹ Ibid.

Qisas is not a synonym of naked vengeance that every individual may take himself from another individual. Rather, it is the name of an organised and systemised form of punishment in criminal law. It is a collective law for the whole *ummah*. The duty of its execution falls on the Government or its officers.⁹⁰

The Ministry may be right as there is nothing in the Quran or Sunnah that forbids the State from taking the responsibility of striking back at the culprit. When carrying out an execution, the State acts on behalf of the heirs of the victim. In all Muslim countries, with the exception of Saudi Arabia, Iran and Sudan, wrongs against human life are punished as crimes and not treated merely as tort. This is quite justifiable since offences of this category seriously interfere with society and the interest of the community in the preservation of peace. The Ministry similarly resolved that “according to the Islamic Jurisprudence, the murder is an offence against the State and society”.⁹¹

The Ministry also questioned some of the draft’s provisions—except that relating to *diyat*—in its comments. It objected to the non-punishment of intentional murder in the cases specified under clause 12 of the draft Ordinance, observing that it seemed as though “the offence of murder in such cases has been made a very minor offence which seems highly improper on the face of it”.⁹² It also strongly criticised the quantity and quality of evidence necessary to prove the case for *qisas*. The comments further disapproved of clause 19 of the draft Ordinance. The Ministry declared that there is nothing un-Islamic in the existing way of execution, i.e., hanging by the neck. In addition, it criticised clauses 28, 29, 102, 104, sub-clause 3 of clause 108, and clauses 111, 114, 120 and 121.

During the period in which the Interior Ministry was busy evaluating the draft law and preparing its comments, the President of Pakistan issued another directive to the Council; the law was to be examined by the Ministry of Law and thereafter be published to elicit public opinion.⁹³ In pursuance of this directive, the Law Ministry revised the law and forwarded it to the Council. The Council did not initially accede to

⁹⁰ Maulana Abdul Majid Daryabadi, *Translation and Commentary of the Holy Quran*, vol. 1, Karachi, 1974, p. 234.

⁹¹ Ministry of Interior, Letter reference no. 1/8/80–JS (L), dated 30 December 1980.

⁹² *Ibid.*

⁹³ CMLA’s Secretariat (Public) Rawalpindi, Letter Reference no. 1795, dated 22 November 1980.

some of the Ministry's amendments, but the matter was later resolved after several meetings between the two institutions.⁹⁴ The Council then forwarded this draft to the Ministry of Law.⁹⁵ Having obtained the President's approval, the Law Ministry published the draft in the *Gazette of Pakistan*, on 13 December 1980.⁹⁶

3.4.2.3 *The comments of the Women's Division*

On 17 December 1980, the Ministry of Law asked the Women's Division, Research Wing, Secretariat of the Government of Pakistan, to gather views from various women's organisations on the draft law of *qisas* and *diyat*.⁹⁷ The Women's Division invited representatives from a number of prominent women's organisations, as well as social workers and other knowledgeable persons, to comment on the provisions of the law in general and in particular on those that concerned women. The Division found there to be considerable anxiety over sections 10(b), 15 and 25(2) of the draft law.

Section 10(b) restricts evidence to "at least two Muslim male witnesses". The Division's recommendation in this regard is interesting in that it suggested the word "male" be deleted but made no comment on the word "Muslim". Had this suggestion been accepted, the evidence of both Muslim males and females would carry the same weight, but not the evidence of non-Muslim women or men. Interestingly, the arguments to underpin such an appeal were not based on any doctrines of Islam; rather, they were based upon a neutral socioeconomic theory and the Constitution of Pakistan. It was firstly argued that:

[i]n the socioeconomic pattern both in rural and urban areas, while the women stay at home, the males are usually away from home for the whole day or night or both. There are many other complex situations in life patterns in the fifteenth century of Islam which must be kept in mind... Lacs [sing. lac = 100,000] of Pakistani workers live abroad and many villages have predominantly female populations over long periods of time. This has already had wide repercussions which have to be realistically appreciated. One consequence is that females travel alone much more, sometime in separate compartments. In such situations if murder is committed, male eyewitnesses would seldom be available and it would not be possible to punish offender. This provision is therefore likely to endanger the life of

⁹⁴ Tanzilur Rehman, interview by the author on 27 February 2002.

⁹⁵ Council's letter no. F.3 (31)/80-R-CII, dated 1 December 1980.

⁹⁶ Notification no. 3(31)/80-R-CII.

⁹⁷ Ministry of Law's letter no. Dy.759/80-L.R.

children, the aged, sick male and female members of the family at home, since the criminals will escape the punishments due to lack of evidence of offence against humans whether male or female.⁹⁸

It was probably due to the pressure of Zia-ul-Haq's fervent drive for Islamisation that the Women's Division showed concern only on behalf of Muslim women, whereas it was supposed to speak on behalf of all the women of Pakistan.

The second argument was based upon Article 25 of the 1973 Constitution, which ensures that "all citizens are equal before law and are entitled to equal protection of law". Clause 3 of the article further states that special provisions for the protection of children and women may be formulated. Therefore, it was argued that section 10(b) of the draft also contravenes Article 25 of the Constitution.

The evidence of minors was also excluded by section 10(b) of the draft Ordinance for the purposes of punishment under *qisas*. Speaking on behalf of "professionals with experience" who had expressed their concerns regarding the Women's Division, it observed that the evidence of children should also be accepted to punish an offender under *qisas* since it "can prove most valuable in establishing the truth".⁹⁹

Sub-clause (2) of Section 15 of the draft Ordinance allowed a *wali*¹⁰⁰ to compound the offence at the time of execution of offence on accepting *badl-e-sulh*.¹⁰¹ However, if the *wali* is a minor or insane, his father or grandfather may compound *qisas* on his behalf. In all fairness, the Division demanded that the words "mother" and "grandmother" be added in the section respectively. It further suggested that an amendment be made to the effect that if the victims are females, the *qisas* may be compounded with the permission of the father or grandfather, mother or grandmother, and brother or sister, so as to protect women in the husband's family.¹⁰²

The value of *diyat* for female victims of an offence of murder, according to section 25(2) of the draft Ordinance, was fixed at half that of a male. The Division's irritation on this section was justified. It proclaimed

⁹⁸ Women's Division Report submitted through letter reference no. 12-27/81-WF, Islamabad, 25 February 1981.

⁹⁹ Ibid.

¹⁰⁰ The legal heirs of a deceased.

¹⁰¹ *Badl* means 'in exchange of' and *sulh* means 'concord, reconciliation or peace', whereas in the law the term has been used to denote compensation.

¹⁰² Women's Division Report submitted through letter reference no. 12-27/81-WF, Islamabad, 25 February 1981.

that there was no justification for such a distinction. One of the arguments advanced was that since the punishment for the murder of a female was not fixed at half of the murder of a male, there was no grounds for discrimination in the value of the *diyat* of female victims. It further stressed that since females are equal to males in the case of debts, punishments, taxes and liabilities, it would be anomalous if they should count for half of the male in the case of loss of life.¹⁰³ The report stated:

This is tantamount to declaring female life less valuable than that of male. This section needs to be deleted to maintain in letter and spirit and practical terms the fundamental dignity and equality of humanity as envisaged in Islam whether male or female.

Another interesting argument put forth by the Division was that since the Government invested in educating women, most females were assets to their families, communities, society and the nation, and hence there was no reason for retaining this provision in the statute. As far as those women are concerned who may not be productive in the economic sense on account of age, sickness or other liabilities, they are like men who do not work for various reasons. Since the latter's *diyat* was not reduced, why should women's *diyat* be half that of men?

There were other pleas as well, which the Women's Division raised to support the above-mentioned contentions. Only some are worth discussion here, as the subject will be closely and thoroughly examined when analysing the debates of *Majlis-i-Shoora*. The report warned that the law would make the murder of a female more worthwhile to criminals who would have this advantage added to the comparative physical weakness of females. Another convincing point raised by the Division was that the reduction of *diyat* would actually harm not the murdered female but those who receive it, whether male or female. It reads, "there is no specific *Quranic* injunction in the regard".¹⁰⁴ Perhaps the proposed section was inferred from the position of women *vis-à-vis* their share in the estate of parents. The Division declared that the reasons behind there being one-half of a share for daughters under the Islamic law of inheritance could not be applied to the law of *qisas* and *diyat*.

¹⁰³ Ibid.

¹⁰⁴ Ibid., p. 3.

3.4.2.4 *The comments of the Ministry of Religious and Minority Affairs*

The comments of the Women's Division were severely criticised by the Ministry of Religious and Minority Affairs. The Ministry observed that the comments were basically taken from a report by the All Pakistan Women's Association.¹⁰⁵ The Division's request that a woman's testimony be given the same value as a man's was rejected outright by Tufail Ahmad Qureshi, Deputy Director of Jurisprudence, Ministry of Religious and Minority Affairs.¹⁰⁶ He observed that "[n]ot only all schools of (Islamic) law agree on this issue but it is also based on 'consensus communis' (ijma). We therefore oppose the recommendations of APWA".¹⁰⁷

The Ministry also turned down the other two contentions: that the words "mother" and "grandmother" be inserted into section 15, and in cases where victims are females, the *qisas* may only be compounded with the permission of the father, mother, brother or sister of the deceased women. In the words of Qureshi, "the contentions are against the accepted views of Muslim jurists". Thus, according to him, the recommendations of 'APWA' were to be opposed. The Secretary of the Ministry, Mr. Imtiaz, endorsed Qureshi's views and forwarded the file to the Ministry of Law. A copy was also sent to the CII.¹⁰⁸

In addition to the above-discussed comments of women's organisations, about 1500 letters containing views, comments and suggestions from members of the Bench, Bar, Legal Institutions, *ulema* and the public were received by the CII which were then examined and tabulated.¹⁰⁹ By the time the tabulation was complete, the Council's constitutional term of three years had expired. Rehman, who had occupied the post to fill in the period remaining after Justice Cheema's resignation, was given an assurance for a fresh term, and thus continued working as Chairman of the Council even though at the time it had no members. For this reason, following the suggestions that were received in consequence of the draft's publication, the Chairman consulted various *ulema* of different schools of thought and scholars. The draft was revised,

¹⁰⁵ Memo no. 169/AdJ/81, Ministry of Religious and Minority Affairs, Islamabad, 17 March 1981.

¹⁰⁶ Ibid.

¹⁰⁷ Women's Division Report submitted through letter reference no. 12-27/81-WF, Islamabad, 25 February 1981.

¹⁰⁸ Ibid.

¹⁰⁹ Dr. Tanzil-ur-Rahman, interview by the author, 27 February 2002.

finalised and presented to the President of Pakistan on 17 May 1981 for its promulgation.

On 31 May 1981, the President reconstituted the Council and asked the Chairman to place the draft before the new Council. In its first session (23–27 June 1981), the CII went over the draft law and approved it with some amendments.¹¹⁰ The Ordinance was later published in booklet form and declared as classified.¹¹¹ Writing the background of the law in June 1981, the draftsman of the CII restated the fact that the work on the *qisas* and *diyat* law was taken up by the Council in 1978, whereas similar work at the Law Division's level only began after the President's directive on 6 August 1979.¹¹²

The *Hudud* laws of 1979 (promulgated in February 1979)¹¹³ and the *qisas* and *diyat* law show a number of similarities in their layout and scheme. This substantiates Haider's and many others scholars'¹¹⁴ contentions that the *qisas* and *diyat* law had been formulated ready for enforcement at the same time as the *Hudud* Ordinances, at which point Zia-ul-Haq singled it out and did not allow its promulgation.

For the purposes of brevity, we will use the terms 'the draft Ordinance 1980' and 'the draft Ordinance 1981' when referring to the drafts of the *qisas* and *diyat* Ordinance 1980 and 1981 respectively.

3.5 COMPARISON OF THE TWO DRAFTS

The draft Ordinance of 1981 brought about 136 major and minor changes¹¹⁵ to the earlier provisions of the draft Ordinance of 1980, which dealt with injuries to the human body. 116 of these amendments affected the offences relating to homicide and murder. Of these,

¹¹⁰ Ibid.

¹¹¹ *Draft Ordinance Relating to the Law of Qisas and Diyat*, codified by the Council of Islamic Ideology, Government of Pakistan, Islamabad, 1981, p. 1.

¹¹² Ibid.

¹¹³ Constitutional (Amendment) Order, 1979 PLD, 1979, CS.

¹¹⁴ For example, see *Dawn*, 22 August 2002. Justice Shafi Mohammadi, in an interview by the author on 14 February 2002, maintained that everybody in Pakistan knows that Zia-ul-Haq withheld the *qisas* and *diyat* Ordinance so that Bhutto might not escape the gallows.

¹¹⁵ Some may argue that it is inaccurate to refer to any amendment or change in the law statutes as being 'minor' or 'major'. However, for the sake of brevity I have chosen to use these terms, with 'minor' being used if the change did not affect, in my view, the concepts earlier produced in the Draft Ordinance 1980, whereas if it did, the change is referred to as being 'major'.

57 were major changes, wherein either new concepts were introduced through the insertion of new clauses in the sections, or new sections were created, and the remaining 59 amendments were minor improvements to existing concepts or sections. Most of the 116 amendments were either not retained in subsequent drafts or were not objected to by society. The comparison between the draft ordinances of 1980 and 1981 shall only focus on those provisions that either became the subject of lengthy discussion in the *Majlis-i-Shoora* between 1981–85 and subsequent parliaments, or that gave rise to some major controversy. This exposition will also reflect the executive’s anxiety to bring the law more in line with Macaulay’s Penal Code of 1860.

3.5.1 Definition of ‘adult’

The definition of ‘adult’ was amended in the draft Ordinance of 1981 (a minor change).¹¹⁶ Although the new definition was a departure from that which had been provided in the five *Hudud* Ordinances and the draft Ordinance of 1980, it failed to offer the certainty and definiteness that a penal law demands. The definition of ‘adult’ in the draft Ordinance of 1981 is “a person who has attained the age of eighteen years or puberty, whichever may be earlier”, whereas in all other Islamic Penal laws of the State, it is “a person who has attained the age of eighteen years or puberty”. The matter was left open to court to decide whether an accused under the age of eighteen years had attained puberty at the time of commission of the offence or not.

3.5.2 Definition of ‘qatl’

An additional kind of murder—*qatal-bil-sabab*—was introduced (section 2(l)) in the existing definition of *qatl* (a major change). As we shall see later, when comparing with the law enforced in 1990, the earlier draft had tended towards the Hanbali school of thought, since it was prepared by the Council when it was headed by Justice Cheema. Barrister Ejaz Batalvi, a senior criminal lawyer of Pakistan with 50 years’ practice in criminal law, told me that Justice Cheema, owing to his peculiar interpretations of Islamic law, was also called Ibn Taymiyya after Taqi al din Ahmad Ibn Taymiyya (d. 1328), a Hanbali scholar known in the Islamic world for his uniquely strange vision of *fiqh*

¹¹⁶ The Ordinance was published by the Council in June 1981.

(jurisprudence). In accordance with the Hanbali school of thought, Justice Cheema had provided only three kinds of *qatl* (homicide) in sub clause (l) of section 2, even though the predominant majority of Sunni Muslims in Pakistan follow the *Hanafi* School of law.¹¹⁷

As mentioned above, another category of murder—*qatal-bil-sabab*—which was added (by Justice Rehman), is found only in a particular version of the Hanafi¹¹⁸ school of thought. *Qatal-bil-sabab* translates as ‘indirect killing’. The law defined it under section 27 as follows:

whoever without any intention to cause death of, or cause harm to, any person, does any unlawful act which becomes a cause for the death of another person, is said to have committed *qatal-bil-sabab*.

With regards to the punishment of *qatal-i-bil-sabab*, the section states:

- (a) *diyat*, payable by his *aqila*, if the person killed is *Masum al-dam*; or
- (b) *tazir* and punished with imprisonment of either description for a term which may extend to five years, if the person killed is as *ghayr*¹¹⁹ *mason al-dam*.

The definitions of *masoom-ud-dam* (‘whose blood is protected’) and *ghair masoom* (‘whose blood is not protected’) were also changed, to the effect that under the draft Ordinance of 1981, non-Muslims of a Muslim or non-Muslim State were given equal protection by the law.

3.5.3 *Aqila and Qatl-i-Amd*

The existing definition and concept of *aqila* was retained in the draft Ordinance of 1981.¹²⁰ However, the definition of *qatal-i-amd* was made more comprehensive. It now read:

whoever with the intention of causing death, or with the intention of causing bodily injury to a person, causes death of such person, by doing

¹¹⁷ David Pearl and Werner Menski, *op. cit.*, 1998, p. 29.

¹¹⁸ The Hanafi School recognises five classifications of *qatal* (homicide): *amd* (intentional); *shab-hul-amd* (quasi-intentional); *khata* (accidental); *jari marja al khata* or *qatal-i-qaim-muqam-khata*, as it is known in Pakistan (equivalent to accidental); and *qatal-i-bil-sabab* (indirect homicide). For a clear explanation, see Anderson, “Homicide in Islamic Law”, *op. cit.*, 1951, p. 811. It is worth noting that the fifth classification appeared only after a famous Hanafi jurist al-Jassas (d. 370 A.H.) wrote his book *Ahkam al-Quran*. Before him, as Anderson has pointed out, *Hanafi* Jurists classified homicide into four categories only; see Ibn al-Arabi, *Ahkam al-Quran*, vol. 2, Cairo, pp. 222–3; see also El-Awa, *op. cit.*, 1982, p. 74.

¹¹⁹ The spelling of *ghair* was changed; now it is spelled *ghayr*.

¹²⁰ However, its position was changed from section 29 to sub-clause (2) of section 2.

an act which in ordinary course of nature is likely to cause death, is said to have committed *qatal-i-amd*.

This definition is a blend of sections 299 and 300 of Macauly's Penal Code, 1860, which deals with the definition of culpable homicide and murder. It thus proves that there was nothing un-Islamic in these two sections of the Penal Code.

3.5.4 Tazir

The new law amended the scope of the punishment of *tazir* in cases of *qatl-i-amd*. Under the old section, the punishment of death as *tazir* in cases of *qatl-i-amd* was generally applicable and its scope was wide. The new amendment restricted its operation only to those cases of *qatl-i-amd* "where the circumstances of the case so warrant". Sub-clause (b) of section 5 deals with the punishment of the *qatl-i-amd* and states:

imprisonment for life or imprisonment of either description for twenty years with whipping not exceeding thirty-nine stripes or having regard to facts and circumstances of the case, with death if the proof in either of the forms mentioned in section 10 is not available.

The law thus left it open to the judge's discretion to decide whether or not the manner in which the killing took place warrants the punishment of death as a *tazir*.

Section 6 of the draft Ordinance was also revised. It now reads:
Where two or more persons have conjointly caused death of any other person,

- (a) all of them shall be guilty of *qatl-i-amd*, if the act of each one of them was individually sufficient to cause death;
- (b) all of them shall be guilty of *qatl-i-amd*, if their acts cannot be distinguished or identified as to whose act was sufficient to cause death and whose act was not so sufficient; but if their acts can be distinguished or identified then the person whose act was individually sufficient to cause death shall be guilty of *qatl-i-amd* and the person whose act was individually not sufficient to cause death shall be liable according to the nature of his act; and
- (c) the act of none of them was individually sufficient to cause death and the death was caused as a result of the cumulative effect of the acts of all of them in furtherance of a plan, then all those persons who were directly involved in the commission of offence shall be guilty of *qatal-i-amd* and the persons who were not directly involved in the commission of offence shall be liable according to the nature of

their acts, but if the death was caused without a plan, they all shall be guilty of *qatl-shibh al-amd*.

Basically, both the amended and unamended versions of section 6 try to cover the situations described under sections 34,¹²¹ 35,¹²² 37¹²³ and 149¹²⁴ of the PPC, when read with sections 299 or 302 of the PPC (homicide and murder), the latter sections now being equivalent to *qatl-i-amd* in section 5 of the draft Ordinances. Section 6 of the draft Ordinance merely sets down the interpretation of the earlier sections (in the PPC) by the higher courts. For example, in the case of *Machi Singh and others v. The State*¹²⁵ (this dealt with clause (a) and part one of clause (b) of section 6 of the draft Ordinance of 1981), respondents number 1 and 2 had struck the deceased on his head, whereas respondent number 3, though a member of the party, simply remained present at the scene of occurrence. All were punished under section 302, read with section 149 of the PPC. The High Court altered the charge to that under section 326,¹²⁶ read with section 34 of the PPC, mainly on the ground that the medical evidence did not clearly show which of the two respondents was responsible for the fatal injury, although it clearly found there had been a concerted attack by respondents 1 and 2.

¹²¹ When a criminal act is done by several persons in furtherance of the common intention of all, each of these persons is liable for that act in the same manner as if it were done by him alone.

¹²² Whenever an act which is criminal only because it is done with criminal knowledge or intention, is done by several persons, each of whom who joins in the act with such knowledge or intention, is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.

¹²³ When an offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence.

¹²⁴ If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

¹²⁵ AIR 1983 SC 957.

¹²⁶ Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

The Supreme Court held the High Court's view to be erroneous and sentenced them both under section 302, read with section 34. The Court further observed that once the common intention to kill was established, the question as to who gave the fatal blow was wholly irrelevant for the purposes of decisions under sections 302/34. Once the medical evidence showed that the injuries caused by either one of the accused were sufficient in the ordinary course of nature to cause death, that was sufficient to bring the case within the purview of sections 302/34.

As far as the second part of clause (b) of section 6 is concerned, there are many higher courts' decisions available which hold that in the context of a free fight, section 34 of the PPC shall not be applicable and each person shall be responsible for his own acts.¹²⁷ A good example of clause (c) of section 6 can be found in a case reported in 1971 SCMR 766,¹²⁸ wherein the accused inflicted six blows with a stick, fracturing the deceased's head in six places. None of the injuries was individually sufficient to cause death, which instead resulted from their cumulative effect. The Supreme Court held that the case fell under the third clause of section 300 of the PPC, and conviction of the accused under section 302 was justified.

The only significant change effected by the amendment to the 3rd clause of section 300 was a reduction in the maximum punishment, from 25 to 10 years, where a charge of *qatal-i-amd* was altered to *qatl-shibh al-amd*, the latter offence having been introduced at the same time. It is worth noting, however, that the punishment for voluntarily causing grievous hurt by a dangerous weapon (under section 326 of the defunct law) was also ten years, and hence it can be argued that the amendment was in fact a futile exercise since the same situation could have been dealt with under existing provisions.

Another important section was introduced (section 14, discussed below) which dealt with the punishment of *qatl-i-amd*, wherein an offender is not liable to *qisas* under section 12 or against whom *qisas* is not enforceable under clause (c) of section 13. Subsequent drafts of the law kept these sections intact with minor amendments, which diminished the negative effects of sections 12 and 13 of the draft law of 1980, that had not provided any punishment for offenders whose

¹²⁷ 1984 PCr.LJ 1555; 1987 MLD 1919; 1987 PCr.LJ 1325; 1994 SCMR 1212; 1994 SCMR 1327.

¹²⁸ Mohammad Amin etc. v The State, 1971 SCMR 766.

offence might fall in one of the two situations provided for under sections 12 or 13 or under both.

Section 14 of the draft Ordinance 1981 reads:

- 1) Where an offender guilty of *qatl-i-amd* is not liable to *qisas* under section 12 or the *qisas* is not enforceable under section 13, he shall be liable to *diyat*:

Provided that where the offender is minor or insane, his *diyat* shall be payable by his *aqilah*.

Provided further that where the *qisas* is not enforceable under clause (c) of section 13, the offender shall be liable to *diyat* only if there is no *wali* other than the offender, and if there is no *wali* other than offender he shall be liable to *tazir* and imprisoned for a term which may extend to fourteen years or, with whipping, not exceeding thirteen-nine stripes, or with both.

- 2) Notwithstanding anything contained in subsection (1) the court having regard to the facts and circumstances of the case, in addition to the imprisonment of *diyat*, may, as a *tazir*, punish the offender with the imprisonment of either description for a term which may extend to fourteen years, or with whipping not exceeding thirty-nine stripes, or both.

This means that although offenders whose offence may fall in one of the categories described under sections 12 and 13 will not be punished with death as *tazir*, they will still be punished with imprisonment as *tazir*, which may extend up to 14 years or with whipping.

Three important amendments were made in section 14, which deals with the waiver of the right of *qisas* in cases of *qatl-i-amd*:

- 1) it was said that where the State is *wali* the right of *qisas* would not be waived;
- 2) *wali* would not be able to waive the right of *qisas* on behalf of the minor or insane person; and
- 3) where the deceased himself had waived the right of *qisas* before his death the *qisas* and *diyat* would stand waived.

We can see how hard the Executive was trying to strike a balance between the demands of modern times and that of the *ulema*. It was keen to retain the characteristic of law that made criminal homicide an offence against the State, whereas the various *ulema* were pressurising the Government to adopt interpretations of the law that had been propounded by jurists of their schools of thought from the medieval period of Islam.

The amendment in section 15 (which was 16 in the draft Ordinance of 1981) enabled the State to compound the *qisas* if it is the *wali* of the deceased, provided that the value of *badl-i-sulh* should not be less than the value of *diyat*.

Aqilah, its concept and related issues, were discussed at length in the *Majlis-i-Shoora* debates. The traditionalists and liberals were not able to solve any of the issues regarding *aqila*, questioning its constituents, its members' responsibilities, the Government's liability, and above all the practicability of the concept in the present-day context. The Ordinance of 1981 did not bring much change in the concept of *aqila*, but tried to make its application less burdensome. Section 32 of the draft Ordinance of 1981 reads:

no member of *aqilah* shall be made liable to pay as *diyat* more than three *dirhams* (Coin) Shari¹²⁹ equivalent to 8.91 grams of silver or its value in money, per year. Provide that where the number of the members of an *aqilah* is such that it does not cover the full amount of *diyat*, the remaining amount shall be recovered from the convict.

3.5.5 Diyat

The Government's liability to pay *diyat*¹³⁰ was retained in the new draft, with the additional condition that if the real offender is found, then the *diyat* paid by the Government shall be refunded to it.¹³¹

The draft Ordinance of 1980 did not bar a civil suit for damages for the victim or his family, whereas the new Ordinance did. If an offender is punished with *qisas*, *diyat* or any other punishment described in the Ordinance of 1981 no separate suit for the damages lie against the offender.

The next significant and lengthy amendment made to the draft Ordinance of 1981 was the incorporation of chapter IV (with some paraphrasing and restructuring) of the PPC, which deals with general exceptions. The exceptions introduced in this draft were not retained in subsequent drafts prepared by Zia's *Majlis-i-Shoora* or by subsequent

¹²⁹ The *Dirham Shari* is a specific weight of pure silver, equivalent to 3.0 grams.

¹³⁰ Section 104 of the draft Ordinance of 1980, and section 107 of the draft Ordinance of 1981.

¹³¹ *Ibid.*

Governments. Nevertheless, they were always borne in mind by the judiciary when interpreting the *qisas* and *diyāt* law of Pakistan (for further explanation, see Chapter Six).¹³²

3.6 QISAS AND *DIYAT* LAW VERSUS THE COLONIAL LAW OF HOMICIDE AND MURDER

Section 109 of the 1980 draft Ordinance, which describes the general exceptions, contains 19 sub-clauses with many explanations and illustrations. These were essentially replicas of sections 76 to 106 of the PPC, with a few modifications. Some Arabic terms were also inserted to define those offences that already used Arabic terms in their definitions under *Hudud* Laws, e.g., *zina-bil-jabr*¹³³ (rape), *Harabah*¹³⁴ (highway dacoity), etc.

On the whole, the exercise done in clauses and sub-clauses of section 109 of the draft Ordinance of 1981 is a kind of restatement of the exceptions already laid down in Chapter IV of the PPC. This re-phrasing not only underlines the quality of the change that the Executive and the Council wanted to introduce in the name of Islamic law, but also the quantity. It demonstrates that Macaulay's Code best described the exceptions that must be considered before charging or convicting anyone for the commission of any offence, Islamic or un-Islamic.

The next few provisions of the draft Ordinance of 1980 were the same as provisions of other *Hudud* Ordinances that were promulgated in 1979, e.g., the extent of the application of the PPC's provisions and that of CrPC, the condition that the presiding officer of the court should be a Muslim, and the saving clauses.¹³⁵

Until this stage, the draft Ordinance of 1981 amended and brought about changes in the draft Ordinance of 1980 either in the definition

¹³² The interpretation of the law by the judiciary forms part of the next chapter.

¹³³ See sub-clause (ii) of clause (m) section 109, and section 6 of the *Offences of Zina (Enforcement of Hudud) Ordinance, 1979*; PLD 1979 CS 45.

¹³⁴ See sub-clause (ii) of clause (m) section 109 and section 15 of the *Offences against Property (Enforcement of Hudud) Ordinance, 1979*; PLD 1979 CS 51.

¹³⁵ See sections 23–26 of the *Offences Against Property (Enforcement of Hudud) Ordinance, 1979*; Sections 19–22 of the *Offences of Qazf (Enforcement of Hudud) Ordinance, 1979*; and Sections 26–30 and 31–33 of *Prohibition (Enforcement of Hudud) Order, 1979*.

of the offences or in their punishment. By introducing punishments for offences for which punishments were not prescribed under the draft Ordinance of 1980 (e.g., see section 12 of the draft Ordinance 1980), it tried to make the offence of *qatl* (homicide) a State concern rather than simply a family affair.

3.6.1 *Procedural changes proposed in the colonial Law*

The draft ordinance of 1981 also prescribed some procedural changes. Although it stated that most of the sections of *The Code of Criminal Procedure, 1898* and *The Evidence Act, 1872*, would be applicable to all the proceedings under the Ordinance, their application was subject to the conditions laid down under sections 115 to 119.

Sections 115 and 116 required that the cases of homicide reported to police be investigated under the supervision of the Sessions Judge, who would have exclusive authority to take the cognisance of the offence and offenders. The power of the Executive to pardon the offenders of *qisas* was taken away by virtue of section 122 of the draft Ordinance of 1981. The inclusion of section 124 was particularly intriguing, since it enabled the *ulema* to appear before the court (in addition to advocates) in defence or for the prosecution of cases tried under the Ordinance. This provision of the law was neither present in the draft ordinance of 1980 nor in any other Islamic laws promulgated in 1979 or thereafter. The provision did not affect the *Legal Practitioners and Bar Councils Act, 1973* (*'the 1973 Act'*), which deals with the qualifications of a person who may appear before various courts on behalf of the parties; but introduced a new class of lawyers, who may argue murder cases before the various courts of law.

Section 22 of *the 1973 Act* stipulates that "...no person shall be entitled to practise the profession of law unless he is an advocate". Even then, the draft Ordinance of 1981, without any allusion to this clause of the *1973 Act*, authorised the *ulema* to appear before the court. They had not only to show their expertise in the 130 provisions of the *qisas* and *diyat* law, but in hundreds of other provisions of the CrPC and PPC that were kept intact by the draft law of 1981.

It is clear that the provision was an incentive for *madrassa* (Islamic schools where religious education is imparted) education. Zia-ul-Haq and his junta used to consider the students and graduates of these schools as the foot soldiers who would support the dictator as he moved ahead with his agenda to bring Islamic Order into the country. The amendment

was a part of his efforts to open job opportunities for the thousands of *Taliban*¹³⁶ studying in *Madrassas* largely funded by the State.

Another crucial provision of the draft Ordinance of 1981 was section 125, that prescribed the way in which the law was to be interpreted. It states: “Interpretation—in the interpretation and the application of the provisions of this Ordinance, the court shall seek guidance, *from the Holy Quran, Sunnah and Fiqh*”. This section is also included in the draft law of 1980, as well as in all the other Islamic laws (*Hudud Laws*) drafted by the Council and ordained by Zia in 1979, with the exception of the word *fiqh*. *Fiqh*, as described in Chapter One, literally means ‘knowledge’. The word was added to allow judges to use other sources of Islamic jurisprudence while interpreting the law. In one way, the move attempts to restrict the freedom of the judges to construe the Quran and Sunnah in light of their own understanding. On the other hand, it enables them to construe the law in accordance with their sectarian interpretation of law based on their own *fiqh*, or school of law.

The draft Ordinance of 1981 also introduced another technical term, Shariah, in section 126. The law declared that matters which were not covered by the draft Ordinance of 1981 but were ancillary or akin to its provisions should be decided according to Shariah. These terms were avoided in earlier legislations as they could give rise to sectarian interpretations.

Cases pending before the courts and the offences committed before the commencement of the draft Ordinance were declared by section 127 as being outside the application of this draft ordinance. However, the composition in pending murder cases, or those which had already been decided by the courts, was allowed under section 128 of the draft Ordinance. It is understandable that the provision could not have been added in the draft Ordinance of 1980 drafted by Justice Cheema, as that was drafted when Bhutto was still alive.

The draft Ordinance of 1981, similarly to the Ordinance of 1980, did not only repeal the sections of the PPC pertaining to homicide, murder and the offences relating to injuries on the human body, but also overruled three other Acts of the British period.¹³⁷

¹³⁶ Although the term is now identified with the Taliban government of Afghanistan, it means students of Islamic education.

¹³⁷ The Fatal Accidents Act, 1867; The Punjab Murderous Outrages Act, 1867; and The Female Infanticide Prevention Act, 1870.

3.7 CONCLUSION

As with all the Islamic laws enforced by Zia-ul-Haq in 1979, the law of *qisas* and *diyat* is tied up with a strong political background. Zia openly exploited Shariah and its laws to acquire political gains. This is evident not only from the promulgation of the *hudud* laws, but also from the time taken for the promulgation of the *qisas* and *diyat* law. Even though the draft of the *qisas* and *diyat* law was ready for notification at the same time as the *hudud* laws, its promulgation was withheld for political reasons, in that it would have saved the life of Zia's political rival, the deposed Prime Minister, Z.A. Bhutto.

The draft ordinance of *qisas* and *diyat* law 1980 had all of the pitfalls that a precipitate legislation could have (similarly to the *Hudud* Ordinances).¹³⁸ Some of the offences were left unpunished (for instance, section 12, wherein the only punishment was the payment of *diyat*) whereas in other cases, e.g., *qatal-i-Shibh-hul-amd* (homicide not amounting to murder), the punishment under *tazir* could be extended up to 25 years, i.e., more than a life sentence (14 years).

The draft Ordinance of 1981 attempted to cover these defects but did not reform the whole Ordinance. Although many amendments were introduced, they did not change the overall structure of the previous Ordinance. The Council also did not take into account the women's organisations' points of view regarding the law. The recommendations of the Ministry of the Interior were not given much weight. To some extent, the Executive certainly succeeded in making the commission of a crime an offence against the State, but overall the influence of the traditionalist ulema prevailed. To attribute the role of investigation officers to the judges was a new idea. This innovation was clearly against the norms on which the Penal Code of 1860 and other inter-related Acts—the Code of Criminal Procedure 1898, Evidence Act

¹³⁸ To study the flaws in the *Hudud* laws of Pakistan, see Asma Jahangir and Hina Jilani, *The Huddod Ordinance: A Divine Sanction?* Lahore, 1990; Rashida Patel, *Islamization of Laws in Pakistan?* Karachi, 1986; Anita Weiss, "Women in Pakistan: Implications of the Current Program of Islamization", Working paper series no. 78, Office of Women in International Development, Michigan State University, January 1985; Richard Kurin, "Islamization: A view from the Countryside", in Anita M. Weiss, ed., *The Application of Islamic Laws in a Modern State*, Lahore, 1987, pp. 115–28.

1872, etc.—were based. Although the two drafts demonstrate dissimilar approaches towards the application of *qisas* and *diyat* law in Pakistan, neither took into account the important aspect of socio-economic conditions in the country.

CHAPTER FOUR

ASSEMBLY DEBATES ON THE LAW OF MURDER AND HOMICIDE, 1981–97

INTRODUCTION

There has always been a divide in Pakistan between traditional *ulema*¹ and contemporary learned Muslims, representing two different currents of thought in Pakistani society. Both think within the framework of Islam, take inspiration from the Quran and Sunnah and conclude that their religion is compatible with the contemporary needs of society. The difference lies in their respective approaches to the application of Islam and its laws in the modern day context.

Traditional *ulema* believe that Islamic laws, as defined and structured by the early scholars of Islam, are accurately complete and thus present a finalised version of Shariah which can be applied in their existing form to the modern world. They assert that there is no need to modify the ‘brilliant’ deductions of the early scholars. Contemporary learned scholars, on the other hand, stress that it is only the principles of Islam that are universal, immutable and timeless, not the laws deduced by the early jurists. They assert, therefore, that the laws of Islam should always be reconsidered, reformulated and restructured—on the basis of those invariable principles and values—in response to contemporary societal demands.

Most Governments have tended to exploit this difference in opinion in order to remain in power. For instance, Zia-ul-Haq and Nawaz Sharif exploited the *ulema*, and Benazir Bhutto in turn exploited modern contemporary thinkers. These governments even switched between the two groups as and when it suited them. Given that both democratic and military governments in Pakistan have always solemnly affirmed their

¹ ‘*Ulema*’, as explained earlier, refers to the legal scholars of Islam. In the context of Pakistan, however, I use this term to mean those people who spent time in Islamic seminaries and then became involved in the politics of the country, irrespective of whether they obtained a thorough qualification in Islamic law or not.

commitment to Islam and promised to enforce Islamic laws without actually defining their chosen version (i.e., traditional or modern) it is particularly interesting and relevant to conduct an analysis of this gap between the two groups.

It can safely be said that no government can abrogate laws issued by earlier governments if they had been issued in the name of Islam. In spite of the supposedly clear commitment to Islam, however, the policy to enforce the Islamic law of culpable homicide and murder differed significantly from one Government to another. For instance, Zia did not actually enforce this law even though he was in government for eleven years and had an evangelical fervour for Islam. It was Jatoi's interim Government, which was only in power for three months in 1990, which enforced the law through an Ordinance. Benazir Bhutto's Government did not abrogate the law when it came into power for the second time in 1993, although it had not enforced it during its first term (1988–90). It was only in 1997, in the second tenure of the Nawaz Sharif Government, that the legislation was finally rushed through Parliament and the law was enacted.

As demonstrated below, the Members of the Assemblies who were in favour of the introduction of *qisas* and *diyat* law were driven more by their zeal for Islam than by reason, rationality, or viability of the law. Their approach was not practical and analytical since they neither discussed the concept and theories of crime and punishment in Islam nor showed any concern for the peculiar social milieu of Pakistani society. It is shown that even though the Members were debating on a crucial piece of legislation and dealing with matters of life and death, they did not bother to analyse homicide statistics or social scientific theories related to the crime of homicide; rather, they seemed more concerned to give speeches that would make them be seen by the people and rulers of Pakistan as defenders of Islam.

Analysis of the debates suggests that there were counter-groups to these Members, consisting of those who were concerned about the viability of the law, its impact on society, and its adjustment within the system of criminal justice of Pakistan in general and the PPC in particular. Moreover, these groups were mindful of the principles of Islam and Islamic law and suggested alternatives within the framework of Islamic laws.

4.1 THE FEDERAL COUNCIL (*MAJLIS-E-SHOORA*), 1981–85

Article 4 of the Provisional Constitutional Order, 1981² (PCO), authorised the President (Zia) to constitute a *Majlis-e-Shoora*³ consisting of such persons and performing such functions as determined by him. The PCO was issued on 25 March 1981, and the Federal Council (*Majlis-e-Shoora*) Order, 1981, was promulgated nine months later, on 24 December 1981.⁴ The creation of the *Shoora* was an interim arrangement to facilitate “association and consultation with regard to the affairs of the State pending the restoration of democracy and its representative institutions”.⁵ Since the *Shoora* was established to fill the void left by the unavailability of representative bodies, the tasks assigned to it were akin to those of the Parliament. It can be argued, however, that the whole exercise was a mockery, to cheat the credulous and uneducated populous, which had no access to the Statutory Orders that bring into force such institutions and were unable to understand such technicalities.

The members of the *Shoora* were under the impression that they were allowed to consider and discuss matters specified in the federal and concurrent legislative lists provided in the Constitution of Pakistan. In fact, their decisions and recommendations held no weight,⁶ and could safely be called ‘friendly advice’, which the President could amend, modify and dismiss, without offering any reason for these decisions. Furthermore, they had no security of tenure. Nevertheless, the *Shoora* did discuss a number of matters⁷ and four crucial legislative bills,⁸

² Provisional Constitutional Order no. 1 of 1981.

³ Zia used the Arabic term *Majlis-i-Shoora* to give an Islamic flavour to his political venture of establishing an institution to help him lengthen his dictatorship and protract his promise of holding general elections. For further reading on the Islamic concept of *Majlis-e-Shoora*, see Mohammad Shafiq, “The Role and Place of *Shoora* in the Islamic Polity, *Islamic Studies*”, vol. 23, no. 4, 1984, Islamabad, p. 419.

⁴ PO no. 15 of 1981.

⁵ Ibid.

⁶ Ibid., sections 5 and 8.

⁷ See Inaugural Addresses by President General Mohammad Zia-ul-Haq in Federal Council, Islamabad, 1984.

⁸ (1) The Ordinance of *Qadi* Courts, introduced on 18 January 1982 and adopted on 20 February 1983; this bill was never promulgated by the President; (2) The Ordinance of the Laws of Pre-Emption, introduced on 18 January 1982, was adopted on 14 October 1982 but was never promulgated by the President; (3) The Ordinance on the Law of *Qisas* and *Diyat*, introduced on 18 January 1982, was adopted on

though only one—*The Qanun-e-Shahadat Order, 1984*—was approved by the President (and is still in force today).

Although the debates of the *Shoora* and subsequent Parliaments have escaped most scholars' attention, they provide a wealth of information about the mindset of the people involved in the process of Islamisation in Pakistan. The variety of interpretations and understandings of Shariah within the framework of Islam, with reference to the social conditions of Pakistan, have never been considered in oriental and occidental research on the process of Islamisation of the law as a whole⁹ or on specific laws¹⁰ introduced as a result of Islamisation in Pakistan. This chapter examines such debates and analyses the arguments of Members regarding the introduction of the Islamic law of culpable homicide and murder.

A closer examination of the configuration of the *Shoora* reveals that its members were carefully chosen on the recommendations of the Deputy Commissioners of districts and further scrutinised and cleared by the secret agencies of Pakistan. This was in order to ensure that those joining Zia's coterie followed his interests and had no ties with the deposed and hanged prime minister, Z.A. Bhutto, "who was not seriously interested in the application of Islam in Pakistan".¹¹ Intriguing, however, is the opposition to the application of *qisas* and *diyat* law as proposed by the Government, which emerged from within this carefully chosen *Shoora*.

As mentioned earlier, the Bill of Offences against the Human Body (Enforcement of *qisas* and *diyat*) Ordinance, 1981, was introduced to the house on 18 January 1982, when it was handed down to the Select

26 July but never promulgated by the President; (4) The Ordinance on Law of Evidence, introduced on 16 October 1982 and adopted on 16 October 1982, was the only bill promulgated by the President of Pakistan. See Raja Zafar-ul-Haq, *Debates of the Federal Council, 1981*, p. 1880.

⁹ Ejaz Ahmad Faruqi, *Pakistan: A Crisis in the Renaissance of Islam*, Lahore, 1991; S.K. Datta and R. Sharma, *Pakistan: From Jinnah to Jihad*, London, 2003; Anwar Husain Syed, *Pakistan: Islam, Politics, and National Solidarity*, New York, 1982; Bidanda M. Chengappa, *Pakistan, Islamisation, Army and Foreign Policy*, New Delhi, 2004; Christina Lamb, *Waiting for Allah: Pakistan's Struggle for Democracy*, London, 1991.

¹⁰ For instance, see Mohammad Amin, *Islamization of Laws in Pakistan*, Lahore, 1989; Rubya Mehdi, *Islamization of Laws in Pakistan*, London, 1992; Abdur Rashid, *The Islamisation of Laws in Pakistan, with special reference to the status of women*, unpublished thesis, University of London, School of Oriental and African Studies, 1987.

¹¹ For an interesting discussion on the selection of the members of the *Shoora* and its composition, see Hamid Khan, *op. cit.*, p. 653.

Committee¹² of the *Shoora* for deliberations. After conclusion of the Select Committee's report, the bill was then handed to another committee (Standing Committee) constituted by the house, which also produced its own report.¹³ Since both reports contained varying recommendations on some of the important clauses, the *Shoora* constituted another Select Committee (on 1 November 1983) to whom these reports were referred so that a final report could be prepared. There were seven members in this Select Committee, of which Chaudhary Altaf Hussain was nominated chairman.¹⁴

The Committee prepared a detailed report on the draft of the *qisas* and *diyat* law after about 40 sessions (held between 1 October 1983 and 30 March 1984) and presented it to the Assembly.¹⁵ Realizing that the Committee's suggestions did not conform with the Government's aspirations, the *Shoora* constituted yet another Select Committee (9 April 1984), with the Minister for Religious and Minority Affairs, Raja Zafar-ul-Haq, as Chairman. All previous reports were handed down to this new Committee to finalise the bill, which was subsequently approved by the *Shoora*.¹⁶

Zafar-ul-Haq presented his committee's report on 17 July 1984. The Chairman of the *Shoora*, Chaudhary Safadar, allocated three days from 23 July 1984 for the final deliberations on the report. Only 68 of about 310 members of the *Shoora*¹⁷ participated in this debate. They can be divided into three major groups:

¹² There were 27 standing committees constituted in the FC. The Standing Committee of Law and Parliament Affairs was comprised of eight lawyers, one landlord and a man of clergy, whom Amin refers to as a "religious scholar"; see Amin, *op. cit.*, 1988, p. 79.

¹³ On the recommendation of the standing committee, the report was referred to the Standing Committee of Religious and Parliamentary Affairs and Special Committee on the Acceleration of Nizam-i-Islam in the country on 5 February 1983; see *ibid.*

¹⁴ Report of the Select Committee on the draft Ordinance Relating to the Law of *Qisas* and *Diyat*, Federal Council (*Majlis-e-Shoora*) Secteriat, Islamabad, 1984, p. 1.

¹⁵ *Ibid.*

¹⁶ Raja Zafarul Haq, opening speech, *Debates of The Federal Council, op. cit.*, 1984, p. 1879.

¹⁷ Minister of Religious and Minority Affairs, *Debates of The Federal Council, op. cit.*, 26 July 1984, p. 2434.

- 1) those who were over-zealous about the fact that an Islamic law was being enforced, including the *ulema* members of the *Shoora*, who had no knowledge (at least formally) of the existing law in the country;¹⁸
- 2) women members of the *Shoora* and minorities' representatives, who put forward reservations against the Ordinance and raised serious objections about the particular interpretation of Islamic law that was contained within it and which if ultimately adopted; and
- 3) those in favour of Islamic law but were not happy with the particular brand of the law presented by the Committee, since, according to them, this 'official version' had not taken into consideration present-day societal demands.

The *Shoora* debates were dominated by the virtues of Islam and Islamic law, the benefits of the systems of *aqila*¹⁹ and *qassama*²⁰ that were introduced in the Ordinance, underlying the philosophy behind the rule of a woman's half *diyat*,²¹ and the value of women's and minorities' evidence in cases of *qisas*.²²

4.1.1 *General discussions about Shariah in the Shoora*

Highlighting the arduous task of his committee, Raja Zafar-ul-Haq stated that one of the insurmountable hurdles it encountered was that there was no society or country in the world where Islamic Order and Shariah were enforced, and from which Pakistan could draw an outline and frame Islamic laws while taking into consideration the local social conditions. This statement can only be understood with reference to his personal sectarian approach, since Islamic laws, especially criminal laws, had in fact been enforced in many countries which officially called

¹⁸ This can be judged on the basis of the speeches they made in the *Shoora*, wherein there were occasional references to Islamic law, and in which their aversion to other laws was highlighted; however, there were no valid references as to the law provided in the PPC.

¹⁹ Section 2(b) of the Ordinance defined *aqila* as "all male, adult and sane members of a group, class of a group, class of persons, association, institution, organisation, company, corporation, establishment, department, trade union, organised tribe or a *biradri* (technical fraternity) through which the offender or the convict receives or expects to receive help and support".

²⁰ Section 104 of the Ordinance dealt with the oath (*qasamat*) where the offender committing *qatl* is not known.

²¹ Clause 2 of section 28 mandated that the value of *diyat* where the victim is female shall be one-half of the scale specified for a male.

²² Section 10 of the Ordinance prescribed: "*Qatl-i-amd* can only be proved either by the confession of the commission of the offence or by the evidence of at least two Muslim adult male witnesses, about whom the court is satisfied". Provided, the Ordinance stated, "if the accused is a non-Muslim, the witness may be non-Muslims".

themselves Islamic States, e.g., Saudi Arabia,²³ Libya²⁴ and Iran.²⁵ Also, the Select Committee of the Parliament of Egypt had prepared a draft on the law of *qisas* and *diyat* which was under translation in the Islamic Research Institute of Pakistan.²⁶ However, none were “truly Islamic States”, according to the Minister.

In line with this careless statement, the Chairman’s speech was full of other inadequacies and reflected an endeavour to show that his own personal comprehension of Islamic laws was the best. He emphasised that Islamic law is in a complete form and it must not be thought that there are gaps to be filled through the use of reason. He stressed that a Muslim is one who submits before God with his reason and all his rationality, and that without such an attitude the faith of a Muslim would not blossom. He then proceeded to prove the benefits of the institutions of *qasama* and *aqila*, which were later rejected by subsequent law framers as unsustainable in the present day-context.

Most of those representing the Government in this debate took similar positions. For instance, Haji Mohammad Saif ullah Khan said that anyone who tried to find fault with unanimous decisions of the *ulema* was a sinful person.²⁷ Abol Hussnain Mohammad Yousaf Ali said that the path of Islam is different from other paths, and that it is not checked before treading over it, but after!²⁸ He further said that the best evidence for the validity of the law of *qisas* and *diyat* is that it has

²³ Mohammad Al-Hewesh, “Shariah Penalties and Ways of their Implementation in the Kingdom of Saudi Arabia (First Retaliation Penalty ‘Kisas’, Blood Money ‘Diya’, Expiation ‘Kaffara’)” in *The Effect of Islamic Legislation on Crime Prevention in Saudi Arabia, Proceedings of the Symposium held in Riyadh, 16–21 Shawal 1396 A.H. (9–13 October 1976)*, trans., ed., and printed in collaboration with the United Nations Social Defence Research Institute (UNSDRI), Riyadh, Ministry of the Interior, Kingdom of Saudi Arabia, Crime Prevention Research Centre, 1980, p. 606.

²⁴ Ann Elizabeth, Mayer, “Reinstating Islamic Criminal Law in Libya” in D.H. Dwyer, ed., *Law and Islam in the Middle East*, New York, 1990.

²⁵ The *Islamic Penal Code* was passed by the Committee for Judicial Affairs of the Islamic Consultative Assembly on 12 July 1982; see *Islamic Penal Code*, published in Official Gazette no. 10988, 16 November 1982; also see Firouz Mahmoudi, “On Criminalization in Iran: Sources and Features”, *European Journal of Crime, Criminal Law and Criminal Justice*, vol. 10, no. 1, 2002, pp. 45–53.

²⁶ Mahmood Ahmad Ghazi, ed., *Muswwada Qanun-e-qisas wa diyat, urdu*, Idara Tahqiqat-i-Islami, Islamabad, Pakistan.

²⁷ *Debates of The Federal Council, op. cit.*, p. 1901. It may be pointed out here that almost all the members of *Majlis-e-Shoora* who participated in the debates over the bill delivered their speeches in Urdu. Therefore, the statements extensively quoted in this chapter are my translations.

²⁸ *Debates of The Federal Council, op. cit.*, p. 1989.

within its fold the *noor-i-ilahi* (the light of God), and that hence the law should be enforced as it is.²⁹

Mohammad Baqi reminded the House that seven committees³⁰ had considered this law and could not reach a consensus. He further remarked that:

[w]e should reflect as to which mental disease we are suffering from. We are trying to codify a law like the English, which we must not... There are only three verses in the Quran which are enough to deal with the law of *qisas* and *diyat*. Therefore, we should request that the President promulgate an Ordinance to the effect that from today, matters pertaining to *qisas* and *diyat* shall be dealt with in accordance with those three verses.³¹

Mohammad Hamza criticised the use of non-Muslim views, e.g., Joseph Schacht's, by the persons who wrote the dissenting note in the Committee's report. Malik Muhammad Ramzan went further and said that according to his limited Islamic knowledge, he did not know of any provision in Islamic law which indicated that Christians, Jews or Hindus should be allowed to participate in discussions while legislating in the light of Quran.³²

Fakharuddin M. Habib disapproved the use of logic and reason in formulating law in accordance with Shariat and stated that people should blindly follow what the jurists of Islam have laid down since they had attained a sublime status in this world. He gave the House the example of Imam Shafiee, who, when asked by the Caliph to participate in a disputation/argumentation with Christians, had offered a prayer after laying down a prayer mat on the waters of full-flowing river of *Dajla* (in the presence of Christians and Muslims); the law laid down by such a jurist should not be discussed by persons having no knowledge of Islam.³³

²⁹ Ibid., p. 1990.

³⁰ Here he counts all committees, including those that were constituted before the constitution of the *Shoora*.

³¹ Ibid., p. 1998.

³² Ibid., p. 2087.

³³ Ibid., p. 2159.

4.1.2 *Issues concerning women and non-Muslims*

4.1.2.1 *On a woman's testimony and diyat*

Zafar-ul-Haq stated that women and non-Muslims were equal before the law in Pakistan. We shall examine the points of view of women and non-Muslims—both of whom disputed this claim—in the latter part of this section, but we must first analyse the stance of those in favour of the application of this law.

Haji Saifullah stated that the presumption that women were discriminated against under this law had to be erroneous, since all *ulema* who partook in the legislative process had mothers, sisters and daughters. How would it be possible for a person not to want to give to his mother or sister what is due as their right? As far as the Shariat is concerned, whatever Allah and His prophet give to the people must not raise the slightest objection as such could destroy all the good works done by previous *ulema*.³⁴

Mir Rasool Baksh Talpur put forward a particularly strange argument. He stated that there is wisdom in not calling women as witnesses; that “it is not because they are not fit to give evidence. Rather, it is a privilege granted to women not to appear in the court, to safeguard their delicate and tender psychological constitution”.³⁵ Nawabzada Iftikhar Ahmad Khan Ansari stated that:

since women and men are two different entities composed of different constituents, nature has assigned to them two different responsibilities. If we look at the conditions of today's courts, we find that men tell a lot of lies. We should correct that structure rather than bringing our women into the courts of law.

Retired Chief Justice Bashiruddin Khan said that “women never agitated against the attribution of their half share in the inheritance, nor could they. On this analogy the principle of their half *diyāt* is understandable”.

Such statements clearly show how those involved were over-zealous in their acceptance of Islamic law in whatever form it was presented and were not ready to examine the issues objectively. If Talpur's argument was accepted, then women's evidence would not have been admissible

³⁴ *Ibid.*, p. 1906.

³⁵ *Ibid.*, p. 1988.

in all cases, e.g., in punishment under *tazir*. In addition, none of the above even attempted to justify why the evidence of non-Muslims is excluded from consideration in cases of *qatl-i-amd*. Women, however, disputed the rhetoric and raised crucial objections, which were relevant not only to the law presented in the *Shoora* but also to *The Act of 1997*. Begum Sabiha Shakeel, for example, asked:

what would happen if, in a house, there are only two girls and one is killed? What would happen if, in a house, a husband and wife are present and the husband is murdered? If a mother and son are living in a house and the son is killed, who would give the evidence? The House says a murderer will be punished under *tazir*. My question in this case is, would you not be depriving the sister, mother and wife of their right of *qisas*?

Begum Raze Aziz-ud-din, a member of the committee that presented the report, said that “the *ulema* have tied themselves into the sectarian ties of *Brailvee* and *Deobandees*. Whenever any tradition of the prophet is cited in favour of women’s right, it is said to be weak.”³⁶

Begum Salma Tassaduq Hussain recounted everyday atrocities committed against women: that they were beaten and oppressed, their modesty often outraged; they are thrown out of their houses and have their children snatched from them. She said that as all this was perpetrated directly under the noses of the *ulema*, who have failed to discharge their responsibilities towards men inasmuch as they have failed to teach them to respect women, how can women then entrust them with the responsibility of framing laws under Islam?³⁷

Begum Nasim A. Majid raised a very interesting point about the half *diyat* of a woman: since *diyat* is an economic compensation given to heirs, whether it is given in half or full would not affect the deceased woman, but rather her heirs. Therefore, the heirs of a murdered woman who was the head of a household would suffer, whereas in the case of a man they would get full compensation.

Begum Qamar Isphahani stressed that it is not written anywhere in the Quran (or its translations) that a woman is not a competent witness in a murder case. She said that Allah stressed the truthfulness of the evidence, not the gender of the sex that deposes.³⁸

³⁶ Ibid., p. 1984.

³⁷ Ibid., p. 2167.

³⁸ Ibid., p. 2203.

4.1.2.2 *Status of a non-Muslim's evidence*

Being a tiny minority in Pakistan, non-Muslims faced a great dilemma as they still had to speak within the framework of Islamic law in order to assert their rights. They were members of an assembly whose majority were ardent supporters of 'Islam' and gave speeches without even bothering to put forward any reasons or justification for the need to exclude non-Muslims' evidence from consideration in proving cases of *qatl-i-amd*. Non-Muslims were aware that even their presence in the assembly was frowned upon. Therefore, they not only had to couch their objections to the law in very reverential language, but also begin their speeches by eulogising Islam and its laws, emphasising how it had always guarded their interests.

Stephen P. Lal, after congratulating the Committee's Chairman for preparing such a wonderful report, asked,

if a Muslim family is living in a minorities' town and some vagabonds kill a Muslim member, and Muslim eyewitnesses are not available and only non-Muslims have witnessed the occurrence, what would happen with the right of *qisas* of the Muslim family?

He asked why it was "that a member of the minority can become a minister, ambassador and member of *Shoora* but not a competent witness in cases of *qatl-i-amd*". He maintained that a "member of the minority is as patriotic as the majority" and further that "Islam does not allow discrimination; it has always shown tolerance in the treatment of minorities. If the minorities are accepted as competent persons under this law, they would not feel discriminated against, deprived or as second-class citizens of the State".³⁹

Lieutenant Colonel (rtd) W. Herbert Balouch, who based his speech on the sayings of the prophet of Islam and principles of Islamic jurisprudence, contended that

there is no reference to any race or colour in the requirement of evidence. Only truthfulness is required. If this requirement of nationality or faith were specified then tomorrow in India the Hindus would say that two Hindus are required and in England, they would require the evidence of two Christians. What type of justice is this and from where does this emanate?⁴⁰

³⁹ Debates of The Federal Council, *op. cit.*, pp. 2002-3.

⁴⁰ *Ibid.*, p. 2075.

Francis X. Lobo, after referring to the basic duties of the members of the *Shoora*, i.e., to accelerate the process of Islamisation and change the existing un-Islamic law into Islamic law, commended the Committee for accomplishing the “Herculean task” of formulating the law of *qisas* and *diyat*. However, he maintained that “the laws governing evidence and compensation as far as minorities are concerned are unacceptable and are ambiguous”. He said:

our father of the nation, Quaid-i-Azam Muhammad Ali Jinnah, carved out a State for the Muslims, but in his opening address on the birth of our country gave assurances to all whereby he guaranteed equal rights and participation irrespective of caste, colour and creed. He further stated that minorities were a sacred trust. “... We are Pakistanis first, second and last and constitutionally Muslims. The eyes of the world are focussed on our country. Show them the magnanimity of the Musslman by allowing no discrimination to creep into any law in Pakistan as ordained in the holy Quran and Sunnah. Let us state clearly that these laws are based on ‘insaniyat’ (humanity). On the other hand, if we are denied these inherent rights as citizens of Pakistan, I will have no alternative but to visit the *mazar* of *Quaid-i-Azam* and cry out loud for justice in the name of Islam and the holy Quran.”⁴¹

Although the Chairman of the *Shoora* thanked Lobo for his speech, neither he nor the Committee’s chairman commented on it any further.

4.2 A SANE ELEMENT

Mumtaz Ahmad Tarar very perceptively noted that

the standard set for the admissibility of evidence in cases of *qisas* is too high and it is highly unlikely that any one could fulfil that criterion. Therefore, it seems that no one will be punished with *qisas* in case of *qatl-i-amd*.⁴²

This study has found that his judgment was absolutely correct. Extensive fieldwork, case-law analysis and examination of empirical data has shown that not a single punishment of *qisas* was able to be carried out in Pakistan in the last fourteen years, even after the application of this law. Tarar also cautioned that culprits may terrorise a deceased person’s heirs so as to obtain their pardon and as such, to escape punishment.⁴³

⁴¹ Ibid., p. 2171.

⁴² Ibid., p. 1900.

⁴³ Ibid., p. 1904.

Akhwandzada Bahrawar Saeed further said that, according to his knowledge of Islam, there is no embargo in Shariah against the evidence of women and non-Muslims in cases of *qatl-i-amd*.⁴⁴

Sheikh Imdad Ahmad explained that although *ulema* of the medieval period had laboured very hard to lay down the laws of Shariah, none had claimed that these were immutable; rather, they had laid down the laws keeping in view the social constraints of their time. Hence, he argued, the present *ulema* should do the same. He pointed out that throughout the history of Islamic law, people had been introducing changes into laws laid down by their predecessors. Even when Islamic Law was codified for the first time, those codifying it differed from those of the ‘first generation’. He stated that “[s]ociety is in progress and so should be the law”.⁴⁵

Sheikh Ahmad stressed that the provision allowing pardoning of the culprit on the basis of the heirs’ statement should be reconsidered in view of the peculiar conditions prevalent in our society, wherein (as we know) statements are often obtained using unlawful means. He recommended that *qisas* should only be waived if the majority of the *walis* waive this right and not just by one *wali*’s pardon. He asked, “from which of the Quranic verses have the *ulema* brought in the provision under which they declare that there is no *qisas* in case of the murder of a son, daughter, wife or son in law?” He requested the House not to accept Arab culture as an integral part of Islamic law.

Of great interest were the arguments forwarded by Chaudhary Altaf Hussain, a member of the Committee and the previous Committee’s Chairman, who had written a dissenting note in the Committee’s report. Some of his recommendations—immunity from the punishment of *qatl-i-amd* for culprits who kill those who disrespected the prophet’s wives⁴⁶—make him appear to be one of the factional, narrow-minded bigots that dominated the orthodox group. However, when arguing for the consideration of contemporary realities whilst framing the law,⁴⁷ he emerges as someone who has respect for present-day scholarship. There is an interesting dichotomy advanced in his arguments, which is perhaps typical of modern Muslims: he supports rationality, reason and scientific enquiry and seeks to benefit from contemporary scholarship,

⁴⁴ Ibid., p. 1914.

⁴⁵ Ibid., p. 1970.

⁴⁶ Ibid., p. 2021.

⁴⁷ Ibid., p. 2028.

yet insists in adopting certain doctrines and dogmas that do not stand the test of reason and rationality. For instance, he argues against the orthodox point of view that the Shariah grants immunity to a father from the punishment of *qatl-i-amd* if he kills his progeny,⁴⁸ but he argues the same for one who kills a paramour of his wife, daughter or sister,⁴⁹ even though there are some Muslim jurists who say that such a (private) person has no right to kill in such circumstances. This dichotomy underlines his flow of thought throughout the speech.

Alluding to Justice Cornelius, a retired Chief Justice of the Supreme Court who was Christian, Hussain asked, “why can’t a person who can become the chief justice of Pakistan become a competent witness in a case of *qatl-i-amd* liable to *qisas*?”⁵⁰ He requested that the House make women’s and non-Muslims’ evidence admissible in cases of *qisas*. His main contention was that the existing penal code was not an English law, and that it was in fact framed on the foundations of *Fatawa-i-Alamgiri*. To identify the provisions of the IPC/PPC with the *Fatawa-i-Alamgiri* is beyond the scope of this work; however, it can certainly be said that the law of culpable homicide and murder in nineteenth-century England appears much harsher than the equivalent law which was prevalent in India at that time.⁵¹ According to Christopher Hollis, there were about 220 capital offences in England in 1820.⁵² In 1801, for example, a boy was put to death for stealing a spoon; in 1806, a girl of seven was hanged at Lynn; and in 1831, a boy of nine was hanged at Chelmsford.⁵³

4.3 PASSING OF THE BILL

The *Shoora* completed its debate on the law on 25 July 1984. As stated before, only 68 of the 310 members took part in the debate. Of these, 30 did not speak a word on the law. The Chairman consistently asked

⁴⁸ Ibid., p. 229.

⁴⁹ Ibid., p. 2023.

⁵⁰ Ibid., p. 2027.

⁵¹ Christopher Hollis, “The English Story” in *The Homicide Act: The First Thorough Examination of How the Homicide Act Has Been Working in Practice*, London, 1964, pp. 7–23; at p. 110, Hollis argued that the English Penal Code was the worst of any civilised nation for at least two centuries.

⁵² Christopher Hollis, *Capital Punishment and British Politics*, p. 14; Koestler, *Reflections on Hanging*, p. 13.

⁵³ G. Gardiner and N. Curitis-Raleigh, “The Judicial Attack on Penal Reform”, *The Law Quarterly Review*, April, 1949, pp. 196–219.

them to contribute to the debate, but they did not, and perhaps they could not.⁵⁴ On the following morning, the second reading and the voting on the clauses took place simultaneously. Chaudhary Altaf Hussain, objecting to the procedure adopted by the Chairman, withdrew all his amendments in protest.⁵⁵ Chaudhary Mohammad Anwar Bhinder, an old parliamentarian and past speaker of the Punjab Assembly (1961), also objected to the procedure and withdrew his amendments.⁵⁶ Lieutenant Colonel Herbert Balouch, a member from the minority, not only withdrew his amendments but also walked out of the session.⁵⁷ All the women, including Begum Razia Azzizuddin, also walked out of the proceedings.⁵⁸ Syed Saeed Hassan and Khawja Tariq Rahim followed suit as they too found women badly discriminated against.⁵⁹

The bill went through, notwithstanding this lively activity. On the passing of the bill, Moulana Moeen-ud-din Lakhvi immediately prostrated to God on the floor of the House in thankfulness to Allah Almighty that another Shariah bill had gone through.⁶⁰ He said it was a great moment for him that a step towards the implementation of the Shariah in Pakistan had been taken. The Federal Council's session was prorogued that same day, and came to its end on the holding of general elections in February 1985. However, the traditionalists' arguments that had influenced the House proved impotent in persuading the President; Zia did not promulgate the law recommended by the *Shoora*.

4.4 A POLITICAL PARLIAMENT OF JUNEJO'S GOVERNMENT: FEBRUARY 1985 TO 29 MAY 1988

The assembly that brought an end to the *Shoora* had come into existence on the basis of elections held on a non-party basis. Many of its members were either members of the *Shoora* or related to them.⁶¹ The Bill on

⁵⁴ For instance, see Mufti Mohammad Hussain Qadri, *Debates of the Federal Council, op. cit.*, p. 2095; Fakharuddin A. Habib, *Debates of the Federal Council, op. cit.*, p. 2157; Saeedur Rehman Khan, *Debates of the Federal Council, op. cit.*, p. 2181; Allah Baksh Abbasi, *Debates of the Federal Council, op. cit.*, p. 2001.

⁵⁵ *Ibid.*, p. 2385.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, p. 2395.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, p. 2434.

⁶¹ Wakil Anjum, *Syasat kai Firoun* (in Urdu), Lahore, 1996; Wakil Anjum, *Siyasa Danoo Ki Qalabazian* (in Urdu), Lahore, 1996; Ahmad Salim, *Pakistani Siyayat Kai*

Offences Against the Human Body (Enforcement of *Qisas* and *Diyat*) Law which was not enforced by the President and, despite approval by the *Shoora*, was never floated on the floor of the House for debate. The Assembly hurriedly passed the notorious Eighth Amendment to the Constitution of Pakistan (crucial for the political life of the President), but did not even deliberate on the law that was instrumental to the lives of the accused, culprits, and condemned prisoners who were languishing behind bars and in death cells, since the Shariat Courts had declared as un-Islamic the law dealing with the offences of culpable homicide and murder as contained in the PPC.

4.5 PARTY-BASED ASSEMBLY OF BENAZIR BHUTTO: 19 NOVEMBER 1988 TO 6 AUGUST 1990

The next assembly brought back to power the Pakistan Peoples Party (PPP), whose chairman Z.A. Bhutto was hanged by Zia's Government in 1979. Bhutto's daughter, Benazir, was now Prime Minister of Pakistan. It was very unlikely that her Government would have presented the bill in the Assembly, since she had publicly spoken against the laws imposed by Zia in the name of Islam.⁶² The law hence did not come under discussion in this parliamentary era (1988–90).

4.6 THE PARLIAMENT OF 1990, NAWAZ SHARIF'S GOVERNMENT: 27 OCTOBER 1990 TO 11 JULY 1993

By the time the Parliament of 1990 came into existence, the Islamic law of *qisas* and *diyat* had already been promulgated by the Interim Government through the Criminal Law Amendment Ordinance.⁶³ Since this Ordinance had already been issued, it was the legal obligation of the Parliament to consider the law, as the procedure of introducing an Ordinance could only be a temporary arrangement (provided by the 1973 Constitution). Thus, on 13 October 1990, the Criminal Law (Fourth Amendment) Bill 1991 was introduced and referred to the

Pachas Kirdar (in Urdu), Lahore, 1997; also see a brief comment in Hamid Khan, *op. cit.*, 2001, p. 633.

⁶² See Chapter Four.

⁶³ *Ibid.*

Standing Committee of the Assembly.⁶⁴ A lawyer, Mian Mohummad Yasin Khan Watoo, was the Chairman of the nine members' Standing Committee,⁶⁵ which brought in extensive changes to the Bill. Chaudhary Altaf Hussain, Iftikhar Hussain Gilani and Peter Jan Sahotra (Minister of State for the Minorities Affairs) wrote notes of dissent on the proposed bill. The arguments contained therein proved unanswerable by the other committee members. The dissent note severely criticised the method the State had adopted to formulate the bill and gave an example of Indian parliamentary practice, wherein (according to the authors) thirty years was spent on research. The note states:

the Islamic law was researched on the one hand and the main classification of murder, culpable homicide not amounting to murder and murder by rash and negligent driving act were all derived from the Islamic law and based upon the Muslim Jurists of that time. It was the Muslim jurists who who had given the opinion that murder is not compoundable and it has been based mainly upon the opinion of Hazrat Imam Abu Hanifa.⁶⁶

The 75-page long dissent note claimed that the Bill was “sketchy” and did not deal with day-to-day problems. The authors argued that the law was not based upon divine traditions of the Holy prophet, but had been lifted from ordinary textbooks without any supporting material from the two primary sources of Islamic law, the Quran and Sunnah. “It is based only on misconception and superficial zeal”, they wrote.⁶⁷

Presenting the report in the Assembly on 10 June 1993, Chaudhary Abdul Ghafoor (Minister for Law and Justice) introduced *The Criminal Law (Amendment) Bill, 1993*. Syed Zafar Ali Shah, a member of the opposition, opposed the bill.⁶⁸ By this time, the *Criminal Law (Second Amendment) Ordinance, 1990*, the *qisas* and *diyat* law, had been re-promulgated twelve times. Shah opposed the bill on the ground that since the law would have a far-reaching effect, it should have been handed down to a Select Committee to examine it thoroughly and then present it to the Assembly. He referred to the note of dissent given

⁶⁴ Report of the Standing Committee on Law, Justice and Parliamentary Affairs on the Criminal Law (Fourth Amendment) Bill, 1991 (Ordinance no. 30 of 1991), 1991, National Assembly Secretariat, Islamabad, p. 1.

⁶⁵ For details, see *ibid.*

⁶⁶ *Ibid.*, p. 120.

⁶⁷ *Ibid.*, p. 121.

⁶⁸ *National Assembly Debates*, vol. 2, no. 6, 1993, p. 606.

by Altaf Hussain, which was 75 pages long, whereas the bill itself was only 25 pages.

He further said that had the prophet lived another ten years, he would have introduced many more amendments to the customs of that time. According to him, most of the provisions of the law were simply the prevailing practices from the prophet's time and hence there was an urgent need to reconsider which of these could and could not be retained in the changed times. He stated that "now-a-days a man kills another and then threatens his heirs that if they did not pardon him then he would kill them too. Because of these threats, people were pardoning murderers."⁶⁹ He argued that the law should not be considered bad purely because it was framed by the English, and that they actually did right thing in disallowing pardon and composition in cases of murder. He begged the house to abandon this obduracy and to take into account the interests of the public and State.⁷⁰ On these grounds, he suggested that the bill be put to the public at large to elicit their opinion on the law. When the Minister of Law asked why the Bar Associations of the country had not raised objections on the law, especially since it had been in currency from September 1990, Shah replied:

Sir, the reason had better be told in private rather than in public. It has been common knowledge in order to facilitate the disposal of cases, that because of the difficulties experienced by the people, the litigants, and lawyers in executing their work and prosecuting the laws, the Advocates find it so onerous, so difficult in the present circumstances, where witnesses cannot be found, where the police are not efficient but in fact totally corrupt, where they feel that it will be easy. It will be rather convenient for them; they will get the compoundability of the offence. They will manage some sort of compromise between the parties and it will be easy because money will be exchanged between the victim or victim's heir and the offender. They find it easy due to the force of the circumstance, not because of justice.⁷¹

This statement was too bold and blunt to be given in such a public forum. The Bar Association should in fact have taken exception to it. However, neither the lawyers sitting in the Assembly nor the Minister of Law responded. Orthodox religious personalities in the House, e.g.,

⁶⁹ *Ibid.*, p. 614.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*, p. 1423.

Moulvi Mohmaad Khan Shirani,⁷² Moulvi Mohammad Siddique Shah,⁷³ Moulana Mohammad Azam Tariq,⁷⁴ and Moulvi Mohammad Amin⁷⁵ had also expressed their reservations and disapproval of the bill on the basis that it was not completely Islamic, but they were not ready to oppose it to an extent that might antagonise the Government.

For instance, Liaqat Ali Balouch, a member of *Jamat-i-Islami* Pakistan⁷⁶ (a pro-Government group), objected that although he was in favour of this Islamic law, the law as promulgated through the Ordinances did not contain all the important concepts of the Islamic law of *qisas* and *diyat*. He said that “[m]any weaknesses of the law had surfaced...and no reference has been made to the concepts of *aqila* or *qasama* in the law”.⁷⁷

Despite the opposition, the Government floated the bill for a second reading and elicited the House’s opinion on a clause-by-clause basis. Before the initiation of the second reading, Shah said, “[l]et it be placed on record that I have great doubts on the viability of all this law and I think this is an impracticable law.”⁷⁸ 20 clauses and 39 sections (from section 299 to 338) of the bill had been approved by the Assembly of 1993 by the time the Session was prorogued on 11 July 1993. The National Assembly was dissolved on 18 July 1993, and the bill hence could not mature into an enactment.

4.7 BENAZIR BHUTTO’S SECOND TERM IN GOVERNMENT: OCTOBER 1993 TO 13 NOVEMBER 1996

Although the Islamic law of *qisas* and *diyat* remained enforced during this period and was kept alive through the Ordinances, the bill was virtually shelved. It was not discussed on the floor of the house until the Assembly was dissolved by the President on 6 November 1996.

⁷² Ibid., p. 1667.

⁷³ Ibid., p. 1673.

⁷⁴ Ibid., p. 1677.

⁷⁵ Ibid., p. 1683.

⁷⁶ *Jamat-i-Islami* Pakistan is one of the political parties of Pakistan which was established on religious grounds. Maulana Maududi founded the *Jamat* in August 1941, before the partition of India; for details, see Ishtiaq Hussain Qureshi, *Ulema in Politics*, Maaref Ltd., Karachi, 1972, p. 368.

⁷⁷ *National Assembly Debates*, vol. 2, no. 6, 1993, p. 610.

⁷⁸ Ibid., p. 1688.

4.8 NAWAZ SHARIF'S SECOND TERM IN GOVERNMENT: 4 FEBRUARY TO 7 APRIL 1997

The National Assembly came into being in the first week of February 1997. Nawaz Sharif took oath of Government on 17 February 1997. In the afternoon of 7 April 1997, the Government moved the motion:

that under 285 of the Rules of Procedure and Conduct of Business in the National Assembly 1992, the requirements of rules 104 and 105(2) of the said Rules in respect of the Bill further to amend the Pakistan Penal Code, 1860 and the Code of Criminal Procedure, 1898. [The Criminal Law (Fourth Amendment Bill, 1996), (Ordinance No. CXIII of 1996) be dispensed with.⁷⁹

The Rules of Assembly regarding handing over a bill to a standing committee and then a select committee for discussion and debate, as well as prior notice to members of parliament, were all scrapped. The motion was adopted on the strength of the majority of Nawaz Sharif's political party in the Assembly. The opposition walked out and the law was introduced to the House on the plea that the bill was put on members' tables ten days earlier (27 March 1997) and they should therefore have realised that it could be moved at any time thereafter.⁸⁰

After the opposition's walk-out, the majority party did not bother to discuss the law at all. Ironically and rather amazingly, the law that was not enforced by Zia-ul-Haq, despite all his apparent enthusiasm to enforce Islamic laws in the country, was passed in less than 30 minutes in the Assembly of Nawaz Sharif's Government. No discussion or debate took place whatsoever about a law which had been deliberated by at least ten committees and on which no consensus had emerged in three successive assemblies.

The Assembly had an excellent opportunity at that stage to consider the pros and cons of the law's application, since it had already been in force in the form of an Ordinance for seven years. Data relating to crime, along with the statistics of successful police investigations, court convictions and compromises in murder cases could have been ascertained and examined. The framing of the final version of the law should have been done in light of all these facts and figures. However, the haste shown by Nawaz Sharif's party and the perfunctory manner

⁷⁹ *National Assembly Debates*, 1997, vol. 4, no. 7, Islamabad, p. 577.

⁸⁰ *Ibid.*, p. 591.

in which the law was enacted shows that the primary motive was to pay lip service to Islam by simply adopting a law that was issued in its name.

4.9 CONCLUSION

From the above analysis, it is clear that a strong opposition against the law emerged whenever it was discussed in the various Assemblies or in the Committees constituted by them. Both implicit and explicit arguments against the provisions were based within the framework of Islamic law. Modernists wanted Islamic laws, but insisted that they be restructured and their sources be re-interpreted to take into account specific societal conditions and the more general demands of modern times. Traditionalists, on the other hand, were ready to accept anything in the name of Islam without considering the viability of those laws in the modern-day context. For them, the law structured by the medieval scholars was true Islam and sufficient to meet requirements through all the ages.

However, the traditionalists seemed to forget to inquire into why the jurists and scholars of the medieval period felt a need to structure these laws in the first place. Why did they not leave the laws as they were inherited from the prophet? If they had the authority and principles to structure Islamic law to keep pace with historical progress, then why should modern scholars not do the same according to the needs of their time? The traditionalists were also unmindful of the fact that by choosing to become members of an assembly, they had already implicitly agreed to legislate laws for the people that would suit the particular social conditions of the country. They had thus become part of a political process, which empowered them to issue a *fatwa*/law or a set of *fatwas* that would have the same authority, at least legally, which *fatwas* issued by a medieval scholar had when sanctioned by the rulers.

The traditionalists showed a distinct lack of confidence in their knowledge and were not ready to discharge the duty which the people of Pakistan and the Constitution had bestowed upon them. Perhaps it was that these members had much zeal for Islam and were unwilling (or unprepared?) to address the challenge to their beliefs in the traditional laws of Islam that was inherent in the questions raised by the modernists. Or maybe it was the case that gaining trivial political and worldly benefits in the name of Islam was for them a sufficient reward for their alleged love of Islam and its laws.

CHAPTER FIVE

THE NEW LAW AND JUDICIARY

INTRODUCTION

On 5 September 1990, the Government of Pakistan promulgated the *Criminal Law (Second Amendment) Ordinance, 1990*¹ ('Ordinance VII'), whereby the Islamic law of *Jinayat*² was introduced in the State of Pakistan. In Chapter Two, we found that this Ordinance had been drafted and issued on the insistence of the superior judiciary of Pakistan. However, it needs to be emphasised here that its promulgation was a consequence of the Attorney General's conceding statement made in the Supreme Court (on 17 August 1990) that the Government was prepared to amend the law of culpable homicide and murder provided in the PPC to bring it into conformity with the injunctions of Islam, in compliance with the judgments of the Shariat Courts. The Attorney General made the statement in the Shariat Review Petitions filed by the Federal Government in 1990,³ wherein the latter had challenged the Supreme Court's verdict on the State's appeals in *Gul Hassan*⁴ and other related cases.⁵

From 5 September 1990 onwards, when the *qisas* and *diyat* law was introduced in the criminal legal order of Pakistan, the State repeated the law through twenty Ordinances⁶ until Parliament accorded approval to

¹ PLD CS 1990 110.

² This literally means 'offences' (singular *jinaya*); see Schacht, *An Introduction to Islamic Law*, London, p. 181. However, the majority of Muslim jurists apply this term to offences that result in the loss of life and limb, such as murder, causing bodily injury, physical violence or wilful abortion only. See Audah, *Criminal Law of Islam*, p. 73, and the sources cited therein. We have also used this term subscribing to the majority view.

³ *Federation of Pakistan and another v. NWFP Government and Others*, PLD 1990 SC 1172.

⁴ PLD 1989 SC 633.

⁵ *Federation of Pakistan v. Mohammad Riaz and Others; Muhammad Shafi Muhammad v. Federation of Pakistan*, and the other cases cited in PLD 1989 SC 633.

⁶ Ordinance I of 1991, PLD 1991 CS 208; Ordinance XVIII of 1991, PLD 1991 CS 277; Ordinance XXX of 1991, PLD 1991 CS 521; Ordinance XLII of 1991, PLD 1992 CS 62; Ordinance IV of 1992, PLD 1992 CS 176; Ordinance X of 1992, PLD 1992 CS 262; Ordinance XVII of 1992, PLD 1993 CS 70; Ordinance III of 1993, PLD 1993 CS

Ordinance CXIII of 1996 and passed the *Criminal Law (Amendment) Act, 1997*⁷ on 11 April 1997. The Government had to re-issue the law twenty times because an Ordinance issued by the President (by virtue of Article 89 of the 1973 Constitution) lapses after four months if it is not approved by the Assembly during that period. Successive Assemblies could not complete their deliberations and arrive at any decision about the law for a period of almost seven years. They neither disapproved the law outright, nor approved it. The courts thus applied the law that was in force through these twenty successively issued Ordinances.

This chapter examines at length the application of this highly controversial law of *qisas* and *diyat*. It is argued that there are inherent flaws in the text of the law, which are exploited by vicious murderers to avoid the punishment for one of the gravest crimes possible, i.e., unlawful homicide.⁸ The research highlights the uses, misuses and abuses of the fundamental feature of the Pakistani law of *qisas* and *diyat*, viz. composition in murder cases. This chapter is divided into three major parts.

Part One investigates the factors surrounding the issuance of the Ordinance in September 1990, after the dismissal of the Federal Government's appeal by the Supreme Court of Pakistan in the *Gul Hassan* case.⁹ It argues that the introduction of the *qisas* and *diyat* law was a political move by President Ishaq Khan aimed at pleasing the Supreme Court of Pakistan. This was absolutely crucial for him at this juncture, in that the validity of his orders, by which he had dismissed Benazir Bhutto's Government and dissolved the National and Provincial Assemblies of Pakistan, were under scrutiny before the courts. Chief Justice Afzal Zullah¹⁰ had previously expressed his annoyance and displeasure

226; Ordinance XII of 1993, PLD 1993 CS 334; Ordinance XXXIX of 1993, PLD 1994 CS 27; Ordinance XVII of 1994, PLD 1994 CS 229; Ordinance XLI of 1994, PLD 1995 CS 8; Ordinance LXXI of 1994, PLD 1995 CS 174; Ordinance XV of 1995, PLD 1996 CS 70; Ordinance LVI of 1995, PLD 1996 CS 387; Ordinance XCIX of 1995, PLD 1995 CS 799; Ordinance V of 1996, PLD 1996 CS 965; Ordinance LII of 1996, PLD 1996 CS 1391; Ordinance LXXX of 1996, PLD 1996 CS 1876; Ordinance CXIII of 1996, PLD 1997 CS 165.

⁷ PLD 1997 CS 336.

⁸ See generally Audah, *op. cit.*, 1982, p. 62; *A-G's Reference no. 3 of 1994* [1997] 3 All ER 936, HL.

⁹ PLD 1989 SC 633.

¹⁰ Afzal Zullah obtained his primary and secondary education from a *madrassa* (Islamic seminary). He was a member of the SAB from 1979–82, when he became Chairman of the Bench, a post he held until his retirement from the Supreme Court

at Benazir Bhutto's Government for adopting a procrastinating strategy in legislating and enforcing the Islamic law of *qisas* and *diyat* in compliance with the Supreme Court's judgment in the *Gul Hassan* case. Thus, only ten days after dissolving the Bhutto Government, the Attorney General from the Ishaq Government committed to the Supreme Court that the new law would be promulgated shortly, in compliance with the verdict in the *Gul Hassan* case.

Part Two is focussed on issues concerning the requirements of evidence to prove a case under the Pakistani law of *qisas* and *diyat*.

Finally, Part Three analyses the application of the new law through the examination of case law relating to the higher judiciary¹¹ from 1990–2004. It also surveys the differences among the judges in the understanding of various concepts of the new law.

5.1 THE QISAS AND DIYAT ORDINANCE, 1990: ANALYSIS OF THE POST-1989 LEGO-POLITICAL ERA

An exploration of the historical context of the promulgation of the *qisas* and *diyat* law will help clarify the Government's motives in issuing it at that particular time. This chapter argues that the reason behind the Attorney General's conceding statement in the Supreme Court to promulgate the Islamic law of *qisas* and *diyat* by 12 *Rabi-ul-Awal* (the prophet's date of birth and hence a holy day) was not merely to please God, but also to please the Supreme Court at that critical juncture. The study also reveals the two different and rather conflicting opinions regarding the formulation and application of the *qisas* and *diyat* law in Pakistan, one identified with the superior judiciary headed by Justice Afzal Zullah, and the other identified with Benazir Bhutto's Government (1988–90). It must be noted that the Supreme Court's decision to incorporate the *qisas* and *diyat* law in the criminal law of Pakistan in the case of *Gul Hassan*, was handed down during Benazir Bhutto's tenure.

in 1993. During this period (1 January 1990 to 18 April 1999), he was also the Chief Justice of Pakistan.

¹¹ The expression 'higher judiciary' includes all four provincial High Courts, the Federal Shariat Court, the Supreme Court of Pakistan and the Appellate Courts established by various statutes which are presided by the sitting judges of the High Courts or the Supreme Court of Pakistan (e.g., the Supreme Appellate Bench constituted under *The Speedy Trials Courts Act, 1992*).

In Chapter Two, we learnt that when dismissing the Federal Government's appeal in *Gul Hassan* on 5 July 1989,¹² the SAB, headed by Justice Afzal Zullah, had granted the Government a nine months' gestation period to develop and issue a law of *qisas* and *diyat* in accordance to the injunctions of Islam as laid down by the Quran and Sunnah. The Court had declared that the existing law on the subject was contrary to the injunctions of Islam, inasmuch as it permitted the Government to pardon the accused/convict without reference to and without the permission of the victim or his legal heirs, as the case may be. In addition, it did not allow any of the parties—victim, the legal heirs or the accused—to enter into a compromise in cases of *jinayat*.

The Federal Government's appeals against the judgments of the Peshawar High Court¹³ and of the Federal Shariat Court¹⁴ were pending before the SAB from 1980 and 1981 respectively. This was the period during which Zia's power was at its peak. Although the matter was of supreme importance, the appeals were not taken up immediately by the Supreme Court since they had been filed by Zia's Government, which by that time had become notorious for abruptly and unceremoniously removing judges of the higher judiciary who dared displease him.¹⁵ It was only in 1989, after Zia's death,¹⁶ that the judgments in the appeals were handed down.

This was a difficult period in Benazir Bhutto's Government. She had developed major conflicts with the President of Pakistan, Ghulam Ishaq Khan (1988–93) over the powers to appoint judges of the superior judiciary, and with the country's army chiefs.¹⁷ A political tug-of-war was also going on between Benazir's Government at the centre and Nawaz Sharif's Government in Punjab, the largest province in Pakistan. Nawaz Sharif was at that time trying hard to weaken Benazir's Government by all available means, especially by playing the card of Punjabi nationalism. Similarly, the central Government was endeavouring

¹² PLD 1989 SC 633.

¹³ Shariat Appeal no. 1 of 1980, *Federation of Pakistan v. Gul Hassan Khan*.

¹⁴ Shariat Appeal no. 13 of 1981, *Federation of Pakistan v. Mohammad Riaz*.

¹⁵ See Hamid Khan, *Constitutional and Political History of Pakistan*, Lahore, 2001, pp. 632–96; Abrar Hasan, *Constitutional Crisis and the Judiciary in Pakistan*, Karachi, 1991.

¹⁶ Zia died in a plane crash on 17 August 1988.

¹⁷ See Hamid Khan, *Constitutional and Political History of Pakistan*, Oxford, 2001, p. 719.

to dislodge Nawaz Sharif from the post of Chief Minister of Punjab. Bhutto's premiership was also under challenge; Nawaz Sharif was making preparations towards a no-confidence motion in Parliament.¹⁸ It was in this scenario that Justice Afzal Zullah, who was elevated to the Supreme Court from Punjab, dismissed the appeals of the State filed about nine years before without waiting to hear the Attorney General of Pakistan. Only the Deputy Attorney Generals could represent the Federal Government.¹⁹

On dismissal of its appeals, the Government asked the CII to draft a law that could be moved in the National Assembly for deliberations,²⁰ but was not able to enact the law within the Supreme Court's stipulated time. It thus secured an extension from the Court until 30 May 1990, only a day before its deadline of 22 March 1990, when the PPC provisions that had been earlier declared un-Islamic by the SAB were to cease their effect. On 30 May 1990, the Government again filed a petition before the Court for another extension of six months. Although Justice Zullah strongly and openly criticised the Government for its lack of interest in the matter,²¹ the Court granted interim relief to the Government and adjourned the hearing of the petition to 6 June 1990. Intriguingly, however, on this date the Court granted the State an indefinite extension.²² Relieved from the Court's constant pressure, on 5 July 1990 the Federal Government finally filed a Review Petition against the Court's judgment in *Gul Hassan*.²³

On 29 July 1990, the Attorney General, Barrister Yahya Bakhtiar, made a brief stop-over in the UK on his way back to Pakistan and publicly aired his views on the Supreme Court's insistence to draft the law of *qisas* and *diyat*. He was perhaps also reflecting his Government's understanding of the characteristics of Islamic penal laws and their application in contemporary society. Bakhtiar categorically asserted that

¹⁸ Ibid., p. 717.

¹⁹ PLD 1989 SC 633.

²⁰ Syed Zakir Hussain Shah, member of the Council of Islamic Ideology (1988–92), interview by the author on 3 January 2003, London.

²¹ Address by Justice Zullah, published in PLD 1993 Journal 67.

²² *State of Human Rights in Pakistan 1990*, Human Rights Commission of Pakistan, Lahore, 1990, p. 9.

²³ *Federation of Pakistan v. NWFP Government and others*, PLD 1989 SC 1172.

the power to declare something Islamic or un-Islamic can not be granted to *Aalims* and *Muftis*.²⁴ This power can only be exercised by the people's representative assembly; even the Objectives Resolution, which has now become a part of the 1973 Constitution, declares so.

He emphasized that “[t]he Objectives Resolution states that the Sovereignty belongs to Allah, which shall be exercised through the elected representatives of the people”.²⁵ Criticising the draft bill prepared by the CII, he opined that it “was based on narrow-mindedness” and misconstrued the law against the spirit of Islam.²⁶ To support this point, he gave the example of severe punishments such as the amputation of limbs, which were sanctioned at a time when the institution of prisons did not exist. He explained that the State began issuing prison sentences for correction and reformation when the second Caliph, Umar, established this institution. “No one ever objected to Hazrat Umar’s suspension of the punishment of cutting the hands for theft when famine appeared in Arabia”, he argued.²⁷ He was thus making a case for introducing changes to the application and structure of Islamic penal laws in modern times in line with the changed societal conditions. Such statements by the Government’s topmost lawyer clearly highlight the sharp division between the Government’s and the Shariat Courts’ points of view towards the formulation of the new law.

On 6 August 1990, five days after the above press conference, President Ishaq Khan dismissed Yahya Bakhtiar, deposed Benazir Bhutto’s Government and appointed Ghulam Mustaf Jatoi as the care-taker prime minister (August to November 1990). The dismissal of the National Assembly and the four Provincial Assemblies was challenged in the courts of law. In practical terms, the Interim Government had to defend this Presidential order in the courts, in particular the Supreme Court, which had to finally examine the validity of the President’s Order of dismissal of Assemblies. With the Chief Justice having already expressed his displeasure at the Benazir Bhutto Government’s lack of interest in Islamic law, the Interim Government quickly showed its interest and on 15 August 1990, only 9 days after taking power, the

²⁴ People who claim to be well versed in Islamic law and therefore issue edicts. These remarks clearly alluded to the Shariat Benches of the country.

²⁵ *Imroze*, 29 July 1990, author’s translation.

²⁶ *Ibid.*

²⁷ *Ibid.*

caretaker Government issued the *Criminal Law (Amendment) Ordinance 1990*.²⁸

However, it should be noted that this Ordinance had in fact been drafted by Benazir Bhutto's Ministry of Law; the caretaker Government itself would not have been able to draft an entire Ordinance in just nine days. Bhutto's draft ordinance was a pre-emptive one, intended to be used if the Supreme Court did not extend the original deadline for amending the penal code in accordance with Islamic law.

This Ordinance has escaped the attention of researchers who have worked on the Islamisation of laws in Pakistan.²⁹ Although it was short, containing only five sections, it was the first visible manifestation of the Government's intention to implement the Shariat Court's judgment pertaining to *qisas* and *diyat* law. As will be discussed in more detail later, there was no legal reason for the timing, since the Supreme Court had not specified any deadline for the implementation of the judgment. The Ordinance amended sections 54 and 55 of the PPC. It declared that:

- 1) the sentence of death passed on a murderer should not be commuted without the consent of the deceased's heirs (section 54 of the PPC);
- 2) the sentence of life imprisonment passed against offenders convicted under sections 302,³⁰ 305,³¹ 307,³² 326³³ or 329³⁴ should not be commuted without the victim's consent or, as the case may be, of his heirs' (section 55 of the PPC); and
- 3) in the case of certain offences³⁵ committed against a person, and with the permission of the prosecuting court, these may be compounded by the victim or by his legal heirs if the victim had died³⁶ but the case

²⁸ Ordinance IV of 1990, PLD CS 92.

²⁹ For instance, see Martin Lau, "The Legal mechanism of Islamisation: The New Islamic Criminal Law of Pakistan", *Journal of Law and Society*, Vol. 11, no. 18, 1992; Rubya Mehdi, *The Islamization of the Law in Pakistan*, London, 1944; Mohammad Amin, *Islamization of Laws in Pakistan*, Lahore, 1989.

³⁰ Murder.

³¹ Abetting the suicide of a child or insane person.

³² Attempt to murder.

³³ Voluntarily causing grievous hurt by dangerous weapons.

³⁴ Voluntarily causing grievous hurt to extort property or to constrain to an illegal act.

³⁵ Offences punishable under section 302 (punishment of murder), 307 (attempt to murder), 326 (voluntarily causing grievous hurt by dangerous weapons or means), 329 (voluntarily causing grievous hurt to extort property or to constrain to illegal act), 336 (act endangering life or personal safety of others), and 309 (attempt to commit suicide).

³⁶ Section 4 of Ordinance IV, *Gul Hassan Khan v. The Government*.

was still pending³⁷ (in accordance with the Supreme Court's judgment in *Gul Hassan*).³⁸

In the eventuality that the Court did not extend the time limit imposed on the State to legislate the new law of *jinayat*, the existing law would have become non-existent under the judgment and the law-and-order situation would have become chaotic. The above Ordinance was perfect to deal with this kind of awkward situation and covered almost all the fundamental objections raised by the Peshawar High Court in *Gul Hassan*. Without bringing in wholesale changes to Chapter XVI of the Penal Code of 1860, it met the terms of the courts' directions.

It might have been enough for Bhutto's Government to issue this short Ordinance, which barely carried out the dictates of the Shariat courts' judgments, in an attempt to show formal respect towards the courts' orders. However, it perhaps could not serve the purposes of the interim Government. This Government, whose legitimacy was challenged before the Supreme Court by the deposed members of the Bhutto Government, was expected to show its respect for the Supreme Court's aspirations beyond merely formal compliance. Therefore, on 29 August 1990, the interim Government's Attorney General appeared before the Court and informed it that the law of *qisas* and *diyat* had been drafted according to its stipulations in *Gul Hassan* and was finally being scrutinised by the law department. He pledged that by all means possible, the law would be promulgated by 5 September 1990 and its provisions would take effect from 12 *Rabi-ul-Awal* 1411 A.H. (3 October 1990).³⁹

It is interesting to note that the conceding statement to promulgate the ordinance was made by an unrepresentative Government of Pakistan, which had come into existence only for three months. The Supreme Court did not deem it necessary to disapprove a statement made by a Government that was only in place for 90 days. It did not ponder over the fact that a law of such enormous importance should, firstly, be enacted by an elected Government and, secondly, legislated after thorough debate—in the National Assembly—of its advantages and disadvantages. The interim Government's Attorney General also did not raise this valid plea before the Court. Both the Supreme Court

³⁷ Section 6, Criminal Law (Amendment) Ordinance, 1990.

³⁸ PLD 1989 SC 633.

³⁹ 1997 SCMR 1307.

and the interim Government, it seems, were inclined to avail of the opportunity to promulgate the new law when the people's elected representatives were not in power.

In the wake of the dismissal of Benazir Bhutto's elected Government, the President of Pakistan had already announced the date of the next general elections as 24 October 1990, and 26 October for the National Assembly and Provincial Assemblies, respectively. The law was promulgated on 5 September 1990 and its provisions came into effect on 3 October 1990. A law of extreme importance, relating to matters of life and death, was thus promulgated while the whole country was busy with election preparation, including the superior judiciary, which was occupied with legal battles being fought in the High Courts⁴⁰ and Supreme Court⁴¹ between the members of the dissolved assemblies and the lawyers of the interim Government.

5.1.1 Overview of Ordinance VII of 1990

The *Criminal Law (Second Amendment) Ordinance, 1990* ('Ordinance VII'), came into existence⁴² in the life of the *Criminal Law (Amendment) Ordinance, 1990*⁴³ ('Ordinance VI'). Section 4 of Ordinance VI amended section 345 of the CrPC and made compoundable the offences of murder, culpable homicide amounting to murder, death by negligence, attempt to commit culpable homicide and offences relating to bodily hurt, without affecting any of the definitions of the offences provided in the PPC. In contrast, Ordinance VII introduced the Pakistani version of the Islamic law of *qisas* and *diyat* in the penal system of the country. It replaced sections 299 to 338 of the PPC and therefore introduced its own definitions of offences and punishments thereof. However, keeping in view Ordinance VI of 1990, no change was made to section 345 of the CrPC, which governs the composition of such offences.

⁴⁰ *Ahmad Tariq Rahim v. The Federation of Pakistan*, PLD 1990 Lahore 505; *Khalid Malik v. The Federation of Pakistan*, PLD 1991 Karachi 1; *Aftab Ahmed Sherpao v. The Governor of NWFP*, PLD 1990 Peshawar 192. In all these cases, the validity of the dissolution of Assemblies was challenged. The legality of the dissolution order issued by the President was finally confirmed in *Khawja Ahmad Tariq Rahim v. The Federation of Pakistan*, PLD 1992 SC 64.

⁴¹ *Khawja Ahmad Tariq Rahim v. The Federation of Pakistan*, PLD 1992 SC 64.

⁴² 5 September 1990; whereas its provisions came into effect on 3 October 1990. See PLD CS 1990 110.

⁴³ This ordinance was issued on 15 August 1990, see footnote 6.

Although Ordinance VII introduced Islamic punishments such as *qisas*, *tazir*,⁴⁴ *diyat*,⁴⁵ *arsh*⁴⁶ and *daman*⁴⁷ in the PPC, it maintained the death sentence, imprisonments of both kinds⁴⁸ and financial penalty as provided under the repealed law. One of the punishments of *qatl-i-amd* (intentional homicide) was death as *qisas*,⁴⁹ *qisas* being the right of the victim, or his *wali*⁵⁰ (if the victim had died), which could then be exercised,⁵¹ waived⁵² or compounded⁵³ under the Ordinance. Most interestingly, *qisas* was not defined in Ordinance VII, which bore a clear sign of the Government's indecent haste. This situation was rectified in the next Ordinance, promulgated on 4 January 1991,⁵⁴ and *qisas* was defined under section 302(k) as follows:

[Q]isas means 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*.

However, the right to retaliate was given to the Government's functionary rather than the victim or his *wali*. Bakhtiar, the Attorney General in Benazir Bhutto's Government, had previously objected to this aspect of the bill (that had been drafted by the CII in 1989) when addressing a press conference in London in 1989. According to him, execution of punishment was the right of the victim or his *wali*, as the case may be, given to him by Islamic Criminal law. He questioned how and on what grounds this personal right had been snatched by the Government when it was supposed to be drafting the *qisas* and *diyat* law according to the injunctions of the Quran and Sunnah.⁵⁵ The Government assumed this right under section 314 of the Ordinance; however, the heirs of

⁴⁴ Section 299(e), PPC.

⁴⁵ Section 299(b), PPC.

⁴⁶ Section 299(d), PPC.

⁴⁷ Section 299(k), PPC.

⁴⁸ Two kinds of imprisonment are defined in the ordinance: simple and rigorous. Unless otherwise specified, 'imprisonment' in this article means imprisonment of both kinds.

⁴⁹ Section 302, PPC.

⁵⁰ Section 299(l), PPC.

⁵¹ Section 314, PPC.

⁵² Section 309, PPC.

⁵³ Section 310, PPC.

⁵⁴ See footnote 6.

⁵⁵ The daily *Imroze*, 29 July 1990; my translation.

the victim were required to be present at the time of the execution of *qisas*, either personally or through their representative(s).

In cases where *qatl-i-amd* was proven as per the requirements of section 304 of the PPC (the Islamic law of evidence), the definition of *qisas*, read with section 302 of the PPC, empowered the courts to specify the mode of the execution of *qisas*. For instance, if the offender killed the victim with thirty gunshots, the court might record that the offender be killed in the execution of *qisas* with thirty gunshots. It was in the application of this section that Allah Bakhs Ranjha, an Additional Sessions Judge in Lahore, when sentencing a person who had allegedly killed 100 children after committing sodomy with them and then burnt their bodies in acid, ordered:

... [H]e is convicted under section 302–A PPC as *qisas* on 100 counts. He should be strangled through iron chain, [the] weapon of offence in this case, in the presence of [the] legal heirs of the deceased and then his body should be cut into 100 pieces as it has been proved that he used to cut the dead bodies of the children deceased in this case. The pieces of his dead body should [then] be put into a drum containing the formula *modus operandi* used by the accused for dissolving the dead body.⁵⁶

Under the law, *qatl-i-amd* was not liable to *qisas* if the offender was a minor or insane, if the offender caused the death of his child or grandchild, or when the *wali* was a direct descendant of the offender.⁵⁷ *Qatl-i-amd* committed under *ikrah-i-tam*⁵⁸ was made punishable by up to twenty-five years' but not less than ten years' imprisonment; whereas the person causing *ikrah-i-tam* was made punishable for the kind of *qatl* committed as a consequence of *ikrah-i-tam*.⁵⁹ *Qatl-i-amd* committed under *ikrah-i-naqis*⁶⁰ was made punishable for the kind of *qatl* committed by him, while the person causing such *ikrah-i-tam* was made liable for the punishment of up to ten years. Section 305 (as

⁵⁶ Judgment dated 16 March 2000, in *State v. Javaid Iqbal*, Session Case no. 155 of 2000, in the court of Allah Bakhsh Ranjha, Additional Sessions Judge. It may be pointed out here that the convict, Javaid Iqbal, committed suicide in somewhat mysterious circumstances before the sentence could be carried out.

⁵⁷ Section 306, PPC.

⁵⁸ *Ikrah-i-tam* was defined under section 299 (g) as: "Putting any person, his spouse or any of his blood relations within the prohibited degree of marriage in fear of instant death or instant permanent impairing of any organ of the body or instant fear of being subjected to sodomy or *zina-bil-jabr*".

⁵⁹ Section 303(a), PPC.

⁶⁰ *Ikrah-i-naqis* meant "any form of duress which did not amount to *ikrah-i-tam*", Section 299(h), PPC.

amended) laid down that the death penalty could also be awarded as *tazir* if the proof in either of the forms specified under section 304⁶¹ was not available.⁶² In cases where *qisas* was not applicable according to the injunctions of Islam,⁶³ the offence of *qatl*⁶⁴ was made liable for imprisonment extending up to twenty-five years.

The definition of a minor was not provided in the Ordinance; indeed, there is no such definition in the whole of the PPC. However, the Ordinance defined 'adult', under section 299(a), as: "a person who has attained, being male, the age of eighteen years, or being a female, the age of sixteen years, or has attained puberty, whichever is earlier".

We have examined the lacunae in this definition when analysing the criticism of the law by Government departments (Chapter Three). It suffices to note here that the definition of 'adult' was later amended when the main law was repeated in Ordinance XLII (on 23 December 1991). The Ordinance defined an adult as "a person who is eighteen years of the age". This definition is still in use.

Qisas was also not enforceable in cases wherein the *wali* of the murderer waived his right, voluntarily and without duress (to the satisfaction of the court), or where the right of *qisas* had finally devolved onto a person who had no right of *qisas* against the offender or onto the offender as a result of the *wali*'s death.⁶⁵

An adult sane *wali* was allowed to compound his right of *qisas* at any time by accepting *badl-i-sulh* (exchange of compromise).⁶⁶ *Badl-i-sulh* was explained as:

... mutually agreed compensation according to *Shariah* to be paid or given by the offender to a *wali* in cash or kind or in the form of movable, or immovable property.⁶⁷

Since this explanation allowed the possibility that a woman could be given or handed over as a means of compensation, the Ordinance stated that "only giving a female in marriage would not be a valid *badl-i-sulh*".

⁶¹ Section 304 states that the offence of *qatl-i-amd* can be proved only in two forms: by confession before a court competent to try, or by producing the evidence under article 17 of the *Qanun-i-Shahadat*, 1984.

⁶² Section 302(b), PPC.

⁶³ Section 302(c), PPC.

⁶⁴ Causing death of a person, section 299(j), PPC.

⁶⁵ Section 307, PPC.

⁶⁶ Section 310, PPC.

⁶⁷ *Ibid.*

This clause was amended in Ordinance XXX (issued on 24 August 1991)⁶⁸ and the word “only” was deleted from it. The National Commission on the Status of Women in Pakistan (NCSW), a statutory body created by General Musharraf’s Government in July 2000,⁶⁹ has called for another amendment. The draft bill prepared by the Commission demands that section 310(1) should be substituted with the following: “provided that a woman will not be given in marriage or otherwise in *badl-i-sulh*”.⁷⁰

The Ordinance also empowered the courts to punish an accused of *qatl-i-amd* for up to ten years as *tazir*. Section 311 stated:

notwithstanding anything contained in section 309 or section 310, the court may in its discretion having regards 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 which may extend to ten years as *tazir*:

Provided that the court may sentence and punish an offender who is a previous convict, habitual or professional criminal, with imprisonment of either description for a term which may extend to fourteen years as *tazir*.

This provision was also amended by Ordinance XII (issued on 15 July 1993),⁷¹ which allowed the courts to punish an offender in case all the heirs of the victim did not waive their right of *qisas*, or when keeping in view the principles of *fasad-fil-arz*.⁷² The courts were allowed to sentence such an offender with up to 14 years’ imprisonment. In the explanation of this section, it was stated that *fasad-fil-arz* would include the past conduct of the offender.

Culpable homicides that did not amount to murder under the definition of *qatl-i-amd* were defined under sections 315, 318 and 321 of the PPC as *qatl-i-shibhi-i-amd*, *qatl-i-khata* and *qatl-i-bis-sabab* respectively. None attracted the punishment of *qisas*. However, they were made punishable with imprisonment under *tazir* and *diyât*. The exceptions

⁶⁸ See footnote 6.

⁶⁹ NCSW was created by *Ordinance no. XXVI of 2000*, issued on 10 July 2000, PLD CS 2000 35.

⁷⁰ *Dawn*, 1 February 2004; *Daily Times*, an internet-based newspaper, 21 August 2004, available online at: http://www.dailytimes.com.pk/default.asp?page=story_12-7-2004_pg1_8, viewed on 21 August 2004. Under the present law, a woman can become part of a compromise bargain between the parties in a murder case.

⁷¹ See footnote 6.

⁷² ‘Sacrilège on earth’, Q. 50:10.

contemplated under the repealed section 300 of the PPC⁷³ were not provided in Ordinance VII.

Qatl-i-Shibhi-amd was defined under section 315 as causing death of a person by intentionally causing harm to the body or mind by an act or weapon that in an ordinary course of nature was not sufficient to cause death. It was made punishable with imprisonment that could extend up to fourteen years, in addition to *diyat* under section 316.

Qatl-i-khata (accidental homicide) was made punishable by way of *diyat* only. However, if *qatl-i-khata* was committed by a rash or negligent act other than driving, the offender was made liable for imprisonment that could extend up to five years as *tazir*, in addition to *diyat*.⁷⁴ If a driver killed someone accidentally by rash or negligent driving, he was made liable, in addition to *diyat*, for imprisonment up to ten years.⁷⁵

Qatl-i-bis-sabab was punishable with *diyat* only⁷⁶ and was defined under section 321 as: “whoever without any intention to cause death of or cause harm to, any person, does any unlawful act which becomes the cause of death of another person, is said to have committed *qatl-i-bis-sabab*”. Thus, the essential element of this offence is an unlawful act that resulted in the death of another person, just as in *qatl-i-khata* the vital ingredient is a rash or negligent act. Since intention to cause death or bodily harm is missing in both offences, only the payment of *diyat* is prescribed as punishment.

⁷³ Four situations were spelt out by the repealed law that were to be ruled out if culpable homicide had to be declared murder. *Exception 1*: Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident. *Exception 2*: Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence. *Exception 3*: Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused. *Exception 4*: Culpable homicide is not murder if it is committed without premeditating a sudden quarrel and without the offender having taken undue advantage or acting in a cruel or unusual manner.

⁷⁴ Section 319, PPC.

⁷⁵ Section 320, PPC.

⁷⁶ Section 322, PPC.

Section 323 of the PPC, which described the method for evaluating the value of *diyat*, is interesting. It states:

the court shall, subject to the injunctions of Islam as laid down in the Holy Quran and Sunnah, and keeping in view the financial position of the convict and the heirs of the victim, fix the value of *diyat* which shall be not less than one hundred seventy thousand and six hundred and ten rupees, being the value of 30,630 grams of silver.

The second clause of this section made it incumbent on the Government to notify the value of silver in the official Gazette on 1 July each year. The amount was approximately £1630 only. This definition was later amended through *Ordinance I of 1991* (promulgated on 4 January 1991), which deleted the part describing the amount in rupees. The Government still had to publish the rate of silver in the official Gazette every year on 1 July, as well as on any other date if the rate changed. The value of *diyat* at present is only around £1815 and changes according to the market value of silver.

By virtue of section 338-F, the courts were invested with wide powers to interpret and apply the provisions of the law under the guidance of the injunctions of Islam as laid down in the Quran and Sunnah. The presumption that all judges in Pakistan were well acquainted with these sources and with the method of taking guidance from them was wrong, as there were non-Muslim judges who may never have had a chance to look into these sources. Moreover, to obtain guidance from them requires expertise in the sciences of the Quran and Hadith. Furthermore, the Muslims of Pakistan had already constitutionally refused to recognise the interpretation of the Quran and Sunnah, as rendered by Ahmadis, on the ground that they were unlike other Muslims of the country. They were thus constitutionally barred from calling themselves Muslim.⁷⁷ This illustrates the incredible range of interpretations that can be drawn from these sources. Since an Ahmadi is not barred from becoming a judge, they were allowed by virtue of this law to take guidance from the Quran and Sunnah to interpret the provisions of the *qisas* and *diyat* law as judges of the court. On the basis of such reservations, a Full Bench of the Lahore High Court also criticised the granting of such wide powers to courts.⁷⁸

⁷⁷ Article 260(3) of the 1973 Constitution; for details, see Khan, *op. cit.*, 2001, pp. 514–21; also see *Mujibur Rehman and Three Others v. Federal Government of Pakistan through Attorney General of Pakistan*, PLD 1984 FSC 1.

⁷⁸ MLD 1991 2408.

Ordinance VII declared that the law would be applicable prospectively. However, the benefit of sections 309 (waiver of *qisas*), 310 (compounding of *qisas*) and 338-E (application of section 345 of CrPC and punishment under *tazir*) was extended to any cases pending before the courts immediately before the commencement of the Ordinance.⁷⁹

Ordinance CXIII (promulgated on 11 December 1996), the last ordinance, contained all the provisions of Ordinance VII and accommodated the later amendments discussed above.⁸⁰ This was the ordinance that was finally presented before the Parliament for its enactment into law on 4 April 1997,⁸¹ which still remains the law of the land.

5.1.2 *Post-promulgation scenario*

The first formal protest over the Ordinance was made by Benazir Bhutto on 6 October 1990. She declared that the law enforced on 3 October 1990 was not completely Islamic, and that it did not take into account the demands of the present time. “It is a horrible law issued in the name of Islam”, she insisted.⁸²

The second protest, lodged by the country’s transport industry, was louder and practical. On 6 November 1990, the country was brought to a halt by an industry strike known as the ‘wheel-jam-strike’. They demanded that the Government withdraw the new Ordinance. The *qisas* and *diyat* law had amended section 304-A of the PPC that dealt with punishing the causing of death by a rash and negligent act. Any driver who caused the death of a person in the course of driving was apprehended and prosecuted under this section. Under section 304-A, causing the death of a person by doing any rash or negligent act not amounting to culpable homicide was punishable with imprisonment which could be extended to ten years and/or with a fine.⁸³ The offence was also bailable under schedule II of the CrPC, although it was not compoundable, and a magistrate of first class was empowered to try the offence.

Section 320 of the new *qisas* and *diyat* Ordinance of 1990 governed the offence of rash or negligent driving under the heading of *qatl-i-*

⁷⁹ Section 338-H, PPC.

⁸⁰ See footnote 617.

⁸¹ Criminal Law (Amendment) Act, 1997; PLD 1997 CS 336.

⁸² *Jang*, 6 October 1990, London (my translation).

⁸³ Section 304-A, PPC, 1860, *The Major Acts*, Khyber Law Publishers, Lahore, 1988, p. 72.

khata.⁸⁴ This new section did not change the tenure of imprisonment provided in the repealed law, but made the sentence of imprisonment additional to the *diyat*⁸⁵ payable to the heirs of the victim.⁸⁶ Moreover, the offence was made non-bailable and triable by the Court of Session.⁸⁷ However, the offence, like all others mentioned in chapter XVI of the PPC, was declared compoundable.

The transport industry's stance was that *diyat* in addition to imprisonment was unjustified. Furthermore, drivers should not be made liable to pay *diyat* by themselves. They pointed out that if it was primarily essential to pay *diyat* to the heirs of the victim, then the agencies, e.g., their unions and the insurance bodies, could be made liable. They were also strongly against making the offence non-bailable.⁸⁸ Their strike continued until 13 November 1990,⁸⁹ and in order to end the crisis the Government decided to suspend the operation of the Ordinance for a few days.⁹⁰ Despite government officials' claims that they would not succumb to pressure, since the matter concerned the application of an Islamic law, most of the transport industry's demands were finally met. When the 'new law' was reintroduced through the next Ordinance (issued on 4 January 1991),⁹¹ people found out that the Government had amended it to incorporate what the transport industry had asked for. The definition of *diyat* provided in section 299 (e) was amended. Under this Ordinance, *diyat* payable to the heirs of the victim could be paid by anyone, not necessarily the offender. The offence was also made bailable. To date, it is still unclear whether the original or amended law is 'more Islamic'.

The hardship which the definition and application of *qatl-i-khata* by rash or negligent driving might have caused was felt and raised at a public level soon after the enforcement of the *qisas* and *diyat* law, by a section of society that was generally considered to be illiterate.⁹² Since the provisions had affected the drivers as a class, they managed to

⁸⁴ Homicide by mistake.

⁸⁵ Section 320, Criminal Law (Second Amendment) Ordinance, 1990.

⁸⁶ Section 299(e), Criminal Law (Second Amendment) Ordinance, 1990.

⁸⁷ Amendment in Schedule II of the Code of Criminal Procedure, 1898, introduced by the Criminal Law (Second Amendment) Ordinance, 1990; PLD 1991 CS 209.

⁸⁸ *Musawat*, 14 November 1989.

⁸⁹ *Jang*, 14 November 1990, London.

⁹⁰ S.U. Kaul, "Is this *Qisas* Fair?", *Frontier Post*, 21 November 1990.

⁹¹ Ordinance I of 1991, Criminal Law (Second Amendment) Ordinance, 1990.

⁹² A report published in *Imroze*, 11 November 1990, stated that most bus and taxi drivers could not even read or write their names.

successfully protest against them; however, other provisions of the law that unjustly affected the offenders, victims or their families, who had no union to help them oppose the law collectively, remained unchallenged by the public.⁹³ Nevertheless, the higher judiciary kept finding faults with this hasty legislation, as this study demonstrates.

5.1.3 Application of the qisas and diyat law

It was stated earlier that section 338–H in the Ordinance of 1990 extended the benefits of sections 309 (waiver, or *afw*) and 310 (composition on accepting *badl-i-sulh*) to cases pending before the courts immediately before the commencement of the Ordinance. It meant that the legal heirs of the victim were allowed to waive their right of *qisas* with or without any compensation, even in cases registered under the ‘old law’. In cases of *qatl-i-amd*, legal heirs could also compound the offence on accepting *badl-i-sulh*.

Therefore, soon after the promulgation of the Ordinance of 1990, applications for permission to enter into compromise began pouring into the courts of law. The Ordinance did not equip the courts with guidelines or rules under which they might grant or withhold consent to the parties wishing to enter into a compromise. Neither did the judiciary itself, for the purposes of clarity, consistency and transparency, develop any standard or objective criterion that could be followed by all courts of law in permitting the parties to compound the offence of murder. In *Mushtaq v. State*,⁹⁴ the trial court sentenced Mushtaq to death for murdering his grandfather. This case was tried under the defunct law, however, Mushtaq’s appeal against the judgment was pending in the High Court when the new law came into existence. On 22 August 1990, after six days of the promulgation of Ordinance V, the victim’s heirs appeared before the High Court, stating that they had pardoned the accused in the name of Allah and applied for the Court’s permission to enter into a compromise with the offender. The heirs of the deceased, who was the convict’s grandfather, were the father, uncle(s) and aunt(s)

⁹³ For instance, the union of bus drivers decided to pay the amount of *diyat* on behalf of a commercial driver and union member. However, for private drivers no institution was established which would pay the victim of an accident if the driver was unable to pay the amount of *diyat*. Therefore, both the driver and the victim of the accident suffer: the driver cannot get out of prison because of failing to pay *diyat* and the victim gets no compensation.

⁹⁴ 1990 ALD 675.

if any. The father thus sought the permission of the Court to enter into a compromise with his son, who was condemned to death by the trial court for murdering his father, the accused's grandfather. The State did not object and the Court had no guidelines to follow, thus, the compromise was allowed and the accused was acquitted immediately. A similar decision was made by the High Court in the case of *Muhammad Sarwar v. State*.⁹⁵

Permission to enter into compromises in both of the abovementioned cases was granted under the first ordinance—*Criminal Law (Amendment) Ordinance, 1990*—and before the issuance of Ordinance VII. Even when Ordinance VII, which replaced all the provisions of Chapter XVI of *The Penal Code, 1860*, was issued it did not repeal Ordinance V of 1990 ('Ordinance V'). Therefore, both ordinances were available to astute lawyers, who would naturally invoke the one that would serve the purpose of their client. They were able to do this due to the inappropriate haste with which the Government promulgated the two ordinances. Under Ordinance V, the parties could enter into a compromise only with the permission of the court and without any reference to *diyat*, *badl-i-sulh*. In contrast, under Ordinance VII, the parties were not required to seek permission of the court before entering into a compromise. Parties could waive their right of *qisas* with or without compensation and then inform the court about their compromise.⁹⁶

This was the same, for instance, in the matter of *Zulfiqar v. the State*.⁹⁷ Barrister Batalvi invoked Ordinance V and asked for the acquittal of his accused client on the basis of pardon (*afw*) granted by the legal heirs of the deceased. The parties involved in the case had killed three persons of each others' family. Zulfiqar had killed Muhammad Yousaf, for which the trial court had sentenced him to death. During the prosecution of the *Zulfiqar* case, the complainant party killed two

⁹⁵ 1990 ALD 753.

⁹⁶ Section 338-E of Ordinance VII states: "Subject to the provisions of this chapter and notwithstanding anything contained in section 345 of the *CrPC, 1898*, all offences under this chapter may be waived or compounded and the provisions of sections 309 and 310 shall, mutatis mutandis, apply to the waiver or compounding of the offences". Section 4 of Ordinance V had amended section 345 of the *CrPC*, under which the offence of murder was made compoundable with the permission of the court. Since section 338-E of Ordinance VII stated that, notwithstanding anything contained in section 345 of the *CrPC*, parties entering into compromise under Ordinance VII were not obliged to take the court's permission. This point, with a slight difference, has been discussed in the *Mohammad Ashraf* case, see footnote 134.

⁹⁷ 1991 MLD 2408.

of Zulfiqar's brothers. The persons charged with murdering them, i.e., the complainant party, had already won acquittal on account of compromise between the parties. Now it was Zulfiqar's turn to escape the death sentence on the basis of compromise. Since the legal heirs of the deceased had pardoned Zulfiqar and the High Court was satisfied with the genuineness of the compromise, it acquitted Zulfiqar. Thus, two people who on three occasions had shown society that they had no respect for human life and could take the law into their own hands when they liked were allowed to compromise with each other without any reference to the threat they posed to society.

5.1.3.1 *Retrospective application of the law*

The replaced law was to apply prospectively, except for its provisions pertaining to waiver (section 309), compounding of *qisas* in cases of *qatl-i-amd* (section 310) and hurt (section 338–E).⁹⁸ In cases pending before courts immediately before the commencement of Ordinance VII, parties were allowed to invoke these sections so as to draw benefit from the provisions of the law of *qisas* and *diyat* that allowed them to compound the offences affecting body and life, perhaps at the cost of peace in society.

The Lahore High Court had proceeded further with the interpretation of section 338–E. The Court held that the law did not only allow composition of offences in cases pending before the courts immediately before the promulgation of the Ordinance, but also empowered courts to permit composition in cases that had already been decided and in which convicts were serving their sentences.⁹⁹ Interestingly, the Court completely ignored section 345(2) of the CrPC, whereby the cases pending before courts could only be compounded with the permission of the court. The Court reviewed the judgment in a case delivered under the defunct law on the basis of the contents of the new law and thereby acquitted the accused, accepting the compromise between the parties.

It was observed in other judgments¹⁰⁰ that the power to allow compromises in cases that had been decided by courts before the new law came into effect was vested only in the Government. However, the Lahore High Court observed that such an interpretation was defective since the

⁹⁸ Section 338–H, the Ordinance of 1990.

⁹⁹ *Mst. Raia Bibi v. Muhammad Arshad*, 1994 MLD 1.

¹⁰⁰ PLD 1980 Peshawar 1 and PLD 1980 FSC 1.

Executive authorities would not be able to sentence the accused under *tazir* while allowing compromise between the parties. The Court held that “therefore, the power to permit compromises in those cases also rested with the judiciary”. This judgment was not widely followed.

The first challenge against the application of provisions of the new law retrospectively to cases tried under the defunct law appeared in the case of *Sardar Ali v. The State*.¹⁰¹ A Full Bench consisting of five judges of the Supreme Court was constituted and two senior advocates of the Supreme Court were called as *amicus curiae*. The issue was how the court could allow the parties to enter into a compromise on account of *badl-i-sulh*, in a case where the accused were not sentenced to death. Under section 310 of the new law, the legal heirs of the deceased were allowed to compound the offence on accepting *badl-i-sulh*. Since *qisas* under section 299–K¹⁰² was defined as ‘causing similar hurt at the same part of the body of the convict as he had caused to the victim’ and the accused were not sentenced to death but life imprisonment, the question of the legal heirs accepting *badl-i-sulh* to waive their right of *qisas* could not have arisen.

Having raised this substantial issue, the Court proceeded to decide the case on particularly unsubstantial grounds. Firstly, the court invoked section 10 of Ordinance 1 of 1991,¹⁰³ which amended section 345 of the CrPC to the effect that *qatl-i-amd* and other offences pertaining to *qisas* and *diyat* law were declared compoundable. Secondly, it relied on section 338–H of the new law, which states:

Subject to the provisions of this chapter and section 345 of the code of criminal procedure, 1898, all offences under this chapter may be waived or compounded and provisions of sections 309 and 310 shall *mutatis mutandis*, apply to the waiver or compounding of such offences.

Leaving the matter unresolved, they questioned “whether the permission to compound the offence should be allowed or not”. Since the accused’s party had brought 171,000 rupees (approximately £1700) to the Court to pay the legal heirs of the deceased, which showed a strong desire on the part of the accused’s party to compound the offence and “end their differences”, the compromise was allowed.

¹⁰¹ PLD 1991 SC 202.

¹⁰² Criminal Law (Second Amendment) Ordinance, 1991.

¹⁰³ See footnote 6.

The Court did not seriously contemplate the point that the benefit of section 338–H could only be extended to cases which were decided under the new law. The wording of the section was “under this chapter”, which had replaced the old Chapter XVI of the PPC, under which the offence was originally committed and the accused were tried.

Interestingly, five months later this judgment came under criticism by a Full Bench of the Lahore High Court in *Muhammad Ashraf v. The State*.¹⁰⁴ The High Court compared the previous law of culpable homicide and murder with the substituted one and held that the change in the law was a change not in nomenclature but in substance. It warned:

any apparent similarity in the two provisions, e.g., culpable homicide amounting to murder and *qatl-i-amd*, is not to mislead us, as this similarity is due to the fact that Islamic Penal Laws were in force when the British acquired suzerainty over the sub-continent and the new law was enforced to serve the imperial interests, retaining some of the features of the old law.¹⁰⁵

Thus, if there was no similarity between the two provisions, section 338–H was available to the convicts of offences of culpable homicide amounting to murder as well as other offences which were substituted. Although the Full Bench agreed to follow the Supreme Court’s judgment, it thus disagreed with both the Court’s analysis and conclusion. The High Court argued that the Supreme Court had wrongly applied section 338–H in the *Sardar Ali* case. Nevertheless, since the latter’s judgment was binding on the High Court, it applied the *Sardar Ali* dictum in three petitions it was dealing with. It deplored the fact that the Criminal Law (Amendment) Ordinance, 1990, was not brought to the Supreme Court’s notice and therefore that the effects of the enforcement of this Ordinance had not been noticed and examined.¹⁰⁶

5.1.3.2 *Flaws in the law: evaluation and analysis*

In addition to the lacuna examined above, the Lahore High Court pointed out other flaws in the law. Commenting on section 338–E, whereby courts were empowered to punish the offender despite composition by way of waiver or *sulh-i-badli*, the Court stated:

¹⁰⁴ PLD 1991 Lah 347.

¹⁰⁵ *Ibid.*, p. 351.

¹⁰⁶ *Ibid.*, p. 368.

neither the quantum of imprisonment has been provided, nor the circumstances that are to be kept in view have been spelt out, nor have any guiding principles been laid down.¹⁰⁷

Even section 338–F, enabling provision of the law that empowers courts to interpret and apply the provisions of law under the guidance of the injunctions of the Quran and Sunnah was frowned upon by the court. The Full Bench held that “such unlimited powers of the court were likely to lead to injustice and arbitrariness”¹⁰⁸

The Court advised the legislature that it should lay down precisely the circumstances in which *tazir* could be inflicted despite waiver and in receipt of compensation. Alluding to the general impact of the law that had emerged in public in the preceding eighth months, the Court observed,

the impression that the provisions relating to the offence of *qatl* and hurt as enjoined in the Quran and Sunnah have been introduced, not as a mere pretence and as reality, Islamic penal laws have been enforced and put into real practice must be dispelled.

After highlighting these glaring errors in the text of the law, the Bench then shed light on the scheme of the *qisas* and *diyat* law as it had appeared in the Ordinance. It controverted the provision of *tazir*, under which courts were empowered to punish an accused despite *afw* (waiver), with the support of a Quranic verse which states: “And one is slain wrongly, we gave his heirs authority to demand *qisas* or to forgive” (Q. 17:33).¹⁰⁹

In light of this verse, the Court emphasised that in a case of murder, the authority to demand *qisas* or forgiveness of the accused was given exclusively to the heirs of the deceased and that no authority could distribute this right. The Court surveyed the opinions of other jurists¹¹⁰ of Islam and pointed out that, unless a murderer was notorious for his mischievous activities and a danger to public peace and tranquillity, the punishment under *tazir* was not justified. It held that

the legislature should, therefore, prescribe the acts of commission and omission or the attending circumstances of the offence due to which the

¹⁰⁷ Ibid., p. 369.

¹⁰⁸ Ibid., p. 373.

¹⁰⁹ Ibid., p. 370.

¹¹⁰ Ibn Hazm, Hafiz ibn Qudama, Hafiz Ibn Qayyim, Ibn Rushd, and Abdul Rehman Jazaeri.

offender will render himself liable to be punished with the additional punishment by way of *tazir*, otherwise, the very purpose of enforcing the law of the Quran and Sunnah relating to *Qatl* and *Jurh* (hurt) will stand frustrated and the existing offences of murder and hurt will remain operative and in force for all practical purposes.¹¹¹

In another judgment, Justice Khalil-ur-Rehman Ramday politely criticised the new law, commenting that it did not take into account the exceptions provided under section 300 of the repealed law. Justice Ramday, while delivering a judgment in 1993, three years after the promulgation of the new law and when it had already been repeated through twelve consecutive ordinances, stated:

the omission is understandable as the process of bringing the old provisions of the law on the subject into conformity with the injunctions of Islam is still in its infancy, and attaining the expertise about the law which has now been put in practice is likely to take some time.¹¹²

It was only through the *Criminal Law (Second Amendment) Ordinance, 1991*, that provisions of both the *Criminal Law (Amendment) Ordinance V* and *Criminal Law (Second Amendment) Ordinance VII* were consolidated into one ordinance and were repealed.¹¹³

The rights of society to punish a person who kills one of its members were not at all regarded when framing section 338-F of the Ordinance of 1990. The State perhaps did not envisage the consequences of such a provision, i.e., that once the parties decided to enter into a compromise, the court would not have any power to sentence the accused under *tazir*,¹¹⁴ no matter how brutal, vicious or violent the murder was.

5.2 EVIDENCE UNDER THE QISAS AND DIYAT LAW: SECTION 304

5.2.1 *What makes the conviction under qisas a conviction under tazir?*

Section 304 of the amended PPC spells out the proof for *qatl-i-amd* liable to *qisas* only. It does not provide the proof for *qatl-i-amd* liable to *tazir*, proof for *qatl-i-shibh-i-amd* as well as liable to *diyat* and

¹¹¹ PLD 1991 Lah 347, p. 377.

¹¹² *Ghulam Yasin v. The State*, PLD 1994 Lah 392.

¹¹³ Section 14, Criminal Law (Second Amendment) Ordinance, 1991, n. 6.

¹¹⁴ Section 311 of the new law empowers courts to punish the accused, irrespective of the compromise between the parties. See also the Maliki school perspective on this in Tanzil ur Rahman, *Islami qavanin: hudud, qisas, diyat va tazirat*, Lahore, 1998.

imprisonment,¹¹⁵ proof of *qatl-i-khata* liable to be punished with *diyat* and imprisonment¹¹⁶ and the proof of *qatl-i-bis-sabab* liable to *diyat* only.¹¹⁷ The proof for *qatl-i-amd* liable to *qisas*, under section 304, is as follows:

- 1) the accused makes a voluntary and true confession of the commission of the offence before a competent court to try the offence; or
- 2) by the evidence as provided in Article 17 of *Qanun-i-Shahadat*, 1984 (P.O. no. 10 of 1984).

Article 17 was the only significant change made to *The Evidence Act of 1872* when it was Islamised in 1984 and its name changed to *Qanun-i-Shahadat Order, 1984*. The article provides that the competence and number of witnesses required in any case shall be determined in accordance with the injunctions of Islam, as laid down in the Quran and Sunnah.¹¹⁸ The legislature again shirked its responsibility to ponder, discover, explicate and then legislate in accordance with such injunctions, as to the number and competence of the witnesses required in a case or under a given law. This onerous task was handed down to the wisdom and intelligence of individuals who had gained the chance of becoming presiding officers/judges in particular cases. Consequently, they took over this task and decided on the 'appropriate' number and competence of witnesses.

However, the individual presiding officers/judges may have had different approaches towards the Islamic law of evidence and understandings of the requirement of evidence in particular offences. They could also have belonged to different schools of thought in Islam.¹¹⁹ As can be seen in *Ghulam Murtaza v. The State* (PLD 1989 Karachi 171), decided by Justice Tanzilur Rehman 10 months prior to the enforcement of

¹¹⁵ Sections 315 and 316.

¹¹⁶ Sections 318, 319 and 320.

¹¹⁷ Sections 321 and 322.

¹¹⁸ The complete article is as follows: "(1) The competence of a person to testify, and the number of witnesses required in any case shall be determined in accordance with the injunctions of Islam as laid down in the Holy Quran and Sunnah. (2) Unless otherwise provided in any law relating to the enforcement of *Hudud* or any other Special Law (a) in matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men, or one man and two women, so that one may remind the other, if necessary, and evidence shall be read accordingly; and (b) in all other matters, the court may accept, act on the testimony of one man or one woman, or such other evidence as the circumstances of the case may warrant."

¹¹⁹ For instance, the Maliki school differentiates between the requirements of testimony for the purpose of *qisas* for homicide and *qisas* for injuries. Ibn Furhun, *Tabsirah al-Ahkam*, quoted in Awadah, *op. cit.*, 1982, p. 125.

the *qisas* and *diyat* law, it was held that to punish a convict of murder with the death sentence, there must be evidence from two adult male witnesses of unquestioned integrity, as required under the injunctions of Islam, as provided in the Quran and Sunnah.

Under the Islamic law of evidence,¹²⁰ *tazkiya al-shahud* (purgation of a witness)¹²¹ is an important element of *Shahadah* (testimony), without which the evidence of a witness cannot be admitted by the court. The term '*tazkiya al-shahud*' is not mentioned in the *Qanun-i-Shahadat Order, 1984*. It was mentioned in all the other Islamic penal laws enforced by Zia, with regard to proof of those offences liable to *hadd*,¹²² but was not specifically defined therein. However, the section dealing with the requisites of proof states that the witness must fulfil the requirements of *tazkiya al-shahud* that they be truthful persons and abstain from the major sins (*kabir*).¹²³ The section further explains that *tazkiya al-shahud* means the mode of enquiry adopted by a court to satisfy itself as to the credibility of the witness.

The trial court in *Ghulam Ali v. The State*¹²⁴ adopted this method and sentenced Ghulam Ali with the amputation of his right hand as a sentence for theft liable to *hadd*. Ali had stolen a wall clock from a mosque and been caught red-handed. The Federal Shariat Court concurred with the mode of enquiry adopted by the trial court with regard to *tazkiya al-shahud* of witnesses and maintained the sentence. The Supreme Court, however, held that the mode adopted by the trial court to fulfil the requirements of *tazkiya al-shahud* was a "mockery of Islamic law of Evidence" and acquitted the accused.

¹²⁰ For Islamic law of evidence, see generally, Anwarullah, *The Islamic Law of Evidence*, Islamabad, 1994; Mamaoun Salama, "General Principles of Criminal Evidence in Islamic Jurisprudence" in *The Islamic Criminal Justice System*, ed. Cherif Bassiouni, London, 1982; Wael B. Hallaq, "On Inductive Corroboration, Probability and Certainty in Sunni Legal Thought" in *Law and Legal Theory in Classical and Medieval Islam*, Variorum, 1995; Tanzil-ur-Rehman, "Some Aspect of the Islamic Law of Evidence" in *Essays on Islam*, Lahore, 1988; Mohammad Ibrahim bin Ahmad, *The Testimony of Witness in Islamic Criminal Jurisprudence*, unpublished PhD thesis, University of Edinburgh, 1992.

¹²¹ The procedure of this examination is that when the witnesses have given their testimony, the judge shall ask the defendant whether the witnesses are truthful or not; if the answer is negative, the judge will then start examining the credibility of the witnesses.

¹²² For instance, see section 7 of the Offences Against Property (Enforcement of Hudud) Ordinance, 1979.

¹²³ *Ibid.*

¹²⁴ PLD 1986 SC 741.

The Shariat Appellate Bench of the Supreme Court held that that *tazkiya al-shahud*, according to all accepted versions of the definition, could be carried out in either one or both of the modes, i.e., ‘secret’¹²⁵ and ‘open’.¹²⁶ In this case, the trial court had recalled all the prosecution witnesses after they had deposed against the accused and asked various questions regarding their character and conduct. Thereafter, the court had asked police to inquire about their character. The police constable reported that the witnesses had no criminal record; his superior officer verified the report. The Supreme Court did not approve of this modern application of the principle of *tazkiya al-shahud*.

The above judgment was announced before the application of the *qisas* and *diyat* law. Following the introduction of this law came the judgment in *Sanaullah v. The State*.¹²⁷ In this case, the FSC held that *tazkiya al-shahud* is obligatory in cases punishable with *hadd* and *qisas*. Although in *Ghulam Ali* the Supreme court had reprimanded the FSC and the trial court, the FSC in this case held:

it seems that the learned Sessions Judges or subordinate Judiciary, as a whole, particularly the Sessions/Additional Sessions Judges who try *Hudud* cases know very little about the concept, scope and essentials of *tazkiya-tul-shahood*.

Justice Tanzil-ur-Rehamn authored a 50-page judgment explaining matters regarding and surrounding *tazkiya al-shahud*.

Abdul Qadir Audah claims that the “methods of proof in any penal system reflect the legislators’ desire to widen or limit the number of cases in which a particular punishment may or may not be inflicted”.¹²⁸

¹²⁵ The technical term for this examination is ‘*mastura*’. Precisely speaking, it is conducted by writing a secret letter in which the judge puts down the name, title and address of the witness and the address of the mosque where he usually prays, along with the name of the person against whom he deposes. This letter is then sealed and handed to a person called a *muzaki* (witness examiner). The *muzaki* then goes to the places and people from whom information regarding that person could be obtained. On the basis of this information, he concludes whether the witness is an *adil* (just) or not. The *muzaki* is selected by the judge from the pious people who are not tempted by wealth. For details, see Muhammad Zayd al-Anbani, *kitab Mabaiith fi al-Fiqh al-Islam*, Cairo, 1983.

¹²⁶ In open examination, the witnesses are brought before a judge in the presence of both parties to the proceedings and the *muzaki*. The judge will then ask the *muzaki* about the credibility of the witness. If he says that the witness is *adil*, the accused may still object to his statement and prove that the witness is not just, i.e., incompetent. For details, see al-Anbani, *op. cit.*, 1983.

¹²⁷ PLD 1991 FSC 186.

¹²⁸ Audah, *op. cit.*, 1982, p. 124.

Following the above two judgments, not a single punishment delivered by a trial court under *qisas* could ever attain finality. Retired Chief Justice of Pakistan, Justice Sajjad Ali Shah, who spent most of his life in judicial service, told this author that he himself might not be able to fulfil all the requirements of *tazkiya al-shahud*.¹²⁹ There are cases wherein the trial court punished the accused under *qisas* but those convictions were then altered by a higher court to punishments under *tazir*, since the requirements under *tazkiya al-shahud* had not been fulfilled.¹³⁰ It may also be noted that under the Islamic law of evidence, there must be evidence from two Muslim male adults to prove an offence liable to *qisas*. Evidence from women and non-Muslims is not accepted for this purpose.¹³¹

The only method under which an accused could be convicted with the sentence of *qisas* was thus a confession before a court competent to try that offence. There were some cases wherein the accused confessed their crimes before the magistrates,¹³² but since they had no jurisdiction to try the offence of murder, the confessions were not relied upon by the higher courts, which then dealt with those cases by evaluating any other evidence available on record. Furthermore, the rules dealing with the confession of offences in the Islamic law of evidence are also very strict.¹³³

Interestingly, although the offences which are liable to the punishments of *diyat* (imprisonment and even death under *tazir*) are recognised under Islam, the requirements of evidence relating to the

¹²⁹ An interview with the retired Chief Justice was taken on 19 January 2001 at his Karachi residence. He seems right. According to the qualifications of a just witness, a witness *inter alia* who habitually misses his congregational prayers, takes interest in his money, abuses the companions of the prophet, urinates on his way, eats while walking, or stands up in reception to a cruel ruler is not a reliable witness. See Syed Mateen Hashmi, *Islam ka Qanun-i-Shahadat*, vol. 1, Lahore, pp. 127–44, and sources therein.

¹³⁰ *Wajid Umar v. The State*, 1992 PCrLJ 1536; *Ghulam Haider v. The State*, 1996 PCrLJ 2021; *Mudassar v. The State*, 1996 SCMR 3; *Muhammad Iqbal v. The State*, 1996 PCrLJ 1740; *Mohammad Zial-Huq v. The State*, 1996 SCMR 869; *Shujat Ali v. The State*, 1996 MLD 1325; *Sambli Khan v. The State*, PLD 1998 Peshawar 101; *Abdul Salam v. The State*, 1997 SCMR 29; *Muhammad Yaqub v. The State*, 1998 PCrLJ 638; *Muhammad Pervaiz v. The State*, 2000 PCrLJ 147; *Sarfraz v. The State*, 200 SCMR 1758.

¹³¹ Hashmi, *Islam ka Qanun-i-Shahadat*, 1981, pp. 127–44 and sources therein; also see *Ghulam Murtaza v. The State*, PLD 1989 Kar 293, and the *Sanaullah* case, PLD 1991 FSC 186, p. 221.

¹³² *Abdul Zahir v. The State*, 2000 SCMR 406; *Abdus Salam v. The State*, 2000 SCMR 338; *Nasreen Akhtar v. The State*, 1999 SCMR 1744; *Mohammad Aslam v. Shaukat Ali*, 1997 SCMR 1307.

¹³³ PLD 1991 FSC 186.

competence of witnesses are less strict. Why can the offences of *qatl-i-bis-sabab*, *qatl-i-khata* or *qatl-i-shib-i-amd* not be proved by ordinary, secular evidence? Why can *qatl-i-amd* liable to death under *tazir* be proved by ordinary, secular evidence, whereas *qatl-i-amd* liable to *qisas* must be proved by evidence which seems to be unavailable in Pakistan? It is outside the scope of this chapter to address these questions exhaustively, but it would suffice to say they do indicate that a piecemeal legislation made under political motivations leaves large gaps and unanswerable questions in the law, which cannot be satisfied by judicial interpretation.

5.3 ANALYSIS OF CASE DECISIONS UNDER THE QISAS AND *DIYAT* LAW

5.3.1 *Composition under the law: sections 309 and 310*

5.3.1.1 *All in the name of God*

The enforcement of the *qisas* and *diyat* law brought a flood of compromise applications in murder cases into the courts of law. The general public perception and understanding of the new law was that it allowed *razinama* (literally ‘agreement’ or ‘settlement’) in murder cases. This is reflected in the number of *razinamas* executed between parties—accused/convict and the legal heirs of the deceased—in the ten districts courts that form the jurisdiction of Multan High Court as well as the area of this field research (see Chapter Six). An analysis of case law also shows that *razinama* applications poured into law courts and were liberally granted. In a great number of pending cases, the legal heirs submitted written applications to the courts stating they had waived their right of *qisas* in the name of God,¹³⁴ thus the convicts could be acquitted of the offence. The analysis of the reported judgments shows that courts allowed such applications without detailed scrutiny and an examination of the law.

¹³⁴ For instance, see, *Muhammad Akram v. The State*, 1992 ALD 383(2); *Muhammad Ashraf v. The State*, 1992 ALD 140; *Shabbir Ahmad v. The State*, 1992 ALD 265; *Abdul Majid v. The State*, 1992 ALD 258; *Shaukat Ali v. The State*, 1992 ALD 348(2); *Hakim Ali v. The State*, 1992 ALD 209; *Mst Bashiran v. Haq Nawaz and 6 Others*, 1994 SCMR 1145; *Sarwar Khan v. The State*, 1994 SCMR 1262; *Ijaz Ahmad v. The State*, 1994 SCMR 1247; *Mohammad Irshad v. The State*, 1997 SCMR 951; *Sharafat Ali v. The State*, 1997 PCrLJ 199.

In *Mohammad Suleman v. The State*,¹³⁵ the High Court acquitted five convicts who had been sentenced to death by the trial court for murdering three sons of Mohammad Siddique. A year after the promulgation of Ordinance VII, Siddique and his wife waived their right of *qisas* against the convicts (in the name of God). Although they had experienced the hardship, ordeal and agony of the murder trial and even seen the culprits convicted, following the enforcement of the new law, they suddenly moved a petition in the High Court stating they had pardoned the convicts. The Lahore High Court held that “the compromise entered into between the parties seems to be genuine. There is nothing on the record to hold that the compromise was the result of any misconception or coercion”. The Court certainly did not seem to include in its definition of ‘coercion’ the social pressure and constraints put on the bereaved parents by the relatives of the murderers. The law worked effectively on such a mismatch, *viz.* five murder convicts and their families, against the two depressed, elderly parents, deeply wounded by the murder of their three sons.

Not all legal heirs gave their pardons solely ‘in the name of God’; some demanded *badl-i-sulh* (literally ‘exchange for peace’; technically, consideration for settlement) as well. Convicts thus bought acquittals by fulfilling demands of the heirs of the deceased, which they put forward as *badl-i-sulh*.¹³⁶ This was sometimes even less than the amount prescribed under section 323 of the new law.¹³⁷ When reviewing the law (in Part One of this chapter), it was stated that females could also be ‘given’ in *badl-i-sulh*. However, a *badl-i-sulh* that is based on only giving a female in marriage was deemed to be invalid.

In *Yara v. The State*,¹³⁸ a convict who had initially given ‘only’ his two daughters in *badl-i-sulh* later supplemented this consideration with 200,000 rupees, having been told that it would not otherwise be a valid *badl-i-sulh* (under the proviso of section 10 of the law). The Supreme Court accepted this compromise as valid and ordered for the release of the convict, who was otherwise serving a life sentence. It must be noted that a son of the deceased, who had married the convict’s

¹³⁵ 1992 PCrLJ 1093.

¹³⁶ *Hamid Khan v. The State*, 1992 ALD 383(1); *Shahadat v. The State*, 1992 ALD 367; *Ghulam Haider v. The State*, 1992 ALD 298; *Ali Ahmad v. The State*, 1992 ALD 349(1); *Muhammad Ishaq v. The State*, 1993 SCMR 1989; *Muhammad Sharif v. The State*, 1994 PCrLJ 2477.

¹³⁷ For instance, see *Muhammad Rafique v. The State*, 1993 SCMR 1990.

¹³⁸ 1992 SCMR 1283.

daughter, did not even choose to appear before the Court to verify the genuineness of the compromise. Nevertheless, the Court still accepted the compromise.

In the early days of this law's application, the courts were so keen to give weight to the composition factor, they even counted an invalid compromise application as a mitigating circumstance to alter the legal sentence passed by the trial court. Although such a wide scope for 'compromise' could not have been envisaged by Ordinance VII, it was understood as such by the courts, which, it could be argued, perhaps even operated outside the legal framework of the criminal law of Pakistan.

This misuse of the compromise feature—which may also be termed 'judicial appropriation' of the law—is illustrated in *Manzoor Ahmad v. The State*.¹³⁹ Manzoor, the appellant, was charged with murdering Mst. Denan. The trial court found him guilty and sentenced him to death. The High Court concurred with the appreciation of the evidence by the trial court. However, due to the fact that a miscellaneous application of compromise had been filed under the new law by the complainant (who was not in fact the legal heir of the deceased) and his wife (who was also not the sole legal heir of the deceased, as the Court itself observed), the death sentence was commuted by the High Court into life imprisonment. The provision of law under which the Court derived its powers to commute a sentence based on an invalid and unsubstantiated miscellaneous application, without even asking the views of all the legal heirs of the deceased, was not actually available in the statute. The Court penned only two sentences in this respect:

we do not see any cogent reason to acquit the appellant on the basis of this miscellaneous application. However, the benefit of this application on the question of sentence can/may be given to the appellant.

The Court thus reduced the sentence, despite finding that the evidence against the accused was convincing and the prosecution had successfully brought a guilty verdict.

Having considered the number of compromise applications being made, the mis-statement of facts by parties in order to get such applications accepted, the interest of legal heirs of the deceased, and the often arbitrary exercise of discretion by the courts when accepting these

¹³⁹ 1991 PCrLJ 1480.

applications, the Supreme Court set out a *pro forma* to be filled in by the parties prior to submitting such application. The form required the parties to state, *inter alia*, the correct rate of silver (in order to calculate the *badl-i-sulh* and *diyat*), their relationship with the victim and the names of any minors and other heirs of the deceased. However, most parties paid little attention to these particulars, a fact with which the Supreme Court expressed its displeasure in the *Abdul Ghafoor* case.¹⁴⁰ The Court had discovered in this case that the compromise application was moved under coercion by the convict's party and thus not based on free will. The case had come to surface in February 1992, sixteen months after the promulgation of the *qisas* and *diyat* law. Although most cases are compounded at the trial stage (and sometimes even before the initiation of the trial), little was known about the *pro forma* in the trial courts¹⁴¹ until 2002. This may be because the Supreme Court could formulate rules only for itself and trial courts were regulated by the Criminal Procedure Code, wherein there was no mention of any such *pro forma*. The question remains that if the *pro forma* was able to check for any misstatements and suppression of the facts as well as safeguard the interest of minors, then why was it not introduced to other courts of law that were releasing accused persons on the basis of compromises? Why was it only made mandatory to fill them out in the Supreme Court?

5.3.1.2 *Compromises without completion of Police investigation*

Since the adult heirs of the deceased are allowed by the *qisas* and *diyat* law to compound the right of *qisas* against the offender(s) *at any time*, there have been cases where the accused/offenders paid the amount of compensation/*diyat* even before the formal police investigation into the murder was complete, thus effectively bypassing all legal proceedings. Even though the law did not declare the offence of murder to be a bailable one, the courts began to release those accused on bail, pending trial, if they could show that the legal heirs of the deceased had either pardoned them or provided *badl-i-sulh*.

¹⁴⁰ *Abdul Ghafoor v. The State*, 1992 SCMR 1218; *Hasan Din v. The State*, PLD 1992 SC 246.

¹⁴¹ Interviews with lawyers of trial courts in twenty districts bar associations, 2002–2003.

In *Dawar v. The State*,¹⁴² a woman had accused three persons of the murder of her husband, who was killed on 5 November 1990. Two were arrested by the police and one absconded. The court released the two accused on bail on 1 June 1991, only five months after the murder was committed. The widow had appeared before the court and stated that the legal heirs of the deceased had waived their right of *qisas*. The release of the accused on bail actually amounted to a full acquittal in view of the findings given by the High Court in its judgment. The Court had held that it was well satisfied with the nature and requirements of the compromise, since the '*Shari diyat*' of 1,70,610 rupees had been paid to the heirs of the deceased. The minors had also waived their right of *qisas* through their *wali*, against the payment of their share of *badl-i-sulh*. The only option left with the trial court was that to punish the accused under *tazir*, but this was also eliminated by the High Court, which laid down that:

true pardoning or remission does not mean that the person in authority cannot award penal punishment, and section 311 PPC is also therefore vested with a power in the court to punish an offender with up to ten years imprisonment as *tazir* in its discretion. [...] In fact, the court shall exercise its discretion under section 311 PPC in awarding *tazir* punishment in a situation where the commission of an offence has simultaneously posed a threat to collective peace and tranquillity. Otherwise, the Shariah has given such right to the victim or his lawful heirs to forgive and compound the right of *qisas*.

The case was remanded back to the trial court, which could only sentence the accused if it could establish through the evidence that the murder of a person, who had left behind two minor sons, three daughters, a mother and a widow, was a threat to the collective peace and tranquillity of society.

It is important to note that the lower courts had cast doubts on the genuineness of the compromise, since the mother had not appeared before the court to certify the contents of the compromise deed. Surprisingly, the High Court accepted the widow's statement regarding the compromise on behalf of the mother of the deceased, even though the widow was not authorised by the law to make a statement on behalf of the deceased's mother, and the court could not accept such statement. Nevertheless, the Court *did* accept it and released the accused on bail.

¹⁴² 1991 MLD 1864.

The police thus had nothing to investigate and the trial court had no reason to try the offence, since the High Court was satisfied with the genuineness of the compromise and the correct application of law. The impact that such a judgment would have on other cases pending or coming to the subordinate judiciary is quite clear; it effectively empowered trial courts to accept the statement of one of the heirs of the deceased on behalf of the other(s).

The Sind High Court, in a novel interpretation of the law, ruled in *Muhammad Iqbal v. The State*¹⁴³ that pleading guilty was a prerequisite to the composition of an offence. The accused had denied the accusation but was convicted by the trial court. On appeal, the parties applied for permission to compound the offence. The Court disallowed the application, stating that “the offence may be compounded by the legal heir with the person who has committed the offence and not with one who is only accused of commission of such offence”.¹⁴⁴

Whereas the Peshawar High Court (in *Dawar v. The State*) entertained a compromise application without the police even inquiring as to the occurrence of the crime, the Sind High Court required the accused to confess the crime and hence did not find the trial court’s verdict in this respect sufficient to allow such an application.

5.3.1.3 *Absconder pardoned and acquitted*

The courts even extended the benefits of compromise to an absconding accused. In *Muhammad Nawaz v. The State*,¹⁴⁵ the trial court had sentenced the absconding accused and another to life imprisonment on two counts, for having caused the death of two persons. The High Court then granted permission to compound the offence with the fugitive and acquitted him from the charges.

5.3.1.4 *Compromise with females as the legal heirs of the deceased*

The majority of women in a patriarchal society such as Pakistan¹⁴⁶ spend their lives in the service of their male relatives. Due to social constraints, it is very difficult for a woman to establish and operate a home without the help of a male. Women are generally married into

¹⁴³ 2002 MLD 596.

¹⁴⁴ *Ibid.*, p. 603.

¹⁴⁵ 1998 MLD 1.

¹⁴⁶ See Ameera Javeria, “To be a Woman in Pakistan is to Ask for a Life of Subsistence”, *Journal of The Knight-Wallace Fellows at Michigan*, vol. 12, no. 1, 2001, p. 32.

an extended family, which provides the framework for their lives. Womankind Worldwide, an international NGO, explains that:

a divorced woman or a widow must turn to her father or brother, if they will have her; unless she has a grown up son under whose protection she can live. This is a powerful factor of control over women.¹⁴⁷

Women who do not have the protection of male members of their family, or have no family at all, tend to suffer the most. In this context, the assumption that a woman would be able to follow and prosecute the murder case of her husband, brother or father is merely a legal one that is put forward by proponents of the law. The reality, which everyone in Pakistan is aware of, is that Pakistani women generally cannot withstand family and societal pressures and follow a murder trial on their own. This is particularly the case when there is an easy option available—i.e., compromising the offence—which is strongly recommended by those around her, and when this act of pardoning (*afw*) the accused is preferable in Islam (under the general interpretation of *qisas* and *diyat* law).¹⁴⁸

The judiciary did not take this socio-culturally specific and relevant point into consideration when applying the provisions of sections 309 and 310 of the amended PPC in cases where the deceased had left behind only women and minors. Such participation by women in Pakistan—i.e., those left ‘on their own’ after the death of their close male relatives—could be said to be equivalent to coercion. In *Ghulam Ali v. Mst. Ghulam Sarwar Naqvi*¹⁴⁹ (a civil case), the Supreme Court acknowledged the reality of the social status of women on the subcontinent and observed that it is not very different to that of women in pre-Islamic Arabia. In this case, the Court declared a contract executed by a ‘*parda nashin*’¹⁵⁰ wherein she relinquished her right to the property

¹⁴⁷ See <http://www.womankind.org.uk/global%20reach/South%20Asia/pakistan.html> (accessed 18 July 2003).

¹⁴⁸ Generally, see Ayesha Jalal, “The Convenience of Subservience: Women and the State of Pakistan”, *Women, Islam and the State*, ed. Deniz Kandiyoti, Philadelphia, 1991; Farida Shaheed and K. Mumtaz, *Women in Pakistan: Two Steps Forward One Step Back*, London, 1987; Anita Waites, “The State and Civil Society in Pakistan”, *Contemporary South Asia*, vol. 4, no. 3, 1995, pp. 230–346; Rubya Mehdi, “The Offence of Rape in the Islamic Law of Pakistan”, *Women Living under Muslim Laws*, Dossier 18, BP 23, 34790 Grabels, France, July 1997.

¹⁴⁹ PLD 1990 SC 1.

¹⁵⁰ Literally, a woman who puts on a veil and normally spends her life within the four walls of her house; for further reference, see the judgment of the Privy Council cited in the case.

on account of love, as invalid, on the presumption that such contract might not have been based on free will. The Court held:

in case like the present one there will be a presumption otherwise; namely, that it was not on account of natural love but on account of social constraints which would be presently referred to, that “relinquishment” has taken place.

However, the presumption was not construed “otherwise” in contracts executed by women (as legal heirs of the deceased), whereby the offenders won acquittal under *qisas* and *diyat* law.¹⁵¹

In *Muhammad Yaqub v. The State*,¹⁵² the husband of Mst. Sakina Bibi had been murdered by Mohammad Yaqub, who was released by the court after having entered into a contract of *badl-i-sulh* of 171,000 rupees with the widow. The convict won acquittal from the court on payment of the consideration. It is striking that of the 171,000 rupees paid to the widow, she had to use 41,000 rupees to repay expenses incurred for the prosecution (a point noted by the court itself), whereas the accused/appellant was able to hire one of the best and most expensive criminal lawyers in Pakistan (Barrister Ejaz Hussain Batalvi).¹⁵³ A very wealthy murderer thus only paid 171,000 rupees (equal to £1700) to the widow of the deceased and got away without otherwise being punished for his crime, all with the blessings of the provisions of the Pakistani *qisas* and *diyat* law.

In *Parvez v. The State*,¹⁵⁴ the legal heir of the deceased was his sister. The trial court had sentenced the accused to death under the defunct law, but twelve months after the promulgation of the new law, the convict was acquitted by the appellate court. The bereaved sister, whose only brother had been murdered, apparently pardoned his murderer without demanding any compensation, i.e., ‘in the name of God’.

5.3.1.5 *Waiver but not from all*

There have also been situations in which not all legal heirs have agreed to compound their right of *qisas*. The Lahore High Court decided in

¹⁵¹ 1991 MLD, p. 1864.

¹⁵² 1991 MLD, p. 2408.

¹⁵³ Barrister Ejaz Hussain Batalvi, interview by the author on 14 November 2002. Barrister Batalvi told me that he was a very expensive lawyer and that his high professional fee was a means of controlling his workload. Barrister Batalvi has been a counsel in almost all the important criminal trials of Pakistan.

¹⁵⁴ 1992 PCrLJ 830.

such cases it would proceed with the trial and the accused could be sentenced under *tazir*.¹⁵⁵ In *Nisar Ahmad v. The State*,¹⁵⁶ for example, Nisar Ahmad and his two brothers killed their stepbrother and murderously assaulted his son. The trial court sentenced one of the brothers to death and the other two to seven years' imprisonment each. Interestingly, the widow, two sons and five daughters of the deceased granted *afw* to the three accused, whereas the mother and one son did not. The High Court altered the death sentence (under section 302) to *tazir* (under section 311) and gave a sentence of ten years' imprisonment instead.

The Supreme Court expressed a different view in similar circumstances. In *Manzoor Hussain v. The State*,¹⁵⁷ the Supreme Court upheld the High Court's judgment, which concurred with the trial court's judgment, wherein the accused (Manzoor Hussain) was punished under section 302(c) rather than section 311, despite the grant of a waiver by the wife of the deceased. In this case, the convicts had murdered their brother-in-law, whose bereaved wife eventually waived her right of *qisas* against her brothers. However, the other heirs of the deceased did not. The appellant's lawyer argued that in such a situation—when some heirs had waived their right of *qisas* under sections 309 and 310 and others had not—section 311 applied and the accused could only be convicted with imprisonment, which may extend to ten years. This was precisely the ratio in *Nisar Ahmad*.¹⁵⁸ However, the Supreme Court disagreed. It held that since the punishment of *qatal-i-amd* was not given as a *qisas*, but as a *tazir* under section 302(c), section 311 therefore did not apply and the accused was rightly convicted under section 302(c).

The matter was finally taken up by the Supreme Court in *Sheikh Mohammad Aslam v. Shaukat Ali*.¹⁵⁹ In this case, Shaukat Ali was convicted and sentenced to death under section 302 PPC. However, in an appeal filed by Ali, the High Court altered the death sentence to life imprisonment. Ali appealed further to the Supreme Court to be acquitted the charge of murder, on the basis that he had been pardoned by the legal heirs of the deceased. The report of the Sessions Judge revealed that the convict had been pardoned by all the heirs of the deceased except his mother. The Supreme Court had to assess what options were

¹⁵⁵ *Ghulam Hussain v. The State*, NLR 1993 Cr 203.

¹⁵⁶ 1994 PCrLJ, p. 1587.

¹⁵⁷ 1994 SCMR, p. 1327.

¹⁵⁸ 1994 PCrLJ, p. 1587.

¹⁵⁹ 1997 SCMR, p. 1307.

available to it in such circumstances. A Full Bench was constituted, so as to authoritatively decide the two key issues:

- 1) whether a case under section 302 could be compounded, keeping in view the provisions of section 345¹⁶⁰ of the CrPC, if all the heirs did not agree to the compromise; and
- 2) whether the principles of section 309¹⁶¹ PPC could be applied in a case where punishment is awarded under *tazir*.

The Supreme Court decided both issues in the negative. It held that courts enjoy the power under the provisions of section 345 CrPC to grant permission to the accused and the legal heirs of the deceased to compound the offence, which will result in acquittal. As regards the second issue, the Court held that clause 2 of section 309 could not be pressed into service where the punishment was awarded as *tazir* and not as *qisas*. Therefore, it was held:

since the mother of the deceased had not joined the compromise and as the High Court altered the death sentence into imprisonment for life which could be awarded as *tazir* and not as *qisas*, section 309(2) PPC can not be pressed into service. The above application for compromise is rejected.

In *Khalid Nawaz v. The State*,¹⁶² the Supreme Court commuted the death sentence into fourteen years' imprisonment as *tazir*, in view of the pardon granted by one of the heirs of the deceased. The heir in question was Mst. Taleh Bibi, the mother of the deceased and grandmother of the convict. Taking her waiver into account, the Court held that the accused could not be convicted under sections 306 and 307 of the amended PPC and hence punished him under section 311.

The view that sections 309 and 310 would apply only to cases where death was awarded as *qisas* and not where death was awarded as *tazir* was reiterated in *Muhammad Saleem v. The State*.¹⁶³ Despite the fact that one of the heirs had waived their right to *qisas* and entered into a compromise, the Supreme Court let the accused be punished with a death sentence under section 302(b).

¹⁶⁰ Referring to provisions which regulate a compromise.

¹⁶¹ Sub-section 2 of section 309 states: "Where a victim has more than one *wali*, any one of them may waive his right of *qisas*".

¹⁶² 1999 SCMR 933.

¹⁶³ PLD 2003 SC 512.

5.3.1.6 *Afw on behalf of the minors*

In *Muhammad Nawaz v. The State*,¹⁶⁴ the Division Bench of the Lahore High Court allowed the mother of three bereaved (minor) sons of the deceased to grant the convict *afw* under section 309 on their behalf. The Bench set aside the death sentence and acquitted him from the charges of murder. In another case¹⁶⁵ decided by the same Bench, the granting of *afw* by the wife of the deceased on behalf of two minor sons and daughters was again accepted. *Afw* was granted to the accused in the name of God (*fi sabeel lillah*); he was then released from prison without giving any compensation.

However, Justice Iftikhar Chaudhary, sitting singly in the Quetta High Court in *The State v. Abdul Aziz*,¹⁶⁶ expressed reservations about the view taken in the *Muhammad Mazhar* case.¹⁶⁷ He held that the right of waiver is personal and therefore cannot be exercised by a guardian. According to him, exercise of the right had aptly been curtailed by the legislature, keeping in view the injunctions of Islam, since it could otherwise create complications when the minor finally attained majority. The Court gave an illuminating example:

For instance, if on growing up he repudiates the action of his guardian and claims that trial of the accused on merits, or he alleges that the guardian in fact has received compensation by way of getting *diyat* but that to hoodwink his rights the compromise was styled as waiver. Thus, to avoid such complications, in the larger interest of the minor this right has not been conferred upon him. It is observed that if the offence is compounded by way of '*Sulh*', then in that case right of the minor would also be fully protected because to the extent of his share of *badl-i-Sulah* shall be received by his guardian and on attaining the majority he would be empowered to recover the same from the persons who legally acted on his behalf while compounding the offence. Similarly, in the cases of *diyat* the right of the minor shall also be fully protected.

This interpretation of sections 309 and 310 seems to be more logical than that adopted by the Lahore High Court¹⁶⁸ since it provides for the protection of the rights of minors in a judicious way. Nevertheless, it shows that the Statute does not address the question of what would

¹⁶⁴ 1992 PCrLJ 1664.

¹⁶⁵ *Mohammad Mazhar v. The State*, 1992 PCrLJ 443.

¹⁶⁶ 1993 PCrLJ 68.

¹⁶⁷ *Mohammad Mazhar v. The State*, 1992, PCrLJ, p. 443.

¹⁶⁸ *Ibid.*

happen if a minor, after attaining majority, asked for retrial of the case and refused to waive his/her right of *qisas* or accept compensation.

Despite the above interpretation, the case of *Muhammad Hanif v. The State*¹⁶⁹ (*Muhammad Hanif*) presented a greater riddle and graver loophole in the new law. What would happen if *qatl* did not come under the definition of *qatal-i-amd* liable to *qisas*? This intriguing question was raised by Mohammad Munir Khan Advocate (who later went on to become a Supreme Court judge) when the court had not yet concluded whether the *qatl* committed by the accused was *qatl-i-amd* liable to *qisas* (under section 302(a)) or *qatl-i-amd* liable to *tazir* (under section 302(b) or (c)). The resulting casualty was the rights of minors.

In the above case, Muhammad Hanif had allegedly killed Muhammad Ashraf under grave and sudden provocation. The trial court found Hanif guilty of murder and sentenced him to ten years' imprisonment under section 302(c) of the PPC. Hanif preferred an appeal against this judgment in the Supreme Appellate Court. While the appeal was pending, the wife and father of the deceased filed a petition in the Court, stating that they had pardoned the accused in the name of God. During the hearing of this application, the Court came to know that the deceased had also left six minor children. The question thus arose whether *qisas* could be waived on behalf of minors.

The counsel for the accused, Mohammad Munir Khan Advocate, contended that in view of the Court's judgment in *State v. Mohammad Hanif and Five Others*,¹⁷⁰ (*State v. Mohammad*), sections 309 and 310 relating to *qisas* would not be applicable in this case. In *State v. Mohammad*, the accused had killed the deceased in *ghairat*,¹⁷¹ under grave and sudden provocation, and the Court held that the punishment of *qisas* did not apply. Counsel contended that since the accused had killed the deceased under grave and sudden provocation in this case as well, the amended provisions of the PPC would not apply and the compromise would be considered under section 345 of the CrPC only. Moreover, under the amended CrPC, there was no provision mandating that courts must protect the rights of minors before permitting parties to enter into a compromise. The Court agreed with the contention and acquitted the accused on 28 November 1992.

¹⁶⁹ 1993 PCrLJ 166.

¹⁷⁰ 1992 SCMR 2047.

¹⁷¹ *Ghairat* is loosely translated as 'honour', and such killings are termed 'honour killings'.

However, this contention was wholly misconceived, as was its acceptance. The verdict in *State v. Mohammad* was not at all applicable to the facts and circumstances of this case for three reasons. Firstly, in *State v. Mohammad*, the trial court had acquitted the accused and the Appellate Court then dismissed the State's appeal against this judgment and concurred with the trial court. In this case, however, the trial court had found the accused guilty of the charge of murder, and his appeal against this judgment had yet to be heard when the parties entered into a compromise. Secondly, there was no dispute of the facts of the case in *State v. Mohammad*, whereas in *Muhammad Hanif* there was. Thirdly, in *State v. Mohammad*, the accused were acquitted of the charges of murder, whereas in this case they sought permission to enter into a compromise, for an offence that *prima facie* fell under the definition of *qatl-i-amd*, liable to be punished under section 302 PPC, under which they were later convicted. For argument's sake, if we accept the plea of the accused, then the counsel had to inform the court about the offence the accused had committed, for which the parties were entering into a compromise. In the precedent cited, the court had held that the accused did not commit an offence. However, in this case the accused had to compound the offence with the legal heirs of the deceased, which include minors.

As they were minors, they could not have entered into any contract on their own; therefore under what law had they entered into a compromise? If there was no offence committed by the murderers, why was a compromise required? Furthermore, the Supreme Appellate Court did not go into the subtle distinctions of section 338-E made by the Full Bench of the Lahore High Court in *Muhammad Ashraf v. The State*.¹⁷² In this case, the Court had held that the compromises entered into by the parties were subject to the amended Chapter XVI of the PPC and that the CrPC alone could not be invoked to compound the offence falling under the sections of this chapter. The judgment¹⁷³ of the Quetta High Court (decided on 2 August 1992) was also not taken into consideration.

In *Javaid Masih v. The State*,¹⁷⁴ while interpreting section 309 of the amended PPC, the State clearly laid down that a *wali* could not waive/

¹⁷² PLD 1991 Lah 347.

¹⁷³ PLD 1996 Quetta 56.

¹⁷⁴ 1993 SCMR 1574.

pardon the right of *qisas* in *qatl-i-amd* on behalf of minors under section 309. However, a *wali* may compound the right of *qisas* on behalf of minors in receipt of *badl-i-sulh* under section 310. The point raised in *Muhammad Hanif* was left unaddressed by the court. Had the right of *qisas* compounded by the heirs of the deceased arisen as *qisas* in *qatl-i-amd* or *tazir* in *qatl-i-amd*?

In *Ibrahim v. The State*,¹⁷⁵ the Supreme Court did not order the release of the convicts of double murders until they deposited the minor heirs' share of the *diyat* into their bank accounts. The adult heirs had pardoned their shares in view of the *faisla* (decision by elders in an extended family). Interestingly, in the *faisla* the convicts were asked to only pay 2,000 rupees (equal to £180) to the legal heirs of the two deceased. However, the Supreme Court ensured that each of the two minors was paid an amount of 75,000 rupees.

In *Almar Shah v. The State*,¹⁷⁶ the Supreme Court reiterated its view that it was the duty and legal obligation of courts to preserve, protect and defend the vital interest of minors. Therefore, it did not acquit the accused until they had deposited the minors' share into their accounts. However, in a case in 2000,¹⁷⁷ Justice Abdul Ghani Sheikh of the Sind High Court accepted a compromise on behalf of minors, by their mother, without forcing the convict to deposit the minors' share of *badl-i-sulh* in their accounts. The husband of the deceased appeared before the court and deposed that he pardoned the convict on behalf of the minors as well. The court then released the accused.

Justice Khawja Mohammad Sharif also allowed a compromise wherein the minors' share of *diyat* was neither determined nor deposited in their accounts. The court took into consideration the convict's poverty and released him on the basis that he had been pardoned by the heirs of the deceased, while ignoring the constraints imposed by the statute and the binding precedents of the Supreme Court. The grandparents had entered into a compromise on behalf of the convict's minor children. The court held that the

appellant is a poor man and he has shown his profession as a labourer. The deceased was his wife. Six children were born out of wedlock, two of whom were major sons and four minors. When the application for

¹⁷⁵ 1995 SCMR 1296.

¹⁷⁶ 1999 SCMR 2047.

¹⁷⁷ *Jan Muhammad v. The State*, 2001 MLD 1244.

compromise was submitted, a report was called for. Learned sessions judge, Sargodha, had stated that the grandparents of the minors had also waived their right of *qisas* and pardoned the appellant in the name of Allah (Almighty) . . . I consider this to be a case where a *diyat* amount can be remitted. In view of the abovementioned circumstances and especially keeping in view the fact that the appellant is the father of four minors whom he will not only have to look after but also feed after being released from jail, it will be difficult for him to pay the *diyat* amount.¹⁷⁸

5.3.1.7 *Frauds in the Name of Compromise*

The law of *qisas* and *diyat* does not provide any guidelines as to how courts may ensure that the compromise between the parties is genuine or false. Courts can only find out about misstatement, fraud, coercion or even deception of the parties with regard to a concluded compromise if a third party moves an application to the court indicating such. However, the reality is that most people do not like to unnecessarily get involved in others' matters, especially involving murder cases. The facts narrated in the reported judgments and the decisions of the courts in compromise applications indicate the various kinds of pressures that the legal heirs of a deceased face which push them towards helping the accused/convicts win acquittal from charges of murdering their close relatives.

In *Ghulam Sajjad v. The State*,¹⁷⁹ the Supreme Court refused to interfere in the findings of the High Court, wherein it held that the compromise effected between the parties was invalid because the heirs had made their statements pertaining to pardoning the accused due to the strong influence of a spiritual healer (*peer*). The Supreme Court did, however, allow the parties to approach the High Court again if they wished to record another statement pardoning the convict, but without any undue influence of the *peer*.

The case of *Muhammad Tufail v. The State*¹⁸⁰ illustrates another kind of pressure imposed on the legal heirs of the deceased by the accused/convicts. In this case, the parents of the deceased lied before the court that they were the only legal heirs. The court ordered the acquittal of the accused on the basis of their statement that "we have pardoned the convicts in the name of God and do not object to the acquittal of the accused". The court later discovered that the deceased had also

¹⁷⁸ *Fazal Hussain v. The State*, 2002 PCrLJ 1258.

¹⁷⁹ 1997 SCMR 1526.

¹⁸⁰ 1994 SCMR 1211.

left behind minor sisters and brothers. The order of acquittal was thus recalled by the court, since the parents could not pardon the accused “in the name of God” on behalf of the minors. From the facts of the case, it seems that the accused must have warned the parents not to mention the minors before the court, so as to save him from paying their share of *badl-i-sulh*.

In *Niaz Ahmad v. The State*,¹⁸¹ the father of the deceased agreed to a compromise within three months of the murder of his son. None of the brothers or sisters of the deceased took part in this compromise. Having taken into account the tribal culture of that area, the trial court stressed that the brothers and sisters of the deceased should also be asked if they accepted the composition of the offence. The High Court, however, set aside the trial court order and directed it to keep itself within the confines of the law. The Court held that since the brother and sister were not the legal heirs of the deceased, according to the personal law of the family, they could not have been asked to give their consent about the composition. Thus, the principle that the compromise should bring the two families close and purify any bad blood or hard feelings between the parties was thrown into oblivion by the court.

The case of *Muhammad Yaqoob v. The State*¹⁸² is another example in which the court was misled. The court was told that all the legal heirs of the deceased had compromised the offence with the accused. This compromise had also been certified by the vice-chairman of the union council, who verified that, apart from the legal heirs who had compounded the offence, no other legal heir existed. Consequently, the accused was set free. The court later discovered that the mother of the deceased was alive but had not been involved in the compromise. The court thus recalled its order of acquittal. Interestingly, the deceased’s own brothers and sisters had lied to the court. Why were they not punished for perjury? Why was the vice-chairman not reprimanded? Perhaps it was because such situations arose too often in the courts.

In *Ghulam Shabir v. Mst. Zanib Bibi*,¹⁸³ the court finally acknowledged the tactics that those accused use to take advantage of the heirs of the deceased. It was observed that

¹⁸¹ PLD 1997 Quetta 17.

¹⁸² 1997 PCrLJ 1979.

¹⁸³ 1999 MLD 581.

in many cases the poor and helpless heirs of a deceased [person] cannot withstand the pressure tactics of the influential accused persons and finally submit to their demands even after the accused have exhausted all the remedies under the law. This is mostly done out of the fear of the accused and not of their own free will to pardon them in the name of God.

No concrete solution was given; indeed, this need would not even have arisen if the legislature had fulfilled its responsibilities properly and ensured some procedure through which it would be possible to check if compromises were genuine. It did not, due to its inappropriate haste in promulgating the new law.

In *Muhammad Jabbar v. The State*,¹⁸⁴ the court discovered that Muhammad Jabbar, the murderer of three persons—Mst. Nasreen (his wife), Mst. Aama and Habib Ullah (his sisters-in-law)—had deceived the court, so as to (wrongly) prove that all the legal heirs of the deceased had compounded the offence with him and condoned his killings. It took much deliberation for the Division Bench of the Lahore High Court to figure out that the relatives of the murderer, who were also related to the legal heirs of the deceased, were falsely representing the minors so as to get the convict acquitted.

Another interesting case is *Mohammad Arshad etc v. Additional Sessions Judge*.¹⁸⁵ Mohammad Aslam was to be hanged on 30 October 1999 as punishment for murdering Tariq Mahmood. However, on 8 October, two applications—by Mst. Shamshad Begum (mother of Muhammad Arshad) and Mst. Bushra Bibi (wife of the deceased)—were filed in court in order to obtain permission to compound the offence. Mst. Bushra Bibi informed the court that she had already received 200,000 rupees from the accused for herself and her children. However, the trial court did not consider her statement sufficient, since the father of the deceased had not appeared in court to verify the compromise deed. It therefore dismissed the application. The convict challenged this in the High Court, where the wife of the deceased categorically changed her statement and affirmed that she had actually been abducted by the convict's friends, who had coerced her into executing the compromise deed. She further stated that the Saving Certificates alleged to have been bought in the name of minors were never handed over to her. The High Court thus rejected the petition. Counsel for the accused tried to

¹⁸⁴ 2000 PCrLJ 1687.

¹⁸⁵ PLD 2003 SC 547.

contend in the Supreme Court that once a compromise was accepted it could not be rescinded. However, the Supreme Court observed that this contention was ill-founded and hence refused to give weight to a compromise, whose authenticity was challenged by one of the parties. The Court thus rejected the petition.

5.3.1.8 *Cases of no wali/legal heirs*

In *Javaid Masih v. The State*,¹⁸⁶ Javaid was convicted by the High Court for murdering his sister (Mst. Nasreen) and a man (Shehzad) who had wanted to marry her. Mst. Nasreen's heirs—brothers, sisters and parents of Javaid Masih—waived their right of *qisas* and compounded the offence with Javaid. Shehzad had no legal heir, except for a man (Barakat Masih) who had brought him up. However, he was not accepted as the deceased's *wali* in view of the definition provided under section 305.¹⁸⁷ Consequently, as the Government was to act as his *wali*, compromise on the basis of *afw* was not allowed. This is one of the very few cases wherein compromise was *not* allowed.

5.3.2 *Murders in a family*

In this section, we shall examine the impact of the *qisas* and *diyat* law on murders within families through the examination of various reported judgments. We shall pay special attention to the claim by various women's forums and non-governmental organisations that it is Pakistani women that suffer most under the provisions of this law.

5.3.2.1 *Sisters*

We will first consider the example of a man named Naheed, who demanded a meal from his sister, Mst. Shaheen. He was so infuriated that she had not already prepared it that, following the exchange of some verbal abuse, he repeatedly stabbed her to death with a knife. Since this occurred in 1985, the trial court charged Naheed for murdering his sister under the law that was in force prior to the promulgation of the *qisas* and *diyat* law. The State successfully prosecuted him and he was sentenced to imprisonment for life with a fine of 5,000 rupees. His

¹⁸⁶ 1993 SCMR 1574.

¹⁸⁷ *Wali* in this definition may be heirs of the victim, according to personal law, and the government if there is no heir.

appeal¹⁸⁸ was pending before the High Court when the law of *qisas* and *diyat* was promulgated.

On 7 April 1991, the legal heirs of the deceased—father, mother, four brothers and one sister—executed a compromise deed under the new law and submitted it to the High Court. The deed affirmed that the heirs of the deceased had pardoned the accused (who was also a legal heir) and waived their right of *qisas*. The court released the convict from custody forthwith, stating, “in order to have better relations in future I accept the application for compounding the offence”. The reason for compromise in such a case is relatively simple and understandable: the parents and siblings who had lost one family member did not want to lose another. However, the message such a compromise sends to society is also simple and clear: that sisters are the weaker components of the family and the links of lesser value in that chain. They must thus show unconditional and complete obedience to their male relatives. Moreover, if they are harmed or even murdered by a male relative, society or the law will not come to their rescue.

In another case,¹⁸⁹ the accused (Mohammad Ishaq) was charged with murdering his sister on the pretext that she was refusing to transfer into Ishaq’s name the house she had inherited from her deceased husband. The police found the accused guilty, but before his trial could formally proceed, the legal heirs of the deceased—mother, four brothers and two sisters—appeared before the court and recorded statements to the effect that they had waived their rights of *qisas* and *diyat*. Before ordering the acquittal of the accused, the court asked him why he had murdered his sister, at which point the accused laughed. The court observed that “the accused has laughed in a manner indicative of committing an act of valour instead expressing deep grief and sorrow”. Thus, although it accepted the compromise, the court punished the accused with five years’ sentence as *tazir*, under section 311 of the amended PPC.

The accused appealed against this sentence before the High Court, which found the trial to be replete with errors. Firstly, the murder was committed when the old law was in force. Under section 338–E of the new law, only the sections pertaining to waiver and composition of offences were applicable in this case, not the section under which *tazir*

¹⁸⁸ *Naheed Hussain v. The State*, 1992 PCrLJ 982.

¹⁸⁹ *Muhammad Ishaq v. The State*, PLD 1992 Pesh 187.

could be applied. Secondly, *tazir* could only be applied following conclusion of a full trial. The statements of the heirs of the deceased, wherein they waived their rights of *qisas* and *diyat* against the accused, could not be interpreted so as to declare the accused guilty of the offence. The Court remanded the case back to the trial court for a fresh trial in light of the guidelines laid down by the former. In fact, there was no trial to conduct after such observations by the High Court; the trial court was left with only one option, i.e., to accept the compromise and acquit a cold-blooded murderer charged with murdering his own sister.

In *Muhammad Hanif*,¹⁹⁰ Hanif had killed his wife's sister so that she would not be available to marry Mohammad Aslam, a man whom Hanif had intended would marry his own sister. Sadly, the deceased (Mst. Allah Wasai) had not even wished to marry Mohammad Aslam, whose proposal was under consideration by her parents. This possibility enraged Hanif so much, that he shot Allah Wasai dead, declaring that "she would not live to marry Mohammad Aslam".¹⁹¹ Since the legal heirs of the deceased were direct relations of the wife of the accused, they forgave him "in the name of God" and he was thus set free by the High Court.

5.3.2.2 Killing of wives: section 306

Clauses (b) and (c) of section 306 of the amended PPC state that *qatl-i-amd* is not liable to *qisas* where the offender causes the death of his child or grandchild, or when any wali of the victim is a direct descendant of the offender. In this section, we will examine the impact of this provision on the murder of a wife by her husband or vice versa.

In *Azmat Ullah Khan v. The State*,¹⁹² Mst. Zard Shazadi was murdered by her husband's brother. Approximately three months later, before the initiation of trial proceedings, he was pardoned by the heirs of the deceased. He alleged that he had already paid *diyat* to the minor daughter and husband (a *wali*) of the deceased, and that he was also ready to pay a share of *diyat* to the mother of the deceased if that share was determined by the court. Under this arrangement, the husband of the deceased moved an application in the court that his brother, the murderer, be acquitted from the charge and released. The mother of

¹⁹⁰ 1991 PCrLJ 1795.

¹⁹¹ *Ibid.*, p. 1796.

¹⁹² 1993 PCrLJ 1220.

the deceased contested her son-in-law's application and asked for the case to be tried, since she was also one of the *wali* of the deceased and an eyewitness to the occurrence. The High Court thus directed the trial court to continue.

Among the reported judgments was the important case of *Mohammad Rafique v. The State*,¹⁹³ in which a wife was killed by her husband. In this case, the drama staged by Muhammad Rafique Kamboh, who alleged that someone killed his wife in his absence, was unravelled by local police, who later successfully prosecuted the case and got the accused and his co-accused sentenced, under section 302 of the *qisas* and *diyat* law, with the death penalty. Both convicts challenged the sentence before the Supreme Appellate Court. The Appellate Court did not find any fault with the appreciation of the evidence by the trial court, but noted that it had not considered the effect of clause (c) of section 306 of the amended PPC, wherein *qatl-i-amd* is not liable to *qisas* if the *wali* of the victim is the direct descendant of the offender. However, even in such cases, the courts are empowered, with regard to the facts and circumstances of the case to sentence the offender imprisonment for up to 14 years, as *tazir*.¹⁹⁴ The court thus partly accepted the appeal of the husband and converted his death sentence into fourteen years' imprisonment. The death sentence handed down to the co-accused was also converted to life imprisonment, following the principle under section 109 of the PPC that when the capital sentence is not liable to *qisas*, the conspiracy to commit the same cannot be so either.

It is instructive to note that here that the trial court had not pointed out the sub-clause of section 302 PPC under which the accused had been sentenced to death, i.e., whether they had been sentenced under *qisas* or under *tazir*. Nevertheless, since the evidence had not been produced according to the principles of *Tazkiyat-ul-shahud*, as laid down in the *Saifullah* case, and the judgment did not stipulate that the convict be put to death in the same way that the victim was murdered, it would have been safe to assume that the trial court had convicted the accused under *tazir* (under section 302(b)), and not *qisas* (under section 302(a)). Surprisingly, the Appellate Court did not assume so. The law was laid down, without looking into the two crucial aspects of the case, and it held ground for some time, thereby setting an erroneous precedent.

¹⁹³ 1993 PCrLJ 1403.

¹⁹⁴ Clause 2 of section 308.

The most significant and prominent case in this regard was *Khalil-uz-Zaman v. The Supreme Appellate court*,¹⁹⁵ in which the convict Kahlil-uz-Zaman invoked the original jurisdiction of the Supreme Court against the judgment of the Supreme Appellate Court, since there was no other remedy available in *The Speedy Trials Act, 1992*.¹⁹⁶ Zaman had murdered his wife, who was also the mother of their daughter, Mst. Amina. The trial court found the accused guilty of *qatl-i-amd* and sentenced him to death, under section 302(b). The Appellate Court upheld the judgment of the trial court and endorsed that “in the circumstances, the appellant is liable for *qatl-i-amd* under section 302(a) of the PPC death as *qisas*”.¹⁹⁷

The Supreme Court, with Justice Munir Khan authoring the judgment, severely criticised the Appellate Court for its ignorance and misapplication of Islamic law and pointed out that section 306 of the PPC declares that when any *wali* of the victim is the direct descendant of the offender (of *qatl-i-amd*), he/she would not be liable to *qisas*. Justice Khan commented that it was the blessing of the Constitution that the petitioner was able to save his life, otherwise he would have been hanged due to the carelessness of the Appellate Court. He stated:

The error committed by the courts in convicting the accused/petitioner under section 302, PPC and sentencing him to death was so serious that had the petitioner eventually been hanged to death, we are afraid it would have amounted to murder through judicial process. Needless to say, a plea of good faith/bona fide/ignorance of law/incompetence is/are not available in such like cases.¹⁹⁸

Consequently, the judgment of the Supreme Appellate Court was set aside and, since the Act of 1992 had expired, the case was remanded to the Lahore High Court for a fresh decision, in accordance with the law as laid down by the Supreme Court in this case.

It is interesting to note that the judgment did not simply lay down a principle of law, but was also highly political. Justice Khan had been appointed as an ad hoc judge of the Supreme Court by the Benazir Government, five years after he retired from the Lahore High Court. The judgment he severely criticised (from the Supreme Appellate Court)

¹⁹⁵ PLD 1994 SC 885.

¹⁹⁶ PLD 1992 CS 111.

¹⁹⁷ See footnote 195, p. 889.

¹⁹⁸ *Khalil-uz-Zaman v. Supreme Appellate Bench*, PLD 1994 SC 885, p. 895.

had been authored by Justice Mohammad Rafiq Tarar, who was famous for his association with Nawaz Sharif (Benazir Bhutto's rival). Nawaz Sharif later helped Tarar get elected as President of Pakistan, until which time (1998) the judgment of *Khalil-uz-zaman* held the field.

Since murdering wives was not a rare occurrence in Pakistan,¹⁹⁹ *Khalil-uz-Zaman* was widely referred to²⁰⁰ and followed in a large number of cases.²⁰¹ For example, in *Shabbir Ahmad v. The State*²⁰² the High Court underlined the wisdom of not punishing the accused where the *wali* or *walis* of the victim are the descendants of the offender. The Court held that

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-i-amd* of their mother. The court can award punishment as *Tazir* under clause 2 of section 308 of the PPC, apart from awarding *diyat*...

The Court followed the law as laid down in *Khalil-uz-Zaman* and imprisoned the murderer of a wife, in addition to *diyat*, which he had to pay to his sons and daughters (who were also the sons and daughters of the deceased).

In 1998, Justice Rafique Tarar became the President of Pakistan, and Justice Munir's term in the Supreme Court came to an end. The newly-configured Supreme Court constituted a Full Bench to hear the petition filed against the decision of the High Court in the case of *Khalil-uz-zaman*.²⁰³ Although five years had passed since this decision—considerably more than the limit for the filing of Review/Constitutional Petitions—the Court condoned the delay so as to be able to avail of this opportunity to review the law laid down by the earlier Bench of the Supreme Court. Interestingly, the Supreme Court not only severely censured the Shariat Appellate Bench for disregarding the *qisas* and *diyat* law, but also criticised its own Bench for the inaccurate perusal of the record of the case. The Court held:

¹⁹⁹ For instance, see *State v. Senior Superintendent of Police*, PLD 1991 Lah 224.

²⁰⁰ *Abdul Salam v. The State*, 1997 SCMR 29; *Abdus Salam v. The State*, 2000 SCMR 338; *Muhammad Feroze v. The State*, PLD 2003 Karachi 355.

²⁰¹ For instance, see *Abdul Razzaq v. The State*, 1996 PCrLJ 1237; *Muhammad Iqbal v. The State*, 1999 SCMR 403; *Abdul Razzaq v. The State*, 1996 PCrLJ 1237.

²⁰² *Shabbir Ahmad v. The State*, 1997 PCrLJ 1920.

²⁰³ *Faqir Ullah v. Khalil-uz-Zaman*, 1999 SCMR 2203.

[t]he conversion of death sentence by the learned Supreme Appellate Court awarded by the learned trial court by way of *tazir* into death by way of *qisas* was sheerly in advertence. The learned division Bench of this court ought to have, but did not advert to all these questions and had, therefore, gone wrong in taking it for granted that the convict-respondent had been legally awarded death sentence by way of *qisas*.

The Supreme Court restored the trial court's judgment, by which the accused was sentenced to death as *tazir*. With this decision also died 'the reason' provided by Justice Yousafzai, who authored the judgment in *Shabbir Ahmad* (discussed above).²⁰⁴

This was followed by *Muhammad Akram v. The State*²⁰⁵ and *Bashir Ahmad v. The State*,²⁰⁶ in which the court, under Justice Abbasi, held that "sections 306 and 308 would only be applicable in cases where the accused is punished under section 302(a) PPC" and not where he/she is punished under section 302(b) and (c).

5.3.2.3 Killing of brothers

Land and landed property has often been the root cause of disputes and a bone of contention in the agrarian society of Pakistan.²⁰⁷ Although brothers share equal rights in the property of their father, one may try to outdo the other of his share, which can then lead to a quarrel, possibly even resulting in murder. In this situation, the law would ask the father (as a legal heir of the deceased) whether he would like to compound the offence with one son who killed another son. The consequence of not compounding the offence is that the son who committed the murder will be hanged. However, if the father chooses composition, he has to then live with the fact that he has pardoned the callous murder of his own son, committed purely for the sake of property.

*Shah Behram*²⁰⁸ presents such an example. Some brothers had killed their stepbrother, who had demanded his share in their father's property. On trial of the case, despite the grant of waiver by the father of the deceased, the court sentenced the offenders under section 311 (*tazir*) to ten years' rigorous imprisonment. The accused challenged this sentence and asked for acquittal, in view of the compromise made by the heir of

²⁰⁴ *Shabbir Ahmad v. The State*, 1997 PCrLJ 1920.

²⁰⁵ 2003 SCMR 855.

²⁰⁶ 2004 SCMR 236.

²⁰⁷ Chaudhary, *op. cit.*, 1999, p. 42 and the sources cited therein.

²⁰⁸ PLD 1995 Lah 610.

the deceased. The High Court noted the statement by the father of the deceased, wherein he said that “he has been placed in a very unfortunate position, as one of his sons, i.e., the deceased, Zafar Abbas, has been killed, while two of his other sons and his brother in law are behind the bars as a result of their roles in the said unfortunate occurrence, and that being helpless he has no options but to forgive the culprits/appellants, and be content for their acquittal accordingly”.²⁰⁹ The High Court upheld the trial court’s judgment and refused to admit the appellants’ plea that the trial court unlawfully punished them under *tazir*.

5.3.2.4 *Killing of daughters*

In *Nasir Khan, Mst. Iram Bibi*, aged four years, was severely beaten by her father and later died in hospital. The accused was sentenced to life imprisonment, under section 302(b) as *tazir*. The court held that sections 306 and 309 could not apply, since the trial court had not punished the accused under section 302(a).²¹⁰ Had the accused been punished under section 302(a), the court could not have sentenced him for life. Various trial court lawyers have told this author that in order to take advantage of this seemingly strange state of affairs, accused persons will at present often confess to a crime so that they are sentenced under section 302(a), in which case the court cannot sentence them for life under section 302(b) or (c)²¹¹ if the parties compound the offence. It must be pointed out that this situation only emerged after the review of *Khalil-uz-zaman* (discussed above).

5.3.2.5 *Killing of close relatives*

*Mansoor Ali v. The State*²¹² is a case worth discussing in detail, as it reflects the weaknesses of the law in deterring people from committing this crime. Conversely, the law as it stands almost encourages criminally-minded persons to commit murder, providing they can get themselves declared and accepted as the heirs of the deceased. In this case, the accused/convict was the nephew of the deceased (Yaqub Ali), who was wealthy but without a male issue. Upon his death, his wealth would thus be distributed among his three daughters and other

²⁰⁹ *Ibid.*, p. 612.

²¹⁰ *Nasir Khan v. The State*, 2003 YLR 727.

²¹¹ Javaid Hasmi, advocate, ex-president of the Khanewal Bar Association, interview by the author on 27 October 2002.

²¹² 1997 PCrLJ 247.

family members, as per the Islamic law of inheritance, as practiced in Pakistan.²¹³ The three daughters were well educated: a doctor, a trainee engineer and a school headmistress. On 8 September 1989, the accused/convict broke into the house of Yaqub Ali with a Kalashnikov and fired on all the inhabitants. Five of Mansoor Ali's family members were killed, while two (Mst. Jehan Zaib and Mst. Murad Bibi) received severe bullet injuries.

The accused's motive behind these brutal killings was to wipe out Yaqub Ali's entire family so that he, a nephew, would inherit the property through his father Maher Ali, Yaqub Ali's brother, upon whom the property would devolve. Mst. Murad Bibi, the sister of Yaqub and an injured eye-witness of the incident, survived and recorded a statement in court. The court observed that the accused did not cross-examine her until she turned hostile.²¹⁴ By the time the trial was complete, the accused filed a compromise deed in the court, alleging therein that the heir of the deceased had pardoned the accused. It must be noted that Mst. Murad Bibi, who had seen the accused murdering her brother, his wife and their three daughters, had by then lost her sanity and hence could not be produced before the court. The court found that the compromise deed bore the signature of the accused, but that the signature of Mst. Murad was missing. However, an affidavit attested by the oath commissioner was attached, which bore her thumb impression and in which she stated that she had pardoned the accused without any compensation in the name of Allah. Since the lacuna of the agreement deed was rectified, the trial court acquitted the accused of murdering five persons.

A division Bench of the Quetta High Court took *suo moto* notice²¹⁵ of this judgment and asked the trial court to examine the veracity of the compromise deed. The trial court was further directed to seek the help of a medical board to determine whether Mst. Murad Bibi had in fact lost her sanity, and to be mindful of the fact that it had no legal obligation to accept the compromise. The High Court also mentioned the law whereby the Government becomes the *wali* of the deceased if

²¹³ For the law of inheritance in Islam, see *Muslim Family Law Ordinance, 1961*; A. Fyze, *Outline of Mohammedan Law*, 4th ed., Oxford, 1974; D.F. Mulla, *Principles of Mohamedan Law*, 17th ed., Bombay, 1972.

²¹⁴ *Ibid.*, p. 253.

²¹⁵ One wonders whether the High Court found out about this case because of it being taken up by the media, since a decision of acquittal does not go to the High Court as a matter of routine under the CrPC.

the only *wali* has lost their sanity and no other heir is left, in which case the offence cannot be waived.

The case shows the weakness of the law in dealing with such situations. The courts are not bound under the amended law to sentence the accused under section 311 when the heirs of the deceased pardon the accused or otherwise enter into a compromise. This weakness in the law is taken up by evil-minded persons in that they can avoid the punishment of murder if they can force the heirs of the deceased to enter into a compromise.

5.3.3 Sentence of death as Qisas

It was only in the case of *The State v. Abdul Waheed* (1992 PCrLJ 1596) that the Supreme Appellate Court—constituted under the *Speedy Trial Courts Act 1992*—confirmed the death sentence as *qisas*. The Appellate Court had in fact converted a sentence of twenty-five years' imprisonment passed by the trial court under section 302(c) into one under section 302(a). The principle laid down in this judgment lead convicts being sentenced under *qisas*, without having the requisite evidence for fulfilling the *tazkiya al-shahud*. Later case-law shows that judges did not follow the dictum of the Supreme Appellate Court and insisted that the sentence for *qisas* under section 302(a) could not be passed unless the rules of *tazkiya al-shahud* were followed as to the recording of evidence of the witnesses. They held that in cases where the accused are found guilty of the offence of murder under the 'ordinary' rules of evidence, the accused should be sentenced to death or life imprisonment of lesser punishment as *tazir* under section 302(b) or (c) of the new law.

5.3.4 Tazir

5.3.4.1 Qisas or Tazir? Same evidence, same punishment, different name

After the judgment in *Sanaullah*,²¹⁶ the courts began to award the death sentence as *tazir* under section 302(b) instead of *qisas* under section 302(a). The punishment was the same, i.e., death, except that under *tazir* the person could only be hanged, whereas under *qisas* the mode of causing death could also be directed by the court, i.e., identical to the one in which the victim was murdered. The evidence required to

²¹⁶ PLD 1991 FSC 186.

sentence an accused to death needs to be as conclusive as in any other criminal case. However, for *tazir*, the requirements of the 'Islamic' law of evidence (*tazkiya al-shuhud*) need not be fulfilled. This is despite the fact that *tazir* is also an Islamic punishment and also results in the death of the culprit.

As seen in *Taj Mohammad v. The State* and *Mahmood v. The State*,²¹⁷ the trial court sentenced the accused to death under section 302(a), whereas the appellate court did so under 302(b). The same punishment was awarded, but under a different clause. This meant that although the evidence against the accused was conclusive, it did not fulfil the requirements to be punished under *qisas*.

The punishment of death as *tazir* was also challenged in the FSC in the case of *Abdul Malik v. The State*.²¹⁸ The FSC ruled that the sentence of death as *tazir* could be awarded under section 302(b) in situations where the court believes it necessary to exterminate the culprit in order to wipe out mischief and rid society of heinous crimes.

5.3.4.2 *Acceptance of compromise: principles*

The Supreme Court has accepted compromises in cases wherein the accused were sentenced to death under *tazir* (under section 302(b)) without punishing those convicts for a single day.²¹⁹ The question is, what points need to be considered by courts before they permit parties to compound an offence under section 345 CrPC? A court can sentence an accused person under section 311 of the new law only in cases where the heirs have pardoned the accused under sections 309 or 310, and having considered the facts and circumstances of that case. There is no written guidance in the legislation or by the Supreme Court on, *inter alia*: what sentences can be given to the accused when courts refuse to accept a compromise under section 345 CrPC; why and under what circumstances should courts accept a compromise; and under what circumstances the court should not accept a compromise (even when genuine) and punish the accused under *tazir*.

There are many cases in which the Supreme Court has accepted compromises and acquitted the accused from the charge of murder, but without formulating any legal principle. For instance, in *Sarwar*

²¹⁷ 1993 PCrLJ 1025; 1993 PCrLJ 1047.

²¹⁸ PLD 1996 FSC 1.

²¹⁹ Many of these judgments are referred to in *Hussain Bux v. The State*, PLD 2003 Karachi 127.

Khan v. The State,²²⁰ the heirs forgave the accused “in the name of God”, invoking the provision of section 309 PPC read with section 345 CrPC. Even though the accused was convicted for *tazir* punishment (under section 302(b)), the Court gave an acquittal under section 309. It is unclear why the court acquitted the accused under section 309, since it is applicable only in cases where the accused has been guilty under *qisas*. There are other cases²²¹ in which the accused were acquitted because the heirs had accepted *badl-i-sulh* and were not awarded their *tazir* sentences under sections 309, 310 or 311 PPC.

Although in *Safdar Ali*²²² the court applied sections 309 and 310 and acquitted the accused even though the sentence had been given under section 302 as *tazir*, in a later decision (*Sh. Mohammad Aslam v. The State*, decided in 1997) a compromise was refused and it was held that sections 309 and 310 would be applicable only in those cases wherein the sentence was awarded under *qisas*. However, in *Ghulam Shabbir v. The State*,²²³ the Supreme Court accepted the compromise even though the death sentence was passed under *tazir*. In *Saeedullah v. The State*,²²⁴ the court accepted the compromise between the parties and acquitted the convict without even considering sentencing him under *tazir*. Such cases illustrate well that the law to sentence the accused under *tazir* is a bizarre mishmash and that judges exercise their discretion independently on a case-to-case basis, without following any uniform policy.

5.3.4.3 Sentence as Tazir: sections 311 and 302(b) or (c)

Until the decision in *Tariq Mehmood v. The State*,²²⁵ courts would routinely acquit an accused person immediately once a compromise deed had been filed.²²⁶ In this case, however, the court held that:

the composition of an offence of murder does not automatically entitle an accused to a clean acquittal, and despite such a composition of the offence of murder, it is the obligation of the court to determine and to give a finding that the offence of the accused person did not fall in the preview of section 311, PPC.²²⁷

²²⁰ 1994 PSC (CrI) 212.

²²¹ *Muhammad Ishaq alias Kali v. The State*, 1994 PSC (CrI) 213; *Mohammad Rafiq v. The State*, 1994 PSC (CrI) 231; *Almar Shah v. The State*, 1999 SCMR 2047.

²²² *Safdar Ali v. The State*, PLD 1991 SC 202.

²²³ 2003 SCMR 663.

²²⁴ 2004 SCMR 660.

²²⁵ PLD 1992 Lah 75.

²²⁶ For instance, see 1992 PCrLJ 1093.

²²⁷ *Ibid.*, p. 726.

The case concerned a public servant, Abdul Ghafoor, who served as a guard in the Forest Department of the Government of Punjab. He was murdered because his department had made the convict's party vacate the State land which they occupied. Justice Ramday held that the "murder of Abdul Ghafoor deceased was thus not the murder of just an individual but the murder of an agent of the State". Therefore, despite the waiver of the right of *qisas* by the heir of the deceased ("in the name of Allah"), the court sentenced the accused to ten years' rigorous imprisonment under section 311 as *tazir*. Interestingly, Ghafoor had not been married, his parents and grand parents were dead, and he had had no living brothers or sisters. Ghafoor's sole legal heir, who compounded the offence, was his consanguine brother, in whose name all the property of the deceased was transferred.

The case had been registered and tried under the old law, under which the offence was not compoundable, and the accused had been sentenced to death. The new law, however, enabled his offence to be compounded by the sole legal heir and beneficiary of the property of the deceased. Although he could not get a clean acquittal from the High Court, he was saved from the death penalty or long imprisonment. The new law does not provide safeguards in cases such as these, where distant relatives become beneficiaries upon the death of a person. There is no provision in the law under which the concession given by such a relative, in the shape of a compromise, could be dismissed or at least accepted with more caution.

The Sind High Court took a different view as regards sentencing under *tazir*, ruling in *Moula Bux v. The State*²²⁸ that it could only be applied in cases where the court has declined permission for compounding the offence under section 345 CrPC. This view was reiterated and elaborated in *Usman v. The State*.²²⁹ Justice Zubedi said the courts must recognise the difference between compounding of the offence and compounding of the right of *qisas* under section 309 or 310 of the PPC. The court held that only in cases belonging to the second category could it sentence under *tazir* despite a compromise, i.e., not in cases where the heirs compound the offence with the offender.

²²⁸ 1992 MLD 1590.

²²⁹ 1992 PCrLJ 1960.

A division Bench of the Quetta High Court, in *Muhammad Akbar v. The State*,²³⁰ rejected this view and upheld the punishment of *tazir* given—under section 311 PPC—by the trial court, despite the fact that the parties had entered into a compromise. The court held that the reason to empower the trial court to allow or disallow the compromises reached between the parties on the basis of *afw* or *badl-i-sulh* (under sections 309 and 310 respectively), lies with the court to punish the accused with *tazir* under section 311. The court rightly held that if the interpretation construed in *Usman v. The State*²³¹ were accepted, it would make sections 345(2) and (7) redundant.

In *Hussain Bux v. The State*,²³² a division Bench of the Sind High Court held that the view taken by the single judges in *Moula Bux v. The State*²³³ and *Usman v. The State*²³⁴ did not contain the correct proposition of law.

The Lahore High Court in *Shah Behram*²³⁵ also did not follow the view taken in *Usman v. The State*²³⁶ and despite the waiver by the father of the deceased, punished the accused under section 311. The Quetta Bench in *Nasir-ud-din v. The State*²³⁷ sentenced the accused to fourteen years' life imprisonment under section 311, despite the waiver by the heirs and composition of the accused. Again, in *Muhammad Naeem v. The State*,²³⁸ the Lahore High Court sentenced the accused, despite the fact that he was pardoned by the husband and other heirs of the deceased.

Justice Ramday, who had sentenced the accused for murdering public servants under section 311 (*tazir*),²³⁹ widened the scope of sentence as *tazir* under section 302(c), despite the waiver of the right of *qisas* and composition of the offence by the convicts and heirs. Speaking for the division Bench, Justice Ramday expressed his concerns over the brutality and the manner in which the deceased was murdered, which shows

²³⁰ PLD 1996 Quetta 56.

²³¹ 1992 PCrLJ 1960.

²³² PLD 2003 Karachi 127.

²³³ 1992 PCrLJ 1960.

²³⁴ Ibid.

²³⁵ PLD 1995 Lah 610.

²³⁶ Section 4 of the Ordinance of 1990.

²³⁷ PLD 2002 Quetta 42.

²³⁸ PLJ 2002 Cr.C. (Lah) 667.

²³⁹ Ibid., and *Abdul Ghafoor*, 2000 PCrLJ 1841.

that the court did take these points into consideration while sentencing him under *tazir*. The facts of the case are worth mentioning.

Mst. Alia Bibi, a girl between four and five years of age, was bludgeoned to death by her mother's sister and her brother-in-law, who had developed illicit relations and suspected her for having divulged their relationship to the village. The trial court sentenced Mst. Razia to life imprisonment and her brother-in-law (Asghar Ali) to death. Pending appeal, the parents/heirs of Mst. Alia Bibi appeared before the appellate court and deposed that they had entered into a compromise with the accused, who therefore could be acquitted. Although the court was satisfied with the voluntary nature of the compromise, it refused to permit the parties to compound the offence and held:

this was a callous and cold-blooded murder of an innocent child rooted in an immoral and extra-marital relationship of the two appellants with each other. Such conduct on the part of the appellants is a brutal and dastardly act. Conscience revolts when one thinks of showing any leniency or sympathy towards the one responsible for the same. We have therefore not been able to persuade ourselves to exercise our discretion in favour of the appellants before us. We resultantly withhold the permission for compounding of the offence in question.²⁴⁰

The court sentenced each to fourteen years' rigorous imprisonment. It is difficult to trace the basis of this decision within the criminal law of Islam. Although the sentence may be questionable under the strict injunctions of Islam, which only grants the heirs of the deceased the right to choose between punishing or pardoning the accused, the judgment certainly had a public appeal. If this view were given general acceptance and courts followed the principles laid down in this case, it could mean that the accused may also be put to death under section 302(b) as *tazir*, despite any waiver or composition by the heirs of the deceased. However, this has not happened as yet.

5.3.5 Fisad-Fil-Arz: section 311

It has been stated earlier that on 15 July 1993, when the *qisas* and *diyât* law was repeated through Ordinance XII of 1993,²⁴¹ the provision pertaining to the punishment under *tazir* after waiver or compounding the right of *qisas* in *qatal-i-amd* was amended. This amendment

²⁴⁰ 2003 YLR 1156, p. 677.

²⁴¹ See footnote 6.

is still part of the new law. It allows courts, in view of the principle of *fisad-fil-arz* (literally ‘corruption of earth’), to sentence the accused to up to fourteen years’ imprisonment as *tazir*, despite any compromise or waiver by the heirs of the deceased.

Since the discretion is wide, anything from a day to fourteen years, and the ‘principles of *fisad-fil-arz*’ have not been defined by the statute, it is for the court to decide if the accused—by committing culpable homicide or murder—committed *fisad-fil-arz* or not. Furthermore, if *fisad-fil-arz* has been committed, should the accused be punished by a day or fourteen years?

In *Muhammad Ramzan v. The State*,²⁴² the Supreme Court sentenced a convict to fourteen years’ rigorous imprisonment under section 311 as *tazir*, despite the waiver of right of *qisas* by the heirs of the deceased. Muhammad Ramzan had been convicted for murdering Mst. Amiran Bibi. He had previously murdered her sister and won an acquittal on account of a pardon by the heirs of the deceased. Upon being set free, he murdered Mst. Amiran Bibi. The heirs again submitted to the court that they had pardoned the accused and hence he may be acquitted. The case could also have been examined to determine whether there was any collusion between the heirs of the deceased and the culprits or if the compromise had been entered into under coercion. However, the Supreme Court summarily accepted the compromise, but held that the principle of *fasad-fil-arz* was fully applicable in such circumstances and commuted the sentence (from under section 302(b) as *tazir*) to fourteen years’ imprisonment, under section 311 of the amended PPC. It should also be noted that the Court acknowledged the compromise under section 309, even though the accused had not been punished under *qisas*.

In the case of *Sarfarz Khan v. The State*,²⁴³ the accused had indiscriminately fired on a passenger pick-up with a Kalashnikov, resulting in the death of one passenger and severe bullet injuries to four others. After accepting the compromise between the accused and the heirs of the deceased, the trial court sentenced the accused to five years’ imprisonment as *tazir*, considering the principles of *fasad-fil-arz*. The High Court, keeping in view the same principles, revised the sentenced up to seven years.

²⁴² 1996 SCMR 906.

²⁴³ 1997 PCrLJ 1937.

In another case²⁴⁴ (in which this author appeared as counsel), Justice Ramday of the Lahore High Court, keeping in view the principles of *fasad-fil-arz*, sentenced the accused to ten years' imprisonment under section 311, despite the waiver of *qisas* by the heirs of the deceased and composition of the offence. The accused had killed a police constable, who was part of the police team that had raided his house to recover illicit arms. The court held that he was guilty of *fasad-fil-arz* and extensively and separately defined the meanings of *fasad*²⁴⁵ and *arz*,²⁴⁶ that:

from what has been noticed above, it appears that the ones guilty of creating *fasad-fil-arz* are *inter alia* those who disturb the collective peace and tranquillity in the society; those who disturb the orderly running of the State; those who breach the law and order; and those who disobey the lawful commands of *Ul-il-Amr* (people in authority).²⁴⁷

In *Ijaz Ahmed v. The State*,²⁴⁸ Justice Kayani reinterpreted the meaning of *fasad-fil-arz*. In this case, a brother (Ahmad) murdered his sister, Mst. Maryam, on 21 May 1999. On 26 May 1999, Ahmad admitted that he had murdered his sister by shooting her in various parts of her body with a pistol because she had not ironed his clothes. He also informed the trial court on the same date that her legal heirs had pardoned/waived their right of *qisas* against him. Approximately six months later, the father of the deceased appeared before the court and officially stated that he and the other heirs had pardoned the accused. In view of these statements, the trial court convicted the accused under section 311 as *tazir* and sentenced him to fourteen years' imprisonment. The trial court was of the opinion that the act was particularly brutal, since it involved the killing of a sister, and over such an insignificant matter. In addition, he did not fire one shot but many and at different parts of her body.

Justice Kayani, however, disputed these views. He maintained that in the explanation attached to section 311, the legislature made it abundantly clear that the term *fasad-fil-arz* would only be applied if the

²⁴⁴ *Abdul Ghafoor v. The State*, 2000 PCrLJ 1841.

²⁴⁵ The court defined '*fasad*' according to Elias' *Modern Arabic-English Dictionary*, Elias Modern Press, Cairo, as "*inter alia*, means to spoil, to vitiate, to ruin, to demoralize, to foil, to frustrate, to negate, to deteriorate, to invalidate, to purify or to decompose".

²⁴⁶ The definition of *arz*, according to the same dictionary, was given as "land, but is also used to indicate a piece of land such as a State or country".

²⁴⁷ 2000 PCrLJ 1841.

²⁴⁸ 2000 PCrLJ 116.

offender had a record of conviction. The court held that the wisdom of inflicting punishment under *tazir*, notwithstanding composition or waiver by the heirs, was that it would be awarded as a penalty “not only for the propensity towards criminal acts but its mode of ‘barbaric execution’”. It held that:

if the courts are invested with powers that in each and every case, irrespective of the composition and waiver by the *walis* they can punish the accused, then sections 309 and 310 PPC would become redundant and superfluous in its application. Redundancy is something abhorred by the legislature.²⁴⁹

The judgment of the trial court was therefore set aside and the accused was acquitted.

In spite of this judgment, in a later case Justice Ramday reiterated that the courts are not permitted to act blindly upon a compromise and acquit a culprit. Sentencing the accused under section 311, he ruled:

the courts of law are also expected to consider all the attending facts and circumstances of the case and then to decide whether in the given situation the court should or should not grant permission for compounding the offence. The courts are also obliged to decide whether the case falls within the ambit of the provisions of section 311 PPC, and whether the offender, despite the compromise, deserved to be punished by way of *tazir* under the said provision of law.²⁵⁰

5.3.6 *Diyat: section 323*

The first authoritative pronouncement by the Supreme Court of Pakistan on issues surrounding the *qisas* and *diyat* law came in 1991, in the case of *Safdar Ali v. The State*.²⁵¹ This case raised some crucial issues, which had to be resolved by interpreting the new law. The Supreme Court was especially cautious in delivering its first judgment on this matter and hence requested two of Pakistan’s best lawyers in criminal and Islamic law (Barrister Ejaz Hussain Batalvi and Khalid Ishaq Advocate, respectively) to assist the court as *amicus curiae*. Khalid Ishaq had been dissatisfied with the haste of the Supreme Court and Government in introducing the law of *qisas* and *diyat* without proper deliberations, and thus asked to be excused. Batalvi accepted and assisted the court.

²⁴⁹ Ibid., p. 119.

²⁵⁰ *Muhammad Nazir v. The State*, PLD 2001 Lah 212.

²⁵¹ PLD 1991 SC 202.

Despite its efforts in other respects, the Supreme Court paid little attention to the issue of determining *diyat* amounts. *Diyat* was one of the punishments under section 53 whose value was to be determined under section 323 of the amended PPC. Although the Court did address the relevant provision, it did not deal with it exhaustively. The question was, if the court permits the parties to compound the offence on the basis of *badl-i-sulh*, what amount should be paid as such? In order to answer this question, the court adverted to section 323, which states:

the court shall, subject to the injunctions of Islam as laid down in the Holy Quran and Sunnah and keeping in view the financial position of the convict and the heirs of the victim, fix the value of *diyat* which shall not be less than one hundred seventy thousand and six hundred and ten rupees, being the value of 30,630 grams of silver.²⁵² Section 310(3) provides that the value of *badl-i-sulh* shall not be less than the value of *diyat*.

The Supreme Court did not proceed to inquire into the financial position of the accused and the legal heirs of the deceased, but simply held that since the value of *badl-i-sulh* is not less than the *diyat*, it should be deemed enough. The Supreme Court thus did not use this opportunity, in the early days of the application of this law,²⁵³ to lay down guidelines that would then assist the lower judiciary in determining the financial status of the accused and the heirs of the victim. It also did not rule on the circumstances under which the minimum amount (i.e., not less than the value of *diyat*) should be insisted upon by the court, or those instances in which the court should ask the offender to pay more. It instead dealt with the issue in a perfunctory and mechanical manner, and held that

as the value of thirty thousand six hundred and thirty grams of silver comes to about 171,000 rupees, the *diyat* being paid is not less than the statutory amount in this behalf. Besides, it is also reasonable.²⁵⁴

The Court was supposed to decide objectively on the reasonableness of the amount through using the criteria set out in section 323 of Ordinance VII, i.e., the financial position of the convict and the heirs of the victim (and not vice versa), yet it did not investigate these financial positions. Since the apex court of the country neither considered this

²⁵² Ibid., p. 208.

²⁵³ The case was decided on 13 January 1990, only three months after the promulgation of Ordinance VII of 1990.

²⁵⁴ PLD 1991 SC 292, p. 207.

matter carefully nor emphasised it properly, the lower courts also followed suit. In most cases, they only tried to ensure that the amount of *diyat* offered or paid by the convict was not less than the prescribed amount and did not inquire into the financial position of the convict and the legal heirs of the deceased.

In *Abdul Wahab v. The State*,²⁵⁵ the court was satisfied that the convict's brother had transferred a house worth 120,000 rupees to the minor daughters of the deceased. As this was more than their actual share, it therefore immediately accepted the compromise. The widow, mother and three brothers of the deceased had waived their right of *qisas* without compensation. The convict, who had shot and killed Hasan Shah in 1987, was declared a free man in 1991, only 41 months after the incident, simply because he was able to give 120,000 rupees (approximately £1200) to the minor daughters of the deceased.

5.3.6.1 *Payment of diyat*

The Pakistani version of the Islamic law of *qisas* and *diyat* does not sufficiently explain the issues surrounding the payment of *diyat*. Certain offences are stated in the law²⁵⁶ as being punishable with *diyat*. But what happens if an accused person cannot afford to pay *diyat*? The law allows for *badl-i-sulh* to be paid on a deferred date,²⁵⁷ but makes no mention of *diyat* being paid in instalments or on a deferred date. In the case of a minor offender, the statute provides that the *diyat* shall be paid either by his property or a person determined by the court, but no such provision is made for adults. Perhaps the legislature assumed that all adult offenders would be able to pay the *diyat* themselves. Such a presumption would, of course, be totally incorrect.

In *Asghar Ali v. The State*,²⁵⁸ the trial court convicted the accused with the payment of *diyat* and ordered that he should remain imprisoned until he paid it. How the convict, who was very poor, would pay the stipulated amount was not court's concern. Such questions were eventually raised in a constitutional petition²⁵⁹ eleven years after the law came into force by Abid Hussain and other convicts who were

²⁵⁵ 1991 MLD 1875.

²⁵⁶ Sections 316, 319 and 322, or punishments of *qatl-i-shab-i-amd*, *qatl-i-bil-sabab*, and *qatl-i-khata* respectively.

²⁵⁷ Section 310.

²⁵⁸ 2003 YLR 1156.

²⁵⁹ *Abid Hussain v. The Chairman, Pakistan Bait-ul-Mal*, PLD 2002 Lahore 482.

linguishing in jail even after having completed a substantial part of their sentences since they had no means to pay the *diyat* amount imposed upon them by the courts. In a lengthy judgment, the court eventually held that the State should pay *diyat* to the victim or the heirs of the deceased on behalf of the accused. Relying on the principles of Islamic jurisprudence, the court held:

putting a human being behind bars for the rest of his life for no other reason than his impoverished financial condition is an idea offensive to the 'dignity' bestowed upon him by God the creator. The holy Quran requires the believers to hate crime but not the criminal, and to extend mercy and compassion towards his unfortunate predicament whatever and, however, possible.

It is interesting to note that in deciding this constitutional petition, the court ordered the release of all convicts who had been punished under the criminal law of the State and had been in detention for more than six months on account of their failure to pay *diyat*.

This judgment illustrates how the courts were struggling to resolve the issues left unaddressed by the legislature in its haste to introduce Islamic law in the country. However, mere interpretations hardly decide such issues conclusively; the Provincial Government might have appealed against the judgment, or another judge could have decided the matter differently. The crucial question that remains unresolved is how one can justify the fact that a punishment imposed upon an accused person is shifted to Government functionaries, since the court had decided that the State is the modern manifestation of *aqila*²⁶⁰ and that in appropriate cases assistance can be provided to a convict from *Zakat* and *Usher* funds and *Bait-ul-mal*.²⁶¹ Furthermore, offenders who commit an offence under sections 315, 319 or 322—*qatl-i-shibhi-amd*, *qatl-i-khata* and *qatl-i-sabab* respectively—or any that entails the punishment of *diyat*, would not be punished at all and the Government or other institutions would pay the amount on their behalf. In another case, *Allah Ditta v. The State*,²⁶² Justice Jilani ordered the Home Secretary (Government of Punjab) to arrange payment of *diyat* on behalf of the convict and subsequently released him. The convict had had no means to pay the *diyat* amount and hence had been languishing in prison, even though

²⁶⁰ See Chapter One, footnote 114.

²⁶¹ This technically means 'public funds'.

²⁶² PLD 2002 Lah 406.

he had completed his sentence. This is another example of justice being done outside the parameters of the statute. Such decisions raise the crucial question of whether such crimes can be termed as offences and the perpetrators as offenders, if the State is responsible for paying the resulting fines. It seems that it is the State that is thus being penalised, not the convicts.

5.3.7 Qatl-i-khata and Qatl-bis-sabab

The common feature in *qatl-i-khata* and *qatl-bis-sabab* in the Pakistani law of *qisas* and *diyat* is that the offender should not have intended to kill the deceased. Under *qatl-i-khata*, death occurs due to a rash or negligent act, whereas under *qatl-bis-sabab* it occurs due to an unlawful act. Under *qatl-i-khata*, the accused is liable to imprisonment (of up to five years) in addition to *diyat*, keeping in view the facts and circumstances of the case, whereas under *qatl-bis-sabab*, the accused can be punished with *diyat* only.

In *Muhammad Arif*,²⁶³ the two-year-old son of a civil judge fell into a tubewell in the Officers' Colony where the judge lived. The tubewell had been installed in a room whose doors opened inwards and would give way easily, even with a small push from a child. At the time the child died, the operator of the tubewell, a poor man, had gone to break his fast. The judges' family was also busy breaking their fast (at about 6:45 p.m.), when their son, who had been left unattended, went to the well and fell in. The trial court found the tubewell operator, whose annual salary was approximately 15,000 rupees (£150), guilty of the offence of *qatl-bis-sabab* and sentenced him to pay *diyat* of 117,061 rupees (£1,706). He pleaded for the heirs of the victim to pardon him in the name of God, but they did not. His lawyer did not contest the conviction on appeal; perhaps he did not want to offend or annoy a civil judge from within his practicing area. It could have been argued, for example, that if the tubewell operator was deemed to be negligent, then the judge and his family were equally so for having left the toddler unattended in the first place.

Although the High Court corrected the sentence, it only did so technically and did not address the main issue of the case, *viz.* was there negligence on the part of the operator alone? The Court simply

²⁶³ 1999 MLD 2271.

worked out the correct amount of *diyat*—according to the value of silver at that time—and altered the offence from *qatl-i-bis-sabab* to *qatl-i-khata*. As the the operator’s act had been negligent, not unlawful; the order to pay *diyat* to the judge’s family (the legal heirs of the deceased) was maintained.

It is difficult to state exactly why the poor operator was made a victim of this unfortunate incident and the suit for damages was not filed against the State. It has been argued by many that the Pakistani law of *qisas* and *diyat* can be blamed for allowing the rich and influential to get away with committing certain crimes,²⁶⁴ the necessary corollary of which is that the poor tend to get punished. Ms. Majeda Rizvi, a retired judge of the High Court, observed that the law had affected the weakest segment of the society the most.²⁶⁵ One could argue that the case of *Muhammad Arif* illustrates this well.

5.3.8 *Minor murderers: section 306*

As mentioned above, although the new law defines the term ‘adult’ (the definition provided in the first Ordinance was later amended), there is no such definition for ‘minor’. Defining an adult has always been a matter of complication during the application of Islamic criminal law in Pakistan. The Shariat courts have always insisted that according to the injunctions of Islam, ‘adult’ means a person who has attained puberty.²⁶⁶ They have argued vehemently that the ‘signs of an adult’ as spelt out in various contemporary medical jurisprudences do not precisely define the term ‘*bulugh*’ (literally, adult) according to Islam; that in Islam, a boy shall be considered an adult if he has experienced nocturnal emission and a girl if her menstrual cycle has started.²⁶⁷ What the Shariat courts have not clarified, however, is that since both these experiences are very personal, how would the court decide whether a boy or a girl had attained *bulugh* at the time that the offence was committed? The Government, requiring a viable solution, thus had to fix the maximum age at which a person would be considered a minor, above which they should be legally presumed an adult. This notwithstanding, in *Shaukat*

²⁶⁴ Concluding remarks of a three-day consultation organised by the National Commission on the Status of Women (NCSW), *Dawn*, 12 June 2003.

²⁶⁵ *Ibid.*

²⁶⁶ For instance, see *Furrukh Ikram v. The State*, PLD 1987 FSC 5; *Abdul Jabbar v. The State*, PLD 1991 SC 172.

²⁶⁷ *Ibid.*

Masih v. The State,²⁶⁸ a case involving *zina* (fornication or adultery), the Federal Shariat Court held that the boy would be dealt with as an adult, even though he was under eighteen years of age, since according to the chemical examiner's report he had previously ejaculated.

Under the *qisas* and *diyat* law, although a *qatl-i-amd* committed by a minor is not punishable with *qisas*, he may be punished with *tazir*. In both cases the punishment is death, although imprisonment extending up to twenty-five years can also be sentenced as *tazir*. We will now examine some reported judgments of murder cases concerning minor offenders and explore how they were treated under the law.

In *Naseer Ahmad v. The State*,²⁶⁹ the trial court convicted a seventeen-year-old for committing *qatl-i-amd* under section 302(b) and sentenced him to life imprisonment. In the High Court, Justice Zafar Pasha relied on the provisions of section 306 read with 308 and decided that the accused could not be punished under section 302 since he was under the age of eighteen, and hence set aside the trial court's judgment. Instead, it sentenced him to fourteen years' imprisonment under section 308. However, Justice Pasha had been completely wrong in holding that the minor could not be punished under section 302 of the PPC as amended. There is absolutely nothing barring the accused from being punished under section 302(b) and (c); the exception applying only to section 302(a), i.e., death as *qisas*. Since the trial court had punished the accused under section 302(b), the sentence was in accordance with the law of *qisas* and *diyat* as legislated in Pakistan.

In *Muhammad Afzal v. The State*,²⁷⁰ the trial court sentenced the accused to pay *diyat* of 175,000 rupees either as a lump sum or in ten instalments, with seven years simple imprisonment under section 308. The accused was thirteen years old at the time of offence. The trial court held that no evidence had been produced by the defence which showed that the accused was not mature enough to realise the consequences of his act and hence his case was covered by "the mischief of the proviso II of the section 308 amended PPC".²⁷¹ His appeal was dismissed by the High Court.

The Supreme Court, however, held that the second proviso of section 308 of the PPC lays the burden on the prosecution to prove that

²⁶⁸ PLD 1982 FSC 19.

²⁶⁹ 1999 YLR 2012.

²⁷⁰ 1999 SCMR 2652.

²⁷¹ *Ibid.*, p. 2654.

the minor had attained sufficient maturity in order to have realised the consequences of his act. Therefore, the sentence by the trial court was wrong in law. Since the accused had already served a substantial period of his sentence behind bars as he had been unable to pay the *diyat*, the Supreme Court released him rather than remanding the case back to the trial court.

In *Muhammad Mumtaz Khan v. The State*,²⁷² the accused was sentenced to death for having committed murder. He was between seventeen and eighteen years old when he committed this offence. Although the High Court confirmed the death sentence, the Supreme Court altered this to life imprisonment under section 302(c).

In *Mahmood Alam v. The State*,²⁷³ Mahmood Alam, aged 17, was convicted by the court under section 302(c) with a sentence of twenty-five years' rigorous imprisonment. The Division Bench of the High Court held that this case fell squarely within the provision of section 308 PPC and therefore altered his sentence to ten years' rigorous imprisonment.

In *Muhammad Ashraf v. The State*,²⁷⁴ the accused—who was between seventeen and eighteen years old—was charged with the rape and murder of Mst. Nargis Khatoon, aged eight. The Federal Shariat Court decided that his age was definitely less than eighteen years at the time of the offence. The trial court convicted him under section 302(b) PPC and sentenced him to death as *tazir*. Interestingly, even the Federal Shariat Court held that *Muhammad Ashraf* was covered under clause 2 of section 306. The FSC held that:

it was incumbent on the prosecution to prove that the appellant at the time of occurrence was an adult. Likewise, it was obligatory for the trial court to be aware of the situation in determining the nature and quantum of sentence.²⁷⁵

The FSC altered his sentence from death to fourteen years' imprisonment under section 308 of the PPC. Although the trial court might have misjudged his age, he had been punished under *tazir* and thus the judgment was not legally erroneous since the law only stipulates that a minor cannot be punished by a sentence of *qisas*.

²⁷² 1999 SCMR 837.

²⁷³ 1999 MLD 2282.

²⁷⁴ 2001 PCrLJ 412.

²⁷⁵ *Ibid.*, p. 419.

In *Rahmat Ali v. The State*,²⁷⁶ the trial court convicted Rehmat Ali, aged 16, and sentenced him to life imprisonment under section 302(b). On appeal, the High Court converted this sentence to ten years' imprisonment under section 302(c) read with section 308 of the amended PPC.

5.4 CONCLUSION

In light of the above analysis, it can easily be observed that the Pakistani version of the Islamic law of *qisas* and *diyat* emerged into the legal landscape of Pakistan as a political expediency. It was not introduced to meet the demands of society or reforms the prevailing law of murder and homicide; rather, it was ordained as a consequence of a pledge that the interim Government gave to the Supreme Court of Pakistan. The new law is replete with all the lacunae that are bound to occur in the case of any hasty, politically-motivated and precipitate legislation. The framers of this law not only showed complete inconsideration towards the matrix of Pakistani society, but also failed to create the essential cohesiveness within the legislation that is fundamental for the smooth operation of the criminal justice system. A penal law statute, always being construed strictly, is expected to clearly and decisively define the offences, their punishments, the evidentiary requirements and the defences available to the accused. The law under discussion lacks all these basic merits.

The criminal justice system of Pakistan and its administration are both based on the essential features of English criminal law. The laws acknowledge in their scheme a clear distinction between claims and offences. Claims are dealt with under the civil law statutes and regulated by the *Civil Procedure Code, 1908*. Civil judges have jurisdiction to decide claims that primarily arise out of private wrongs. In such proceedings, plaintiffs claim rights and the courts secure those rights for them from the respondents. Acts and omissions that are declared as offences by the criminal law statutes are dealt with by the criminal courts. It is the State that brings the matter before the court after the registration and investigation of the case, acting not as a claimant, but as an accuser. It thus steps into the shoes of the victim(s) and prosecutes

²⁷⁶ 2002 MLD 918.

the case on their behalf, requesting that the court punish the accused. The State's interest in the punishment of the accused is based on bringing peace and order in society by preventing the recurrence of such acts.

Under the Pakistani *qisas* and *diyat* law, the line between these two proceedings is not patently obvious; rather, it overlaps and leads to disorder. The transplantation of the principles of Islamic law of *qisas* and *diyat*—essentially civil in nature—into the criminal justice system of Pakistan created an internal tension in its functioning, as well as causing conspicuous friction in its administration. The errors and flaws in the text of the statute increased this strain, which further gave rise to uncertainty in the application of its penal clauses. Consequently, the exterior of the law of murder and homicide shows signs of its internal tensions and conflicts with the rest of the criminal justice system. Such flaws, frictions and uncertainties have resulted in the misuse and abuse of the law by the courts and the criminals.

Pakistan's version of the Islamic law of *qisas* and *diyat* is fraught with vague concepts and loose and imprecise definitions. A decade after its application, there are still basic concepts which desperately require explanation and authoritative construction. For example, on 26 October 2002, while hearing a petition for leave to appeal,²⁷⁷ the Supreme Court formulated the following question for consideration:

What is the concept of *Khoon Baha* as per injunction of Islam in the criminal dispensation of justice? Whether *diyat*, as defined under section 299(e) read with section 323 PPC, will be recoverable from the accused jointly, if there is more than one member for the commission of murder of one person, or individually, being *Khoon Baha*, equal to the value of silver notified from time to time by the Government? Whether the court, in an offence falling within the mischief of section 316 PPC, is bound to award a substantive sentence of imprisonment as *tazir* or otherwise? What would be the criteria for awarding sentence of imprisonment as *tazir* under section 316 PPC?

This illustrates that even after twelve years of implementation the main concepts of the law are still unclear in the minds of lawyers, judges and the people of Pakistan. This may be because the law borrowed ideas, concepts and even technical terms from the tribal culture of the *Hijaz* (Saudi Arabia) while both the judiciary and Pakistani society

²⁷⁷ *The State v. Akbar Khan*, 2002 SCMR 1676.

were wholly unfamiliar with such ‘traditional’ mores, norms, values and technical terms.

The analysis of the case law reflects that the judges of the higher courts are not only struggling to interpret the law in such a way as to bring harmony within its various conflicting provisions, but also endeavouring to construe it in conformity with the injunctions of Islam, as laid down in the Quran and Sunnah. However, in doing so, they not only differ from each other on minor points, but also at times interpret the law in completely opposite ways. In a common law-based system, where precedents play a vital role in the understanding of a statute as well as being binding on the lower judiciary, such conflicts in opinion have further augmented the uncertainty and ambiguity regarding the law, which was already prevalent in society. The judgments of the Federal Shariat Court and the Supreme Court show that the lower judiciary was unaware of even the basic principles under Islamic law in relation to recording and relying on evidence. This conclusively proves that leaving the responsibility to the courts, from the magistrates to the Supreme Court, to interpret and in effect structure the law in accordance with the injunctions in the Quran and Sunnah was a totally misplaced and wrong course adopted by the legislature.

All these flaws in the law and in its interpretation are due to the haste of the Government in its formulation. Syed Riaz-ul-Hassan Gilani Advocate, who had been actively engaged in this particular legislative process and who also appeared before the Supreme Court as the Deputy Attorney General of Pakistan in the *Gul Hassan* case, stated,

... the law relating to *qisas* and *diyat* had been introduced in and injected into our pre-existing criminal law and legal system without any serious debate or deliberations, as the same had been done hurriedly under the compulsions of the judgment handed by the Honorable Shariat Appellate Bench of the Supreme Court of Pakistan.²⁷⁸

Gillani candidly admitted before the court that the amendments brought about in the criminal law of Pakistan “need to be reconsidered, reviewed and suitably amended so as to make this new dispensation, rational and practicable”.²⁷⁹

Even in the best of circumstances, good laws are not easy to design or even to enact. This law, however, was legislated in a ‘fast-track mode’

²⁷⁸ *Abid Hussain v. The State*, PLD 2002 Lahore 482.

²⁷⁹ *Ibid.*, p. 503.

in the worst of political environments, i.e., that of uncertainty. It thus contains major discrepancies, inconsistencies and ambiguities, which provide clear opportunities for abuse and result in the intensification of public cynicism towards the law in general. In certain cases, the law in effect decriminalises the offence of murder, e.g., in the case of compromise or where the punishment of *diyat* is either not applicable or cannot be enforced. The power to compromise the offence at any time after its occurrence has put trial courts in an awkward position. Parties often compromise even before completion of the investigation, and trial courts thus cannot punish the accused under *tazir*, even in a case of *fisad-fil-arz*.

It is unclear what the Pakistani law of *qisas* and *diyat* actually intends to achieve. Murder, which is abhorred by God as well as by human beings, has been dealt with extremely leniently under the law, which fails to strike a balance between its effects on the victim's family and on society in general. Judges are not provided with rules or guidelines on how to exercise the wide discretions conferred on them by the law in punishing offenders under *tazir*. Hence, the punishment of murder has lost its deterrence or preventive effects.

CHAPTER SIX

THE IMPACT OF QISAS AND *DIYAT* LAW ON THE ADMINISTRATION OF CRIMINAL JUSTICE IN PAKISTAN

INTRODUCTION

As has been emphasised in previous chapters, the most visible change that the ‘new law’ introduced into the law relating to offences of culpable homicide and murder was the reconceptualisation of the offence of murder. Under the ‘new law’, criminal homicide was not an offence against the legal order of the State, but against the family of the deceased. This approach to criminal homicide was prevalent in the subcontinent almost 150 years ago, during and following Muslim rule.¹ The private character of the *qisas* and *diyat* law was the very reason for its abandonment by the British colonial rulers in the early nineteenth century. The practice of compounding of these offences, combined with the high evidential requirements for proving a case against the accused, led to many acquittals. This meant that Islamic criminal law came to be regarded as a somewhat blunt tool in the maintenance of law and order.

Therefore, the British introduced a system of criminal justice in India that was based on Anglo-Saxon jurisprudence.² In this system, murder is regarded as a public wrong and those who commit it are acted against by the State, punished if found guilty and convicted by courts of law.³ Following the partition of India in 1947, Pakistan retained this system, which continues to this date. The approach that ‘Islamic criminal law’ takes in cases of culpable homicide and murder was hence foreign to this system and could not be accommodated easily. This is consistent with the fact that the system was established in the nineteenth century

¹ M.B. Ahmad, *Administration of Justice in Medieval India*, Aligarh, 1945; also see A.A. Fayzee, “Mohammadan Law in India”, *Comparative Studies in Society and History*, vol. 5, no. 4, 1963, pp. 401–15.

² See Justice Shafiur Rehman in *Federation of Pakistan v. Gul Hassan*, see PLD 1989 SC 633.

³ Sir John William Salmond, *Salmond on Jurisprudence*, 12th ed., ed. by P.J. Fitzgerald, London, 1966, p. 91.

and structured so as to curb the practice of compounding the offences of culpable homicide and murder.⁴

The purpose of this chapter is to examine how a criminal justice system based on Anglo-Saxon jurisprudence has responded to this redefinition of the offences of culpable homicide and murder. It will also examine the workings of some of the components of the machinery of the criminal justice system of Pakistan, *viz.* the police, courts and the criminal litigants. In order to achieve an in-depth understanding of the issue, an overview of the relevant statutory law and its practice is essential. This closer look into the law and its application will help us better appreciate the data analysis provided in subsequent sections.

In this way, the chapter offers a critical analysis of statistics on the crime of murder and its related variables from 1981 to 2000, sifted out from the records of police, trial courts (Sessions Courts), the Lahore High Court Multan Bench, the Federal Shariat Court and the Supreme Court of Pakistan. This penultimate chapter thus furnishes a survey of the impact and ramifications of the introduction of the *qisas* and *diyat* law into the criminal litigation of murder in Pakistan.

6.1 CRIMINAL JUSTICE SYSTEM OF PAKISTAN

The structure of the criminal justice system of Pakistan is founded on three major statutes: (1) *The Pakistan Penal Code, 1860*; (2) *The Code of Criminal Procedure, 1898*; and (3) *The Qanun-i-Shahadat Order, 1984*. Although the police laws⁵ are also important pillars of this edifice, their function is subsidiary to the *Criminal Procedure Code, 1898*. The *Qanun-i-Shahadat Order, 1984* is the new name for *The Evidence Act, 1872*.

⁴ Jorg Fisch, *op. cit.*, pp. 19–57.

⁵ Until 2002, the police laws were comprised of *The Police Act, 1861*; *The Police Act, 1888*; and *The Police Rules, 1934*, periodically amended. However, on 14 August 2002, a new police law, *The Police Order, 2002* was issued by Chief Executive Order no. 22 of 2002; see *Police Order, 2002* in M. Mahmood, *The Major Acts*, Lahore, 2003. The law brought in major changes to the administrative set-up of the police, but did not introduce changes in the method of investigating homicide cases. Therefore, the new Police Law will not have any effect on the findings of this chapter.

6.1.1 *The Pakistan Penal Code, 1860 and The Code of Criminal Procedure, 1898*

The Pakistan Penal Code is the substantive penal law of the State. It defines the acts and omissions that are offences and the punishments thereof. The definition of ‘offence’ provided under section 40 states: “except in the chapters and sections mentioned in clauses 2 and 3 of this section, the word ‘offence’ denotes a thing made punishable by this Code”. Thus, if we look into the new, supplanted chapter XVI of the Code, we find that four kinds of homicide (*qatl*)⁶ are mentioned therein, all of which are made punishable by the Code and therefore fall under the definition of ‘offence’. The structure of this Anglo-Saxon criminal justice system is based on the premise that when an offence is committed, the State machinery goes into motion in order to apprehend the offender. The State feels aggrieved on the basis that it is its responsibility to protect its citizens and their public rights. In this theory, the Government is responsible for law and order in the country. On this premise, an offence is an act committed against the public and is considered a violation of the rights of society, in contradistinction with the rights of individual(s). The violator of a public right is then caught and proceeded against by the State, on behalf of society/the public and in the public interest since the State (in contemporary society) is postulated as custodian of the public interest.

In contrast, as studied in Chapters One and Two, *qatl* under ‘Islamic criminal law’ is understood to be a civil wrong. According to Muslims jurists, murder is an injury to the deceased’s family and a violation of the rights of individuals. It is not an offence against society and hence the State should not interfere. Islamic law, as regards homicide, demands “no prosecution or execution *ex officio*, but only a guarantee of the right of private vengeance”, comments Schacht.⁷ The Islamic criminal justice system of India applied by the Muslim sovereigns prior to the British take-over of the Indian Government, confirms Schacht’s statement. Under that system, the right to prosecute and punish rested with the legal heirs of the deceased. If the victim or the deceased’s family in the case of murder did not complain and request the *qazi* for prosecution of the case, the machinery of the criminal justice system did not go

⁶ (1) *Qatl-i-amd*, section 300; (2) *Qatl-i-shibh-amd*, section 315; (3) *Qatl-i-khata*, section 318; (4) *Qatl-bis-sabab*, section 321.

⁷ Joseph Schacht, *An Introduction of Islamic Law*, Oxford, 1964, p. 177.

into motion and no prosecution would take place at all.⁸ These are also the norms in the criminal justice system of modern-day Saudi Arabia, in which, excepting *qatl-i-ghila* (murder by treachery), only the legal heirs of the deceased can bring the criminal law into motion. They can also forsake it at their will.⁹ We shall analyse the ramifications of this incongruity in the context of Pakistan at a later stage, but here it is sufficient to observe that in the criminal justice system of Pakistan, under the statutory law for the purposes of initiating criminal proceedings, culpable homicide and murder are still considered crimes against the order of the State.

The punishments contained in the *Pakistan Penal Code* which may be incurred due to the commission of any homicide described in chapter XVI of the PPC are *qisas*, *diyat*, *tazir*, fine, death and life imprisonment (simple or rigorous). It is the pronouncement of punishments for the homicides in the PPC that makes them offences, as per the definition of 'offence' set out in the PPC.

The Criminal Procedure Code divides offences into two categories: cognisable and non-cognisable.¹⁰ Cognisable offences are those wherein a police officer may proceed with the arrest of the accused without a warrant.¹¹ All the homicides mentioned in Chapter XVI of the PPC are cognisable offences under the CrPC. The law is thus set in motion when the commission of a criminal homicide (a cognisable offence) is brought to the knowledge of the police. On receiving such information, the police immediately commit the information to writing on a particular form called the First Information Report (or FIR)¹² on a specific register. The FIR register contains 200 pages and is preserved in police stations for 60 years.¹³ Generally speaking, an FIR provides information about the complainant, the time the offence occurred, the time it was reported, the name of any witness(es), the name(s) of the accused (if known), any weapon(s) used, the section(s) of law under which the offence *prima facie* seems to have been committed, the name of the police station in whose boundaries the offence was committed

⁸ T.K. Banerjee, *Background to Indian Criminal Law*, Calcutta, 1963, pp. 70–73.

⁹ See Muhammad Sa'ad al-Rasheed, *Criminal Proceedings in Saudi Arabian Judicial Institutions*, PhD dissertation, University of Durham, 1973.

¹⁰ Section 4, *CrPC*.

¹¹ *Ibid.*

¹² Section 154, *CrPC*.

¹³ See rule 24–5(1) of *The Police Rules, 1934*.

and a brief account of the incident. The FIR also indicates the action taken by the police on the report and notifies the name of the police officer(s) who are assigned the investigation of the crime.

6.1.2 Investigation

The police investigate homicide offences following the procedure laid down in the *CrPC* and *The Police Rules*. In the criminal justice system of Pakistan, the word ‘investigation’ is used as a technical term, defined under section 4(b) of the *CrPC* and includes all proceedings under the *CrPC* for the collection of evidence conducted by the police officer or by a person other than a Magistrate who is authorised by a Magistrate on his behalf. The primary purpose of investigation is to ensure that no one is sent for trial unless there is sufficient evidence available that connects the accused with the offence.¹⁴ Both statutes, the *CrPC* and *The Police Rules*, equip the police with great powers to facilitate them in their investigations. They are empowered to arrest, detain, search, and seize any property¹⁵ that is linked with the offence or can be produced against the offender in order to prove him guilty.

The outcome of an investigation is recorded in a report prepared by the police officer under section 173 of the *CrPC*. This report is commonly termed ‘*challan*’ and details the charges brought against the accused. The *challan* is a formal request, by the police to the court, that the accused should be tried under the offences mentioned therein. A *challan* form contains seven columns that the police officer forwarding the request is legally bound to fill in, *viz.*:

- 1) name of the informant;
- 2) name of the accused not charged by the police and absconding accused;
- 3) name(s) of the person(s) charged and held in custody;
- 4) name(s) of the person(s) charged and on bail;
- 5) details of any property recovered during investigation;
- 6) name(s) and address(es) of the prosecution witness(es); and
- 7) the statement of facts with regard to occurrence of the offence(s), along with the opinion of the investigation officer.

¹⁴ *Muhammad Nawaz Khan v. Noor Muhammad*, PLD 1967 Lah 176.

¹⁵ See sections 155, 156, 47, 49, and 165 of the *CrPC*, respectively.

The investigating officer may also recommend to the judicial magistrate, who supervises the investigation under section 173, that the case against the accused be cancelled. An investigation also comes to a halt when the police declare the offender(s) untraceable.

6.1.3 *Evidence: The Evidence Act, 1872 and the Qanun-e-Shahadat Order, 1984*

Jorg Fisch astutely argues that:

the connection between the substantive law and the law of evidence is of utmost importance. A harsh penal law can be considerably mitigated by strict procedural regulations and the requirements of meticulous observation of the severe evidential rules.¹⁶

All the Islamic criminal laws enforced in Pakistan illustrate Fisch's observation. Section 304 of the Pakistani law of *qisas* and *diyat* stipulates that *qatl-i-amd* liable to *qisas* can only be proved either by the accused's voluntary and true confession of the offence or by the evidence as provided in Article 17 of the *Qanun-e-Shahadat Order, 1984*.

Thousands of criminal cases have been decided by the courts of law in Pakistan since the application of Islamic laws in the State,¹⁷ but not a single judgment has been handed down that is based on evidence which fulfils the requirements of article 17 of the *Qanun-e-Shahadat Order, 1984*.¹⁸ Consequently, all those convicted for murder are sentenced to *tazir* punishments, since the requirements of evidence for sentencing under *tazir* are not as strict as those under *qisas*. Interestingly, the *tazir* punishment in cases of intentional murder is the same as that under *qisas*, viz. death. Although the law of evidence formulated by the British is considered just and safe for the purposes of convictions under *tazir*, it is not so for the punishment under *qisas*. It would be useful at this stage to review a brief history of the transformation of *The Evidence Act, 1872* into the *Qanun-e-Shahadat Order, 1984*.

¹⁶ Fisch, *op. cit.*, 1983, p. 15.

¹⁷ *Hudud* laws were enforced in Pakistan from 1979, whereas the *qisas* and *diyat* laws were applied from 1990; for details, see Chapter One.

¹⁸ In this regard, this research confirms the findings of Asma Jahangir and Charles Kennedy, as given in their works: Asma Jahangir and Hina Jilani, *The Hudood ordinances: a Divine Sanction? A Research Study of the Hudood Ordinances and their Effect on the Disadvantaged Sections of Pakistan Society*, Lahore, 1990; and Charles H. Kennedy, "Islamization and legal reform in Pakistan", *Pacific Affairs*, vol. 63, no. 1, 1990, pp. 62-77.

In 1980, General Zia's Government asked the Islamic Research Institute (IRI) to examine *The Evidence Act, 1872* in order to bring it into conformity with the injunctions of Islam. The IRI made some suggestions for bringing the law into conformity with the 'Islamic law of evidence', but these were not acted upon.¹⁹ Instead, General Zia urged the Council of Islamic Ideology (CII) to draft the new Islamic law of evidence, stating that "[i]n my opinion what is of fundamental importance is that the Law of Evidence should be strictly in accordance with the Quran and Sunnah".²⁰ Accordingly, the CII drafted the *Islamic Law of Evidence Ordinance, 1982*. The General did not approve this draft and on 28 October 1984 promulgated another law of evidence that purported to have been drafted in line with the Quran and Sunnah: *The Qanun-e-Shahadat Order, 1984*.²¹ The Order retained all the principles and sections of *The Evidence Act, 1872*. However, some cosmetic changes were introduced in the new enactment; the sections were re-numbered and fewer than five new sections²² were introduced. None had any direct relevance to Islamic law except article 17.²³ Article 17 of *The Order, 1984* (see section 5.5) specifies the competence and number of witnesses required, according to the Quran and Sunnah, in any case related to Islamic criminal laws. In a case of homicide, the requirement is two male witnesses of just and unblemished integrity.²⁴ Following the introduction of article 17, not a single witness was able to fulfil the requirements of a 'just witness' as stipulated by the Order of 1984 and interpreted by the Supreme Court in the *Ghulam Ali* case (see Section 5.5). Courts presently apply the British-made law of evidence in order to sentence a person guilty of murder under the 'Islamic law' of *qisas* and *diyat* in Pakistan. It is ironic that the one 'Islamic' provision added to the 'un-Islamic' law of evidence was in fact of no use to the 'Islamic courts' of Pakistan.

It could be argued that the unavailability of evidence which meets the requirements of the 'Islamic standards of evidence' may reflect the moral, ethical, and 'Islamic' standards of the society in which the 'Islamic law' is in application. It is intriguing that a society which

¹⁹ Mohammad Mian Siddique, *Fikro Nazr*, March–April, 1983, p. 163.

²⁰ *Draft Ordinance Islamic Law of Evidence, 1982*, Council of Islamic Ideology, Islamabad, 1984, p. vii.

²¹ PO no. 10 of 1984, PLD 1984 CS 32.

²² Articles 17, 163, 164, 165, and 166 were newly introduced.

²³ See Chapter Five.

²⁴ For details, see Dr. Tanzilur Rehman, *op. cit.*, 1989, p. 372.

legislated Islamic laws, including the Islamic law of evidence, could not produce evidence conforming to the requirements of a law that they themselves laid down.

6.1.4 *Trial*

The culmination of a police investigation is an administrative finding against the accused. Such findings can lead only to the trial of the accused, and not to the punishment. The trial is a pre-condition for imposing a formal sanction upon the accused. Interestingly, the CrPC does not define 'trial', but provides all the minute details²⁵ for the process so as to ensure a fair trial of the accused that also does not impinge on the rights of the complainant. Generally speaking, the proceedings of a criminal homicide trial commence with the submission of *challan* by the State in the Sessions Court.

The CrPC defines four classes of criminal courts that administer criminal justice: the High Courts, Courts of Session, the Courts of Magistrates, and such other courts as may be constituted under any law other than the CrPC.²⁶ A Court of Session is established for every session division by the Provincial Government. It consists of a Sessions Judge, Additional Sessions Judge and Assistant Sessions Judge, who are attached to that division.²⁷ The High Court may pass any sentence authorised by the law. A Sessions Judge and Additional Sessions Judge may pass any sentence authorised by law, subject to the condition that any sentence of death must be subjected to confirmation by the High Court.²⁸ An Assistant Sessions Judge may also pass any sentence authorised by law except imprisonment exceeding seven years or a death sentence.

All offences of criminal homicides are exclusively triable either by the High Court or the Courts of Session, as established under the Code of 1898.²⁹ However, the Government has powers, under other laws, to constitute other courts to try offences of the Pakistan Penal Code or other statutes.³⁰ Nevertheless, due to its limited scope, this book is concerned only with the examination of trial by the Courts of Session.

²⁵ See, generally, chapters XV to XXX.

²⁶ Section 6, *CrPC*.

²⁷ Section 9, *CrPC*.

²⁸ Section 31, *CrPC*.

²⁹ Section 6, *CrPC*.

³⁰ *Ibid.*, and for instance see *The Anti Terrorism Act, 1997*.

During the trial, it is the prosecution's responsibility to prove the charges against the accused.³¹ Even after the introduction of the 'Islamic law of *qisas* and *diyat*' in the criminal justice system, the State leads the prosecution. However, in cases of homicide the private complainant may withdraw from the prosecution of the case at any time, which would thus result in an unnatural closure of trial, without a finding on the culpability of the accused. The exercise by the police in investigating the crime of murder, collecting evidence against the accused and spending State resources in pursuing the criminals, is rendered a waste of time as soon as a complainant enters into compromise with the accused. Under the new law, a complainant may inform the court at any time that the legal heirs have pardoned the accused and therefore s/he is not interested in the accused being tried.³² Interestingly, the law permits the complainant to pardon the accused even without having any formal proof or determination of involvement in the crime.

Where a complainant does not pardon the accused, the duty to discharge the burden of proving the accused guilty rests with the prosecution headed by the State. This norm is again based on the principle of English common law, wherein an accused is given the right of silence.³³ The public prosecutors who conduct the trial in cases of culpable homicide and murder are called District Attorneys.³⁴ The complainant party may also hire the services of private lawyers. The trial concludes with the pronouncement of the conviction or acquittal of the charged persons.

On conclusion of the trial, a Charge Sheet Slip is completed under the orders of the trial court and returned to the office of the superintendent police. The result recorded on this slip is then entered into the General Crime Register and the 'English Register'³⁵ of cognisable offences, and thus is finally communicated to the police station that had originally recorded the occurrence of the crime.

³¹ See Chapter IX, The Qanun-e-Shahadat Order, 1984.

³² See Chapter Five.

³³ See R.H. Helmholz, Charles M. Gray, John H. Langbein and Eben Moglen, *The Privilege against Self-Incrimination: Its Origins and Development*, Chicago, 1997; also see J. Michael and B. Emmerson, "Current Topic: The Right to Silence", *European Human Rights Law Review*, vol. 1, 1995, p. 4.

³⁴ Section 265(a), CrPC.

³⁵ Name of a register, perhaps designed by the English during Colonial rule.

Death is the normal penalty for the offence of murder in Pakistan³⁶ in both the repealed and the new law. As mentioned above, when the trial court (the Court of Session) passes a death sentence in a murder case, the judgment is referred to the relevant High Court³⁷ for confirmation. In legal parlance, this is termed a 'Murder Reference'. The High Court enjoys enormous powers to deal with these references. They may confirm the sentence, annul the conviction, or pass any other sentence warranted by law.³⁸

The accused can challenge the judgment of the trial court in the High Court. On the other hand, if the trial court passes a sentence of lesser punishment or even acquits the accused, the complainant can also challenge the sentence in the High Court. On such a challenge, the High Court may revise the sentence of the Court of Session and increase the punishment.³⁹

6.2 SAMPLE AREA OF THE STUDY

Pakistan is administratively divided into four provinces: Balochistan, North-West Frontier Province (NWFP), the Punjab and Sind. Their respective capitals are Quetta, Peshawar, Lahore and Karachi. Each Province is sub-divided into a number of Commissioner's divisions, each division into districts and each district into *tehsils*.⁴⁰ The Province of Punjab comprises 8 divisions and 34 districts; Sind, 5 divisions and 21 districts; Balochistan, 6 divisions and 26 districts; and the North West Frontier Province (NWFP) 7 divisions and 24 districts.⁴¹ There is a High Court in each Province that supervises and controls all the courts subordinate to it.⁴² In terms of population, Punjab has the largest proportion (55.6%), then Sind (23%), NWFP (13.4%) and Balochistan (5%). The other areas to be noted are the Federally Administrative Tribal Area or FATA (2.4%) and Islamabad (0.6%). Other than in Punjab, all provinces embody a sharp distinction between two major

³⁶ Section 302 of the PPC; also see *Nuran v. Nura etc.*, PLD 1975 SC 162.

³⁷ Section 374, *CrPC*.

³⁸ Section 376, *CrPC*.

³⁹ Section 439, *CrPC*.

⁴⁰ *1998 Consensus Report of Punjab Province*, Population Census Organisation Statistics Division, Government of Pakistan, Islamabad, December 1998.

⁴¹ *Report of the Election Commission of Pakistan*, Pakistan Election Commission, Government of Pakistan, Islamabad, 1998, p. 5.

⁴² Article 203 of the *1973 Constitution*.

segments of society, e.g., divided into locals⁴³ and *muhajir* (migrants)⁴⁴ in Sind; feudal and farmers in interior Sind; rural and urban in Karachi; or only tribal units (FATA). Punjab, on the other hand, epitomises the rich multi-cultural and cross-sectional society of Pakistan. All major sections of society are found here, even the tribal sections that form part of the Southern Punjab (Dera Ghazi Khan) division.

The Multan Bench of the Lahore High Court is situated in the southern part of the Punjab. The Bench was established in 1980⁴⁵ and commenced functioning on 7 January 1981.⁴⁶ The Bench exercises jurisdiction over two divisions of Southern Punjab: Multan and Dera Ghazi Khan, which are made of ten districts.

6.2.1 *Multan Division*

The Multan division is comprised of six districts: Multan, Khanewal, Vehari, Pakpattan, Sahiwal and Lodhran. Multan, the oldest city in Pakistan, is also the principal city in the division and houses the Lahore High Court's Multan Bench. According to the 1981 Population Census, the total population of Multan division was 7,533,710.⁴⁷ This grew to 11,530,000 by 1998, according to the 1998 Population and Housing Survey.⁴⁸ The division is spread over an area of 20,510 square kilometres.⁴⁹

6.2.2 *Dera Ghazi Khan Division*

The Dera Ghazi Khan (henceforth DG Khan) division is comprised of four districts: DG Khan, Rajanpur, Layyah and Muzaffargarh. Historically, the old district of DG Khan was part of the early nineteenth-century Multan Kingdom. A part of DG Khan and Rajanpur districts falls under the administrative control of the Federal Government. Although the tribal system is very much in practice, the tribal chiefs, who were

⁴³ People who were residing in Pakistan before the partition of India in 1947.

⁴⁴ People who migrated from India on the eve of the Partition.

⁴⁵ *Imroze*, 2 January 1981.

⁴⁶ *Imroze*, 7 January 1981.

⁴⁷ *Population Census Reports*, Population Census Organisation, Islamabad, 1982, p. 127.

⁴⁸ *Population Census Reports*, Population Census Organisation, Islamabad, 2000, p. 215.

⁴⁹ Map of the Commissioner Multan Division, Multan, Government of Pakistan Press, Karachi, 1990.

given the title of *Tumandars* by the British, have been stripped of their powers to decide criminal matters within the tribes. Nevertheless, they exercise considerable influence on the investigations of cases conducted by the tribal police. At present, a representative of the Federal Government of Pakistan (i.e., a political agent) is in charge of the tribal police and civil administration. However, the district and Sessions Judges working in these two districts hear and decide any murder cases therein in accordance to the criminal law of the country. According to the 1981 census, the population of DG Khan Division was 3,746,839,⁵⁰ which grew to 6,511,377 in 1998.⁵¹ The division is spread over 38,152 squares of kilometres.⁵²

Geographically speaking, the sample area under examination, which is spread over 58,662 square kilometres and populated by 18,041,377 people, is situated in the centre of Pakistan. This area represents a cross-section of contemporary Pakistani society. The average rate of population growth of this area in the last twenty years has been 3.00%,⁵³ higher than the national average of 2.96%.⁵⁴

It needs to be emphasised at this point that this research does not investigate the socio-economic factors affecting the crime of murder. Neither does it concern itself with examining groups or classes that commit murder more often than others. It does, however, take into consideration the social classes that reside in a particular region, so as to examine the reasons and socio-economic factors that play a crucial role in increasing murder by allowing people to enter into compromises and thus offenders to escape the penalties prescribed by law for the offence.

6.2.3 *Analysis of the crime data: its sources and time span*

The study examines the murder data of a twenty-year period, commencing from 1981. The first ten years' data (1981–90) provides the picture of crime and its related variables when the defunct law was under

⁵⁰ *Population Census Reports*, Population Census Organisation, Islamabad, 1982, p. 127.

⁵¹ *Population Census Reports*, Population Census Organisation, Islamabad, 2000, p. 215.

⁵² Statistics based on the record of the Commissioner's office, DG Khan, quoted from the *Population Census Report*, Population Census Organisation, Statistics Division, Government of Pakistan, Islamabad, 2000.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

operation. This is contrasted with the next ten years' data (1991–2000), during which time the 'Islamic' law of *qisas* and *diyat* was in application. The analysis of the rate of criminal homicide, conviction, acquittal on merit and acquittal on the basis of compromise, at the levels of trial courts, the Federal Shariat Court and the Supreme Court, is based on statistics collected from the Superintendent of Police offices and the Sessions Courts of the sample area (ten districts), as well as from the Multan Bench of the Lahore High Court, the Federal Shariat Court and the Supreme Court of Pakistan at Islamabad and its Permanent Seat at Lahore.

6.2.4 *The Police*

Collecting crime data in Pakistan is an arduous task. The only department that collects, compiles and keeps such data is the police; the public have no access to such statistics. However, each year the district Superintendent of Police (SP) office of every district has to prepare its Annual Administration Report that delineates the general crime situation of that district in the previous year. Hence, at the beginning of every year, carefully selected figures of crimes from this report are issued to local media in the district.

The Annual Administration Report provides the number of crimes committed in the district in the previous year and the number of cases convicted by various courts. Reasons behind the rise and fall of specific crimes are generally not included, although in some reports this issue is discussed summarily and evasively as a matter of routine rather than an outcome of research. These Reports are prepared for the Inspector General of Punjab and his evaluation of the police, who then forward the crime figures through the provincial Home Office to the Interior Ministry of the Federal Government.⁵⁵ A copy of the report is generally kept in the Superintendent of Police (SP) office. It was learnt during fieldwork, however, that many of these reports—in the districts of Pakpattan, Lodhran and Layyah—were missing. If this were the situation, original case files were explored for the purposes of this research.

⁵⁵ Rules of Business, Government of Punjab, Lahore, 1988, p. 36.

Although the Reports shed light on some aspects of the offence of murder and related issues, they completely ignore other crucial aspects, e.g., reasons behind increases or decreases in particular crimes. They do not provide the actual numbers of deceased persons mentioned in the FIRs, or state the numbers of alleged accused. Most importantly, they are silent on the number of accused who had been charged by the police for the offence of murder and the number sent for trial. They do, however, indicate the numbers of cases sent up for trial, cases that were cancelled after investigation, and cases wherein the accused could not be traced. Surprisingly, the Reports do not disclose the number of cases in which conviction was confirmed by the higher courts. Furthermore, the number of pending trials are given, but not the number of cases pending investigation.

It needs to be mentioned here that the police record suffers from many other flaws and lacunae. It misconstrues or appropriates the meanings of conviction for its own purposes of having a clear record. For instance, if the police sent four accused to trial under the charge of murder and the court convicted only one and acquitted the other three, the record would still show that the case was won by the police, i.e., without acknowledging that it failed to prove the offence against the other three accused. No systematic study of the judgment is carried out, either by the police or the District Attorney's office, in order to ascertain the reasons for its failure to bring home a guilty sentence for the three that were acquitted.

The practice of sending more persons than the actual culprits to face trial because of corruption in the police department has thus not declined. Such practices not only severely damage the credibility of the police, but also render the conviction figures in the police record irrelevant. Neither the court nor the administration of the State shows any concern for such misdoing. Furthermore, if one of the accused is convicted under the charge of possessing an unlicensed weapon and acquitted of the murder charge, the police record will still count this as a conviction for a murder case. The fact that a conviction in a murder case, as shown in the Police record, thus does not necessarily represent a conviction under a murder charge, is particularly intriguing, if not somewhat bizarre.

Given these shortcomings, this researcher concluded that the police record could only be used to examine the rate of the crime of murder in the sample area. Since murder is one of the most serious crimes, it is generally reported to the police and hence their record is reliable

in this respect. It is only in exceptional cases that the police refuse to record such a crime, e.g., those in which the murderer belongs to the higher echelon of society, or a female is murdered within an influential family.⁵⁶ As mentioned earlier, the police is the only agency that keeps a record of crimes and hence this study uses data collected from police records to analyse the murder crime rate of the sample area.

6.2.5 *The Sessions Courts*

Having discovered the inaccuracies in the police records as regards the rate of conviction and acquittals—those on the basis of compromise and on merit⁵⁷—I reviewed the record of the Courts of Session of all ten districts of the sample area. The Courts of Session that operate as trial courts in cases of criminal homicide and murder register the names of the accused sent for trial by the police, along with the title of the case, in the English Register. The English Register, maintained under the High Court Rules and Orders, also contains the outcome of every trial, explaining whether the accused were acquitted or convicted. It documents the section(s) of law under which the accused, if convicted, were sentenced. The English Register provides the names of the accused, the acquitted and the convicted in three different columns, as well as a brief description of any punishment given. It does not, however, disclose whether acquittals were gained because of compromise between the parties or on merit. According to many of the lawyers interviewed for this book, the reason for this gap in information is obvious: the revelation of such details would eclipse the actual performance of the presiding officers. Session Judges prefer to send figures on the cases they dealt with to the High Courts, rather than divulging information about how such cases were dealt with.

6.2.6 *The District Attorneys' Office Record*

The statistics relating to compromises were particularly crucial for this study. Therefore, to procure the figures of compromises subsequent to the submission of *challan* in the trial courts, I searched the records of the District Attorneys' (DAs) Offices of every district in the sample

⁵⁶ Mohammed and Shazia Hasan, *Asian Human Rights Commission*, vol. 13, no. 4, 2003, pp. 143–243.

⁵⁷ 'Acquittal on merit' means acquittal after trial and as a result of the evaluation of the evidence produced for and against him during the trial.

area, since it is the DAs that appear before the trial courts from the prosecution side (in murder cases) to plead the cause of the State. Where the court acquits the accused and dismisses the case, the DA sends the case file to the Advocate General Office with a request to file an appeal or revision against the judgment of the trial court on behalf of the State. Otherwise, they have to send a written explanation to the Solicitor General Punjab (the Provincial head of their department) for not having followed this routine.

However, appeals cannot be filed in cases that are decided on the basis of compromise between the parties. If the compromise is made before conclusion of the evidence at the trial court level, the complainant does not produce any evidence before that court, which then has to dismiss the prosecution's case. Therefore, there would be no point in attempting to challenge such a decision in the higher courts. DAs maintain the record of the cases that are assigned to them for prosecution. Accordingly, the records of the DAs' Offices from the ten sample area districts were also examined. The names of the accused who were acquitted on the basis of compromise were counted and included in the data derived from the Sessions Courts' records.

6.2.7 *Multan Bench of the Lahore High Court*

To determine the rate of conviction in the High Court, information was collected from the records of Lahore High Court Multan Bench. Of this, only the murder references that were heard and decided by the Multan Bench were examined. The Additional Registrar of the High Court prepares an annual performance report, which provides the numbers of references registered, decided and pending. The High Court Judges and consequently the registrar of the court use the phrase "case disposed of" to note that the case has been decided. However, one cannot ascertain from this phrase the nature of the disposal, i.e., whether judgment was passed in the case, remanded back to the trial court or withdrawn by the State merely for some technical reason. There is no way of knowing which order was passed by the court when 'disposing' of the matter. However, if the case is decided on its merits by the Division Bench, it is written that "the Murder Reference is answered in negative" or "the sentence of the trial court is confirmed". Thus, data collected from the High Court is based on information obtained from the actual judgments rendered by the court in Murder References.

The High Court used to only be able to decide Murder References on merits. It had powers to confirm the sentences of the Sessions Courts, amend the sentences of the accused, grant acquittal to the accused after reassessing the evidence on record, or send cases back for retrial; it had no authority in law to take into account any composition of offences by the parties.

Following the introduction of the new law in 1990, however, the High Court was obliged to consider the request of the compromise between the parties, even when the fate of the Murder Reference was impending. Under this law, when private parties in the Murder Reference compound the offence outside of court, they file a Miscellaneous Application in the impending Murder Reference, stating that compensation for the murder has been paid to the legal heirs of the deceased or that the heirs of the deceased have pardoned the accused without any compensation and that therefore the accused may be acquitted of the charges and the Murder Reference dismissed. On such a petition, the High Court either satisfies itself with the veracity of the compromise deed or sends the petition to the trial court, with a direction to inquire into the genuineness of the compromise and to submit its findings to the High Court. However, it should be clarified that there is no requirement under the substantive or procedural law to observe this enquiry, and such inquiries were not even in practice until 1996. In December 1996 the Supreme Court framed these rules and directed all lower courts to observe them when acquitting the accused in murder cases on account of composition between the parties. This issue shall be discussed in more detail in the conclusion.

6.2.8 *The Federal Shariat Court*

The Federal Shariat Court (FSC) of Pakistan succeeded the Shariat Benches, which had been formed in the High Courts of each province *vide* the *Constitution (Amendment) Order, 1979* (PO 3 of 1979). The FSC came into being on 27 May 1980 by virtue of Article 203 of the Constitution. It is the first appellate court against judgments of the Sessions Judges in *hudud* cases and in murder cases where the accused is charged under *hudud* laws. Also sent to the FSC for confirmation are the Murder References from cases wherein the accused had initially been charged by the police for an offence under *hudud* laws in the FIR and whom the trial court has sentenced to death, regardless of whether the court had also charged or punished the accused under

that (*hudud*) offence or not.⁵⁸ These are the cases where the accused is imputed, along with murder, with other offences pertaining to *hudud* laws (e.g., the accused is also charged with *zina*, or theft), and which are exclusively heard in appeal by the FSC. This researcher thus also searched the records of the FSC in order to procure the number and results of the cases from the sample area that were heard and decided by the court.

6.2.9 *The Supreme Court of Pakistan*

Any sentence passed by the High Court or the FSC may be assailed before the Supreme Court of Pakistan under Article 185 of the Constitution of Pakistan. The Supreme Court is the pinnacle of the country's judiciary and the final arbiter of the law. Its permanent seat is at the capital, Islamabad, and it also has two permanent Benches at Lahore and Karachi and sits in Peshawar and Quetta from time to time.

Article 185 of the *1973 Constitution* explains the jurisdiction of the Court and stipulates that it can hear appeals against sentences and judgments of the High Courts only if:

- 1) on appeal, the High Court has reversed an order of acquittal of an accused person and sentenced him/her to death or life imprisonment;
- 2) on revision, the High Court has enhanced the punishment to a sentence of death or life imprisonment; or
- 3) the trial has been conducted by the High Court itself.

In all other matters, e.g., where the High Court concurred with the judgment of the trial court, no direct appeal can be filed in the Supreme Court. However, a petition for leave to appeal may be filed. If accepted, this is converted into an appeal; the case is reopened and the evidence is reassessed by the Court. If the petition for leave to appeal against the verdict of the previous court (i.e., the High Court) is dismissed, that verdict then attains finality.

Therefore, in a Murder Reference, if the High Court concurs with the judgment of the trial court, the convict can only challenge the judgment in a petition for leave to appeal. The parties are at liberty to file this petition either at the Benches or the principal seat of the Supreme Court. However, criminal appeals are preferably filed and heard only at the permanent seat in Islamabad. The petitions for leave to appeal

⁵⁸ Article 203DD, the *1973 Constitution*.

and criminal appeals are heard by a Bench generally comprised of three judges of the Supreme Court.⁵⁹

The petitions for leave to appeal arising against judgments of the Multan High Court are primarily filed at the Lahore Bench of the Supreme Court. This researcher examined records of the Supreme Court—at Islamabad and the permanent Bench at Lahore—that pertained to murder cases from the sample area within a twenty-year period (1981–2000). This research is only concerned with appeals that were filed against judgments of the Multan Bench of the Lahore High Court. The lawyers of either party may file such petitions for leave to appeal. The additional categories of appeals and petitions for leave to appeal are known respectively as ‘jail appeals’⁶⁰ and ‘jail-petitions’.⁶¹ Prisoners that cannot afford to hire the services of professional lawyers of the Supreme Court, file such appeals and petitions on their own, without assistance of the counsels. Unfortunately, these are not recorded at the Benches or the permanent seat of the Supreme Court, and organised according to the different provinces. Instead, they are placed together with all the jail appeals and petitions filed by the thousands of prisoners serving sentences at various prisons across the country. This researcher could not extract from the large and disorganised record of jail-petitions and jail-appeals the data relating to prisoners aggrieved by judgments of Multan High Court and filed by way of jail-petitions and jail-appeals. Data of the total petitions filed at the Lahore Bench and the permanent seat of the Supreme Court was gathered, but these did not furnish any relevant information concerning our research of convictions and acquittals from 1981–2000.

⁵⁹ Order 21, *The Supreme Court of Pakistan Rules*, Islamabad, Supreme Court Press, 1997.

⁶⁰ Order 22, *Supreme Court Rules*, p. 12.

⁶¹ Order 23, *Supreme Court Rules*, p. 13.

6.3 DATA DERIVED FROM THE POLICE RECORD

Table 6.1 Accumulative Data of Ten Districts of the Sample Area Derived from the Police Records⁶²

YEAR	TOTAL NO. OF FIRS ⁶³	TOTAL NO. OF DECEASED ⁶⁴ REPORTED	TOTAL NO. OF ACCUSED ⁶⁵	TOTAL NO. OF CASES CANCELLED	TOTAL CHALLANS DECIDED ⁶⁶	TOTAL CONVICTIONS ⁶⁷
1981	483	507	937	20	456	176
1982	507	580	1144	20	470	183
1983	446	470	948	28	408	151
1984	458	478	859	20	460	179
1985	463	488	888	23	473	146
1986	545	594	1095	27	514	172
1987	601	644	1249	41	563	177
1988	587	621	1234	43	539	170
1989	737	808	1542	44	667	198
1990	672	723	1464	89	589	204
<i>Sum</i>	<i>5499</i>	<i>5913</i>	<i>11360</i>	<i>355 (6%)</i>	<i>5139</i>	<i>1756 (34%)</i>
1991	687	756	1437	60	693	209
1992	715	822	1503	65	687	244
1993	751	843	1525	67	692	263
1994	886	946	1510	197	743	243
1995	904	976	1679	112	687	234
1996	882	981	1582	91	710	270
1997	924	1002	1877	97	653	226
1998	942	1028	1805	114	618	221
1999	866	1120	1902	92	535	173
2000	874	963	1875	100	504	158
<i>Sum</i>	<i>8431</i>	<i>9437</i>	<i>16695</i>	<i>995 (12%)</i>	<i>6522</i>	<i>2241 (34%)</i>

⁶² Data derived from the records of the Superintendent of the Police Office, Multan.

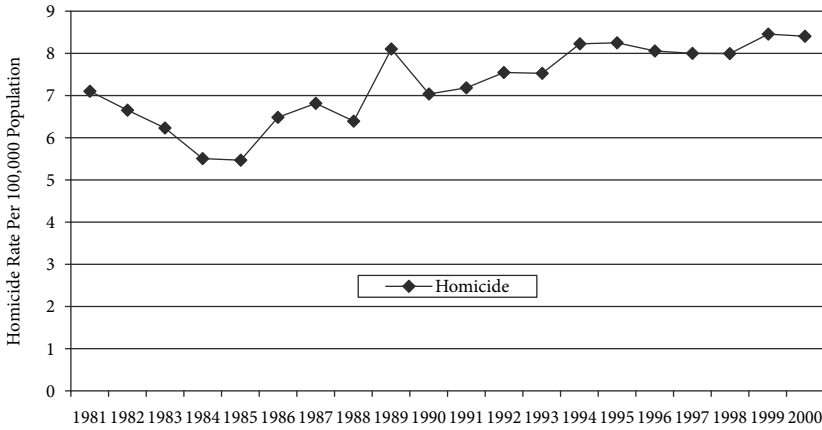
⁶³ First Information Reports of murder cases written under section 154 of the Criminal Procedure Code.

⁶⁴ Number of people murdered and reported in the FIRs.

⁶⁵ Numbers of the accused mentioned in the FIRs.

⁶⁶ This is of the cases that were sent for trial. The rest of the cases are still pending investigation.

⁶⁷ Referring to cases that have been decided by the trial courts. The numbers of pending trials have been subtracted from the *challans* submitted by the police to the trial courts.



Source: Developed by the researcher with reference to the data in Table 1

Graph 6.1 Homicide Rate per 100,000 Population (Sample Area)

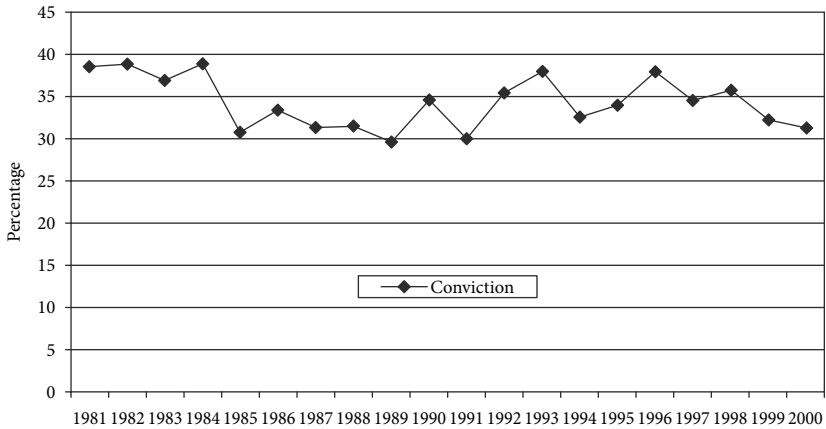
6.3.1 Analysis of data shown in Table 6.1

Table 6.1 shows the cumulative data of the ten districts’ FIRs recorded, number of persons murdered, accused indicted, cases cancelled, *challan*-ed, and cases in which the police had the accused convicted. In the first decade, police registered 5,499 FIRs of murder cases, whereas in the second decade these numbers went up to 8,431. The increase in registration of the cases is also well-reflected in the rate of murder, which grew substantially since 1985.

The average population growth rate of the sample area (3.00%)⁶⁸ is higher than the average national population growth rate of Pakistan (2.69%).⁶⁹ If other variables remain the same, the growth in population would, generally speaking, increase the crime rate as well. However, one would also think that the exorbitant population growth should outgrow the crime rate. At least the crime of murder, which is not directly related to the growth of population, should show some signs of decreasing due to the high increase of population. Table 6.1, however, displays the opposite picture. The soaring rate of murder outnumbered the rapidly rising population growth rate. In 1981, when General Zia established

⁶⁸ See footnote 47.

⁶⁹ Ibid.



Source: Developed by the researcher with reference to the data in Table 1

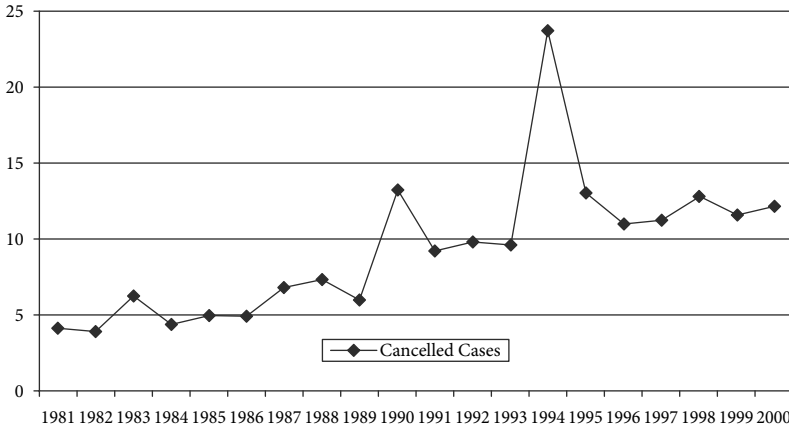
Graph 6.2 Conviction Rate from Police Records (Sample Area)

the Martial Law Courts,⁷⁰ the murder rate was 7 per 100,000 people and declined to 5 per 100,000 per year by 1985. At this point it started to rise again and by 2000 it was 8 murders per 100,000 people per year (Graph 6.1). From 1981–2000, the average growth in the murder rate was over 6.5 per 100,000 per annum, which outstripped the average population growth of 3 per year. For lawmakers, this is an alarming rate of growth of murder. Following the enforcement of the new law in 1990, the rate of murder has steadily increased, contrary to the claims of the supporters of the new law that it would control crimes against persons (see Chapter 3, *Majlis-i-Shoora* debates).

There has always been a tendency by complainants to incriminate more persons in the FIR than the actual number of offenders. This trend has been noticed and reproved by the courts of law in a number of cases,⁷¹ yet the practice continues and has remained more or less the constant over the last twenty years. The law has thus failed to bring about any change in the behaviour, in this respect of either complainants or the police. However, it has brought about a particularly visible change in the rate of cancellation of cases. In the first decade (1981–1990), the police cancelled 355 murder cases out of the total 5,913 registered

⁷⁰ CMLA Orders 1977–85, PLD Publishers, Lahore, 1986.

⁷¹ *Muhammad Latif v. The State*, PLJ 1989 CrC (Lah) 185; *Khan Badshah v. The State*, PLJ 1978 SC 342.



Source: Developed by the researcher with reference to the data in Table 1

Graph 6.3 Percentage of Cases Undecided and Cancelled by Ten Districts' Police Records

FIRs, i.e., 6% of cases. In the second decade, it cancelled 995 out of 9,437 registered murder cases, i.e., 12%. These figures prove that the police took advantage of the 1990 law, and instead of sending *challans* to the court after completing their investigations, began cancelling the cases or declaring them untraceable when they had found that the parties involved had struck a deal. They did not send cases before the court in order to enable it to oversee and ensure that the compromise was genuine and without any coercion. By cancelling the cases in this manner, the police were effectively deciding such cases themselves. This certainly had an effect on the rate of *challans* sent for trials.

I calculated the number of convictions and acquittals *vis-à-vis* the numbers of cases decided by the court. Therefore, the figures of conviction and acquittals are not affected by the pending (cases) *challans*. The examination of the figures indicates that the rate of conviction and acquittal according to this record has not changed much. As Table 6.1 indicates, in the first decade, as a whole the rate of conviction in cases was 34% and this remained the same in the second decade. As mentioned above, the rate of conviction and acquittal as verified by the police record—which bears the seal and signatures of the Superintendents of police—is not very reliable for the purposes of analysis. Nevertheless, these figures have been gathered and analysed in order to make this research more comprehensive.

6.4 DATA DERIVED FROM THE TEN SESSION COURTS OF THE SAMPLE AREA⁷²Table 6.2 Accumulative Data of the Sample Area Derived from the Sessions Courts Records⁷³

YEAR	NO. OF DECISIONS ⁷⁴	NO. OF ACCUSED ⁷⁵ OF THE AWARDED	ACCUSED AWARDED DEATH SENTENCES ⁷⁶	ACCUSED AWARDED LIFE SENTENCES ⁷⁷	TOTAL NO. OF CONVICTIONS ⁷⁸	ACQUITTALS ON MERIT ⁷⁹	ACCUSED ACQUITTED ON THE BASIS OF COMPROMISES	TOTAL ACQUITTALS
1981	510	1050	88	221	309	741	0	741
1982	452	1041	136	132	268	773	0	773
1983	495	1192	135	126	261	931	0	931
1984	445	913	93	168	261	652	0	652
1985	497	1091	89	154	243	848	0	848
1986	447	928	76	117	193	735	0	735
1987	516	1051	80	131	211	840	0	840
1988	470	1042	71	92	163	879	0	879
1989	547	1239	114	125	239	1000	0	1000
1990	531	1268	71	93	164	1104	0	1104
<i>Sum</i>	4939	10815	953 (9%)	1359 (13%)	2312 (22%)	8503 (79%)	0	8503 (78%)
1991	672	1829	152	240	392	1244	193	1437
1992	755	1689	96	146	242	1125	322	1447
1993	578	1434	80	135	215	907	312	1219

Table 6.2 (cont.)

YEAR	NO. OF DECISIONS	NO. OF THE ACCUSED	ACCUSED AWARDED DEATH SENTENCES	ACCUSED AWARDED LIFE SENTENCES	TOTAL NO. OF CONVICTIONS	ACQUITTALS ON MERIT	ACCUSED ON THE BASIS OF COMPROMISES	TOTAL ACQUITTALS
1994	622	1312	79	139	218	781	313	1094
1995	635	1416	83	148	231	827	358	1185
1996	638	1397	94	127	221	829	347	1176
1997	649	1499	93	134	227	882	390	1272
1998	725	1815	124	156	280	1032	503	1535
1999	592	1416	86	146	232	772	412	1184
2000	756	2014	165	188	353	1076	585	1661
<i>Sum</i>	6638	15821	1052 (7%)	1559 (10%)	2611 (17%)	9475 (60%)	3735 (24%)	13210 (83%)

⁷² To see the data derived from the ten districts' Sessions Courts separately, see Appendix F.

⁷³ Data developed from the Records of Sessions Courts and District Attorneys' Offices.

⁷⁴ Decisions that were delivered in the cases sent up for trial under section 302 of the PPC.

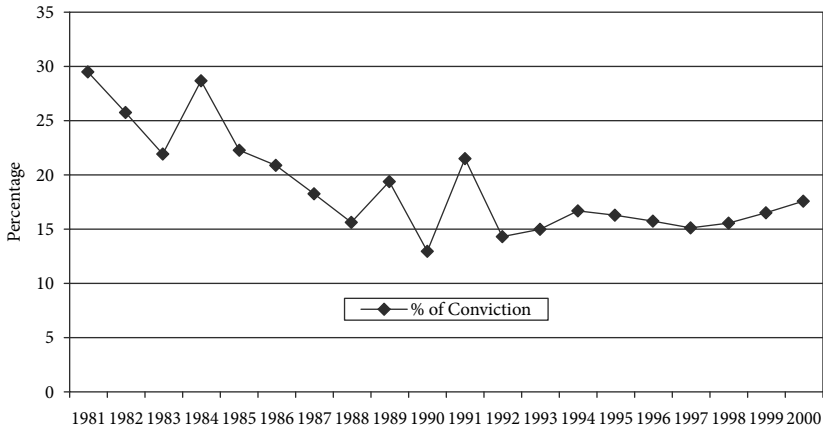
⁷⁵ The accused sent for trial under the charges of murder under section 173 of the CrPC.

⁷⁶ Death sentences awarded only under section 302 of the PPC in both laws, 1860 and 1990.

⁷⁷ Life imprisonment awarded only under section 302 of the PPC in both laws, 1860 and 1990.

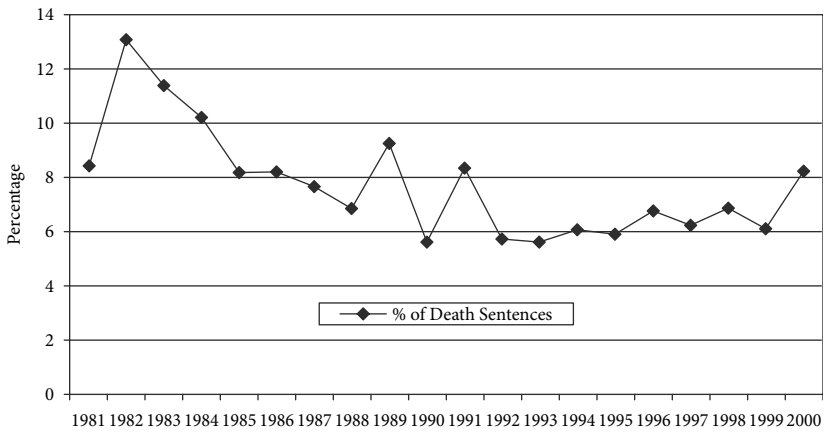
⁷⁸ 'Total Conviction' is the sum of the death sentences and life imprisonments awarded under section 302, PPC.

⁷⁹ Total Conviction is the sum of the death sentences and life imprisonments awarded under section 302 PPC.



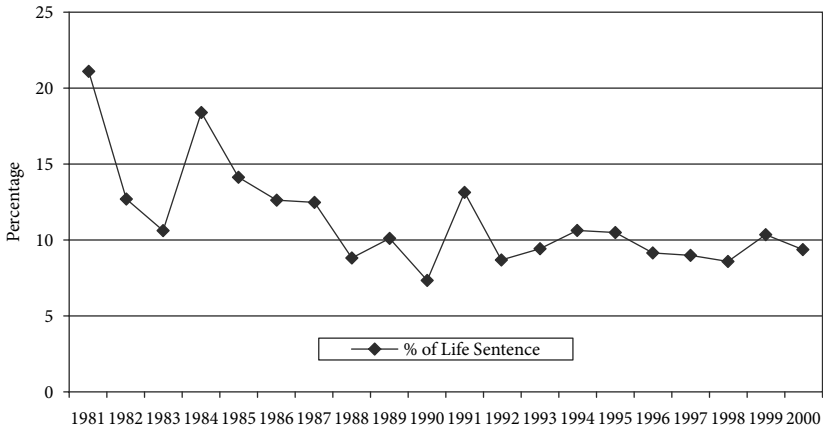
Source: Developed by the researcher with reference to the data in Table 2

Graph 6.4 Conviction Rate from Sessions Courts Records (Sample Area)



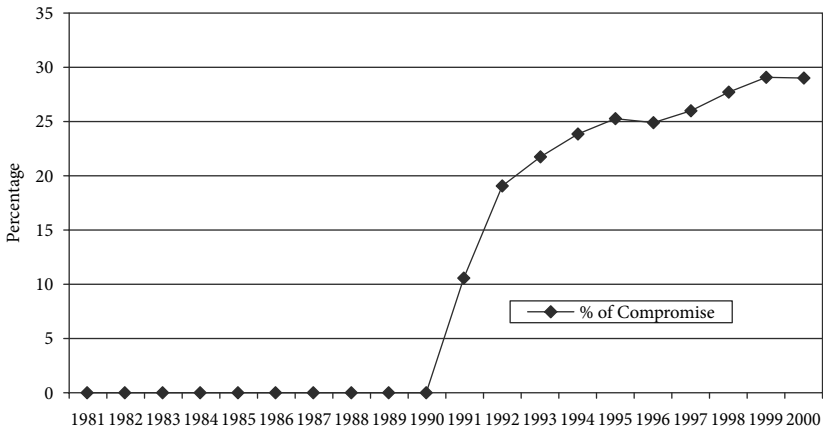
Source: Developed by the researcher with reference to the data in Table 2

Graph 6.5 Rate of Death Sentences from Sessions Courts Records



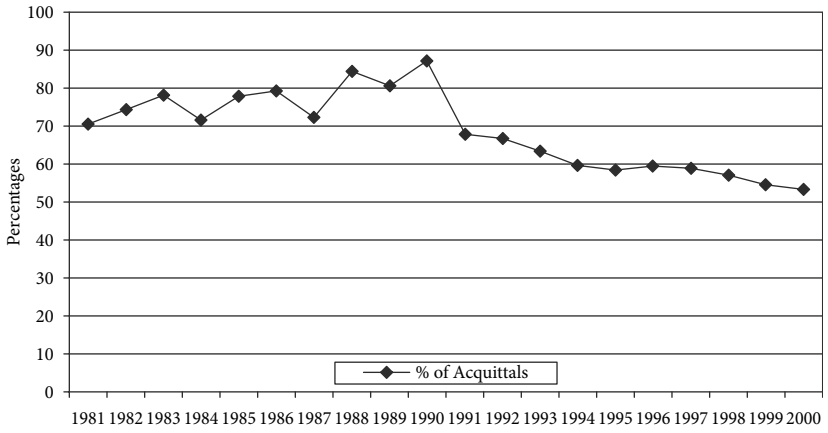
Source: Developed by the researcher with reference to the data in Table 2

Graph 6.6 Rate of Life Sentences from Sessions Courts Records



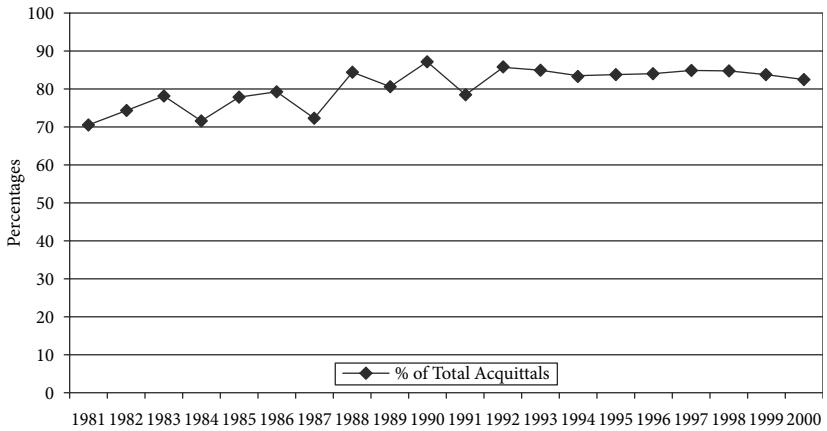
Source: Developed by the researcher with reference to the data in Table 2

Graph 6.7 Rate of Compromise from District Attorney's Office



Source: Developed by the researcher with reference to the data in Table 2

Graph 6.8 Rate of Acquittals on Merits from Sessions Courts Records



Source: Developed by the researcher with reference to the data in Table 2

Graph 6.9 Rate of Total Acquittals from Sessions Courts Records

6.4.1 *Analysis of the data shown in Table 6.2*

The data in Table 6.2 deals with the research conducted at the Sessions Courts of ten districts and at the District Attorneys' Offices of that sample area. The tables were developed after thorough data analysis, and every care is taken to count the names provided in the long records of the Sessions Courts and the DAs' offices. Papers and registers were personally examined and counted by this researcher.

The records of the Sessions Courts reveal that the numbers of cases decided by those courts were not the same as the number of decisions listed in the police records. This is possible for a number of reasons, a few of which I shall mention here. Firstly, the police is the only agency that registers and investigates every single murder case in the State, and it is not only the Sessions Courts that try such cases. The Federal Government has from time to time constituted special courts, either to speed up trials⁸⁰ or to combat the escalating terrorism in Pakistan.⁸¹ In addition, Martial Law Tribunals were established during General Zia's tenure in 1981,⁸² which were empowered to try murder cases as well as other criminal cases. These tribunals were in operation until 1985. Secondly, cases are sometimes transferred from one district to another district. Thirdly, there is a huge backlog of pending cases.

This study is concerned with the outcomes of the cases, not with the administrative practices of different institutions working in the administration of criminal justice in Pakistan. Therefore, this researcher limited himself to an examination of the number of cases decided by the courts of session, so as to analyse the rate of conviction and acquittal.

In Table 6.2, the numbers of the accused are the numbers of persons who were charged by the police for criminal homicide under section 302 and sent for trial in the Sessions Courts. The conviction rate shown in Table 6.2 is not based on the number of cases the police sent for trial, but derived from the number of accused who were sent for trial by the police. Only the accused that were punished under section 302 of the PPC were counted. The total number of convictions is the sum of the accused that were given either a death sentence or life imprisonment.

Another point here also requires explanation. The introduction in 1990 of the permission to compromise murder cases does not mean that the composition of cases was not in practice outside the court before

⁸⁰ Speedy Trials Courts Act, 1992, PLD CS 1992 p. 52.

⁸¹ Anti-Terrorism Courts Act, 1997, PLD CS 1997 p. 132.

⁸² CMLA Orders 1977-85, PLD Publishers, Lahore, 1986, p. 72.

the 1990 law came into force. This point has been dealt with elsewhere, but suffice it to say that those compromises were unwarranted in the eyes of law. In cases where parties would compromise outside courts, the complainants would not produce evidence before courts, thereby constraining the courts to cancel the trial. However, the prosecution was entitled to declare such witnesses hostile and rely only on circumstantial and other evidence, if there was any. This research takes into account—under the heading of ‘compromises’—the category of compromises entered into between parties before 1990. This category relates to only those accused whose compromise with the complainant party/legal heirs of the victim has been recorded. The break-up of the ten years’ period shown in the table also offers a sum of the results of all the variables shown in the table for those ten years.

The examination of data presented in Table 2 leads to some very interesting results. It shows that the change in law in 1991 did not affect the proportion of the accused to the decisions. Many more persons went through the ordeal of trial than the actual number of cases decided by the courts. On the whole, in the first decade, the numbers of decisions increased steadily. In 1981, for example, the courts decided 510 murder cases, but these numbers gradually dropped to 452 in the following year. Thereafter, we find a constant increase in the number of decisions, except in 1989, where the figures show a difference of 77 decisions. Overall, the increase was normal and gradual.

Although the conviction rate dropped throughout the twenty-year period, especially after the introduction of the 1990 law (it fell by 5% in the second decade from an average of 22% in the first decade), the decline was neither sharp nor abrupt. Most surprisingly, instead of the conviction rate immediately falling in 1991 after the introduction of the new law, it actually inflated to 21% in 1991 from 19% in 1989 (Graph 6.4) and subsequently fell to 14% in 1993.

Of the total 2,312 accused that were convicted in the first decade, 953 (41%) were given death sentences and 1,359 (or 59%) were sentenced to life imprisonment. In contrast, of the total of 2,611 convictions in the second decade, 1,052 (40%) were sentenced to death 1,559 (or 60%) were awarded life imprisonment. It represents a very insignificant shift in the proportion of death sentences to life imprisonment in the second decade.

The figures of compromises also show a constant increase. After shooting up to 19% (of the number of accused) in 1992, the numbers of compromises gradually increased to 29% by the year 2000. Unexpectedly, the number of acquittals did not show any dramatic change

in the second decade, despite many compromises taking place. This is owed to the fact that the numbers of acquittals on merits also decreased in the second decade, which further accounts for the absence of the compromise factor in the trial courts' acquittals rate. We notice that independently in all ten districts, the numbers of acquittals on merits decreased in the second decade. This suggests that the trend in the trial courts throughout the second decade has been towards conviction rather than acquittal in cases where a compromise could not be reached.

Lawyers and judges interviewed by this researcher agreed that the conviction rate was deliberately increased by the trial court judges. In 1991, the Government constituted Summary trial courts, which were presided over by lawyers and judges selected from the Sessions Courts. The salary, allowances and other fringe benefits of these judges were equal to the judges of the High Courts, i.e., five times more than sessions judges. The sessions judges selected by the Government were those who had awarded more convictions than acquittals. Thereafter, Anti-Terrorism Courts were established in 1997, and *Ehtesab* Courts were established in 1997.⁸³ The criterion for selection of the Sessions Judges was the same, i.e., being more conviction-inclined. Most of the Sessions Judges interviewed seemed to think that it did not matter much whether they gave incorrect sentences of convictions, since every case of conviction is appealed by the parties and the High Court would correct it anyway. Others said that they were functional judges whose duty was to prepare files for the High Court; therefore, they did not mind convicting the accused in cases where they thought that the accused might have contributed to the murder of the deceased.⁸⁴ The Inspection Team of the High Court comprises of High Court Judges and one senior Sessions Judge, who also appreciate the work of those judges whose conviction rate is higher than the acquittal rate.

The high percentage of the accused *challan*-ed by the police has also contributed to the high rate of conviction at the trial court level. These judges convict at least one accused out of every three or four sent for trial by the police. In this way, they can please both the parties involved and their own senior colleagues as well. Since they often convict one of the accused and release two or three of them, one could conclude that despite the compromise factor, the high rate of conviction at the trial courts level may not be an outcome of better police investigations or

⁸³ Ehtesab Act, 1997.

⁸⁴ Interviews conducted by the author on 20 February 2003.

more effort on the part of the prosecution. It can instead be attributed to the efforts of Sessions Judges who, for personal career prospects, attempt to please the Government and the High Court by convicting on the basis of doubt, rather than acquitting.⁸⁵ Of course this statement cannot be ascribed to every Sessions Judge, but it can safely be said that it is true for most; other than such inference, there is little other explanation for the low acquittal rate on merits.

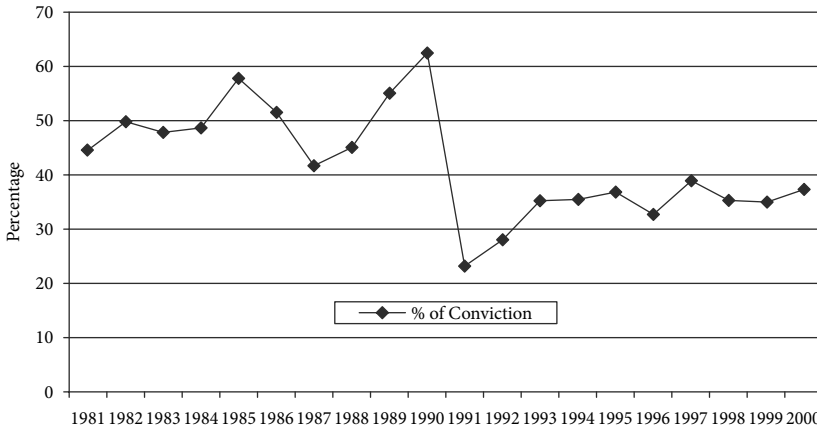
6.5 DATA OBTAINED FROM THE MULTAN BENCH OF THE LAHORE HIGH COURT

Table 6.3⁸⁶ Multan High Court: Murder References Decided by the Multan High Court, 1981–2000

YEAR	NO. OF MURDER REFERENCES	NO. OF CONVICTS	DEATH SENTENCES CONFIRMED	DEATH SENTENCES CONVERTED	TOTAL CONVICTION
1981	48	58	10	16	26
1982	47	60	12	18	30
1983	42	50	11	13	24
1984	38	45	9	13	22
1985	42	50	18	11	29
1986	52	60	15	16	31
1987	31	43	8	10	18
1988	47	53	13	11	24
1989	57	67	16	21	37
1990	45	51	14	18	32
<i>Sum</i>	<i>449</i>	<i>537</i>	<i>126</i>	<i>147</i>	<i>273 (51%)</i>
1991	90	111	14	12	26
1992	80	120	17	17	34
1993	49	62	10	12	22
1994	50	62	10	12	22
1995	60	73	13	14	27
1996	53	61	8	12	20
1997	70	87	13	21	34
1998	38	45	7	9	16
1999	42	57	9	11	20
2000	30	40	8	7	15
<i>Sum</i>	<i>562</i>	<i>718</i>	<i>109</i>	<i>127</i>	<i>236 (33%)</i>

⁸⁵ Interview by the author with lawyers of the trial courts on 23 March 2003.

⁸⁶ Table created on the basis of data derived from the records of the Multan Bench of the Lahore High Court.



Source: Developed by the researcher with reference to the data in Table 3

Graph 6.10 Rate of Conviction, Multan Bench of Lahor High Court, 1981-2000

6.5.1 Analysis of the data shown in Table 6.3

Murder references are placed only before the Divisional Bench of the High Court, which is comprised of two judges of the High Court. To examine the fate of Murder References, I went through Murder References from over a twenty-year period (see Table 6.3).

In 1981, Murder References sent to the Lahore High Court by the Sessions Courts of the districts of both Multan and DG Khan Divisions were transferred to the Bench of the Lahore High Court established in Multan. In 1981, the Bench heard 48 Murder References, some of which had been pending since 1976. After hearing the References, the Divisional Bench of the Multan High Court confirmed the death sentence of ten accused, and sixteen sentences were converted into life imprisonment or other lighter sentences. The conversion from severe to lighter sentences keeps in view the conduct of the accused during commission of the crime and any other mitigating circumstances, e.g., murder because of some obnoxious conduct of the deceased that enraged the accused and took him out of his senses, etc. While lawyers in Pakistan generally consider the High Courts to be courts of relief, the conviction rate of Murder References by the Multan Bench of the Lahore High Court in its first year (45%) seems very high. However, this rate is the sum of death and other punishments given to the accused of the Murder References. If we evaluate the rate of death sentences alone awarded by the High Court, it does look like a court of relief:

Out of 58 accused, only 10 death sentences were confirmed, i.e., 17% (see Graph 6.10).

Every year during the first decade researched, the Multan Bench decided more than 40 cases. In 1984 and 1987, an average of more than 50 condemned prisoners was involved. Although the total conviction rate fluctuates between 45 and 63, the rate of confirmed death sentences remained below 30%, except in 1985, where the rate was 36%. The separation of Table 3 into two decades shows that from 1981–1990, the Court heard 449 Murder References of 538 convicted prisoners. 126 were answered positively, 147 sentences were converted into other sentences, and the rest of the accused were acquitted of murder charges. The total conviction rate of death sentences was 23%, while the conviction rate of other sentences was 27%. The total conviction rate in the first decade was 51%.

In the second decade, the number of decisions increased sharply as a result of the new law, which had been eagerly awaited. As mentioned in Chapter One, in 1980 the FSC declared the law of the PPC as ‘un-Islamic’. Both lawyers and accused were sure that the law of *qisas* and *diyat* would eventually be promulgated, and they hence held back from hearing in the High Courts all those cases in which there was a chance of compromise between parties or where the parties had already compromised the offence but could not bring the compromise on record. When the Government finally issued the Ordinance in 1990, Murder References that had been pending for last seven to eight years were placed before the Bench. Of 111 convicts referred through 90 Murder References, only 14 death sentences were confirmed. 26 sentences were converted into other punishments and rest of the 85 convicts were acquitted. In 1992, the High Court was under the same pressure *vis-à-vis* the workload resulting from the number of Murder References. Of 120 convicts referred through 80 Murder References, only 17 death sentences were confirmed, 34 sentences were converted into various imprisonments and 86 of the accused were released.

As we can see from Table 6.3, after 1992 the number of Murder References decisions declined to normal. In the second decade, the High Court heard 562 Murder References involving 718 convicts. Of these, 109 death sentences were confirmed, 127 sentences were converted into lighter punishments and 428 convicts were acquitted. Throughout the second decade, the rate of confirmation of the death sentence has been less than 20% (being 13% and 14% in 1991 and 1992, respectively).

Even the rate of conversion from death sentences to shorter sentences has been fluctuating between 11% to 24%.

The Murder References decided by the High Court in these two decades explicitly indicate the impact of the change in the law on the rate of conviction of murder cases at that level: an increasing number of people were getting away with murder.

6.6 ANALYSIS OF THE DATA OBTAINED FROM THE FEDERAL SHARIAT COURT

From 1981–2000 and in the sample area under study, only 57 Murder References were sent to the FSC for confirmation by the Session Judges, of which 33 were decided. Of these, only 5 were decided between 1981 and 1990, the remaining 28 being decided between 1991 and 2000. Of the 33 decided, the FSC confirmed 6 death sentences, converted 9 death sentences to life imprisonment and acquitted 18 accused persons on merits.⁸⁷ As there is no provision of compromise in *hudud* laws, the accused are either punished or acquitted on the merits of the case. However, due to the extremely stringent rules of evidence, none are punished under *hudud* punishments; rather, they are awarded sentences under *tazir* provisions.

Since the FSC only decided a few cases in the twenty-year period under consideration, it would not be helpful to attempt to analyse any trends of conviction and acquittal. However, it must be noted that the percentage of conviction in the FSC is much higher than in the High Court. As discussed earlier, this is because the court punishes the accused under *tazir* even when parties may have entered into a compromise.

⁸⁷ Research conducted at the Federal Shariat Court, Islamabad, 23–27 September 2002.

6.7 DATA OBTAINED FROM THE SUPREME COURT OF PAKISTAN

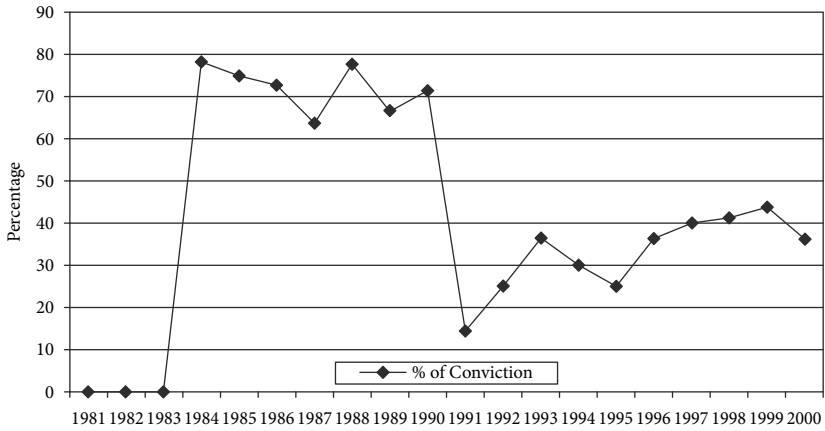
Table 6.4⁸⁸ Criminal Appeals Decided by the Supreme Court of Pakistan, 1981–2000

YEAR	DECISION	DEATH	LIFE	CONVICTION	ACQUITTAL
1981	0	0	0	0	0
1982	0	0	0	0	0
1983	2	0	1	1	1
1984	14	5	6	11	3
1985	12	3	6	9	3
1986	11	3	5	8	3
1987	11	3	4	7	4
1988	9	3	4	7	2
1990	14	3	7	10	4
<i>SUM</i>	<i>76</i>	<i>21</i>	<i>34</i>	<i>55 (72%)</i>	<i>21 (28%)</i>
1991	14	0	2	2	12
1992	16	2	2	4	12
1993	11	3	1	4	7
1994	10	1	2	3	7
1995	8	0	2	2	6
1996	11	1	3	4	7
1997	5	0	2	2	3
1998	17	3	4	7	10
1999	16	3	4	7	9
2000	36	3	10	13	23
<i>SUM</i>	<i>144</i>	<i>16</i>	<i>32</i>	<i>48 (33%)</i>	<i>96 (67%)</i>

6.7.1 *Analysis of the data shown in Table 6.4*

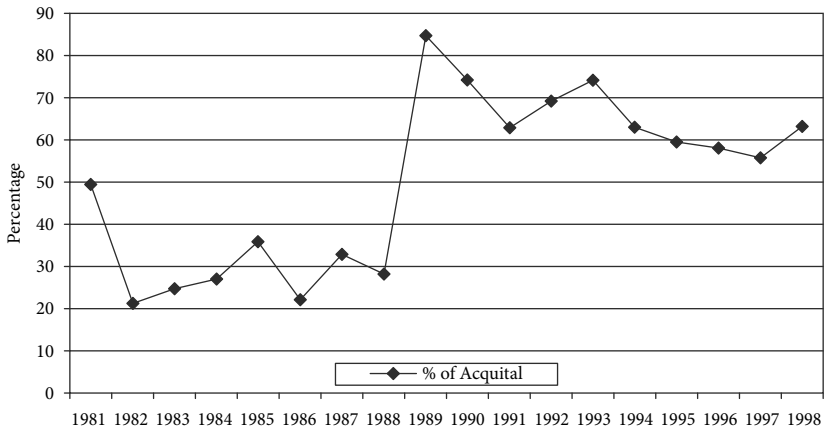
Although Table 6.4 does not provide numbers of Petitions for Leave to Appeal (these are given in the Appendices), these figures and lawyers of the Supreme Court both reveal that before the introduction of the 1990 law, it was very difficult to obtain permission to appeal since the Supreme Court tended to dismiss most such petitions. However, the data collected about petitions for leave to appeal indicates that the Supreme Court became more relaxed in granting permission to appeal after 1990.

⁸⁸ Table created from data obtained from records of the Supreme Court of Pakistan at the Islamabad and Lahore Seats.



Source: Developed by the researcher with reference to the data in Table 4

Graph 6.11 Rate of Conviction, Supreme Court of Pakistan, 1981–2000



Source: Developed by the researcher with reference to the data in Table 4

Graph 6.12 Rate of Acquittal, Supreme Court of Pakistan, 1981–2000

From 1981 to 1990, of 245 leave to appeal petitions, leave was granted in only 46. From 1991 to 2000, however, of 421 petitions, the Court granted leave in 134. Senior advocates of the Supreme Court told this researcher that the Supreme Court at present has become more relaxed in granting leave to appeal in cases where it considers that the parties may enter into compromise if more time were granted and where an order denying leave would diminish such chances.

Table 6.4 presents the numbers of the appeals decided by the Supreme Court against the judgments passed by the Multan High Court from 1981–2000. The table shows that no appeal was decided in 1981 or 1982, apparently because the Multan High Court only began to function in 1981. However, 11 criminal petitions for leave to appeal were filed in 1981 and 29 in 1982,⁸⁹ 6 of which were converted into appeals, but the Supreme Court did not take up any appeal until 1983. In 1983, the Supreme Court took up two appeals, both of which were accepted and the accused were acquitted. For the following seven years, the Supreme Court decided 76 appeals, of which 21 death sentences and 34 sentences for life imprisonment were upheld. The total conviction rate was 72% (55 out of 76).

Although the number of appeals increased in the following decade, the number of convictions fell significantly (see Graph 6.11). The Supreme Court decided 144 appeals in the second decade, of which only 16 death sentences and 32 life imprisonments were upheld, giving a total conviction rate of 33% (48 out of 144). 96 appeals were accepted and the accused were acquitted by the court (see Graph 4.2).

It is not advisable to analyse and contrast the results of the Supreme Court between the two decades, since the Supreme Court began to accept appeals only in 1983. However, if the findings of each year since 1983 are studied, they show that there was a striking change in the rate of convictions after 1991, i.e., after the 1990 law was introduced. The percentage of convictions in the first decade fell from 72% to 14% in 1991. It began to rise thereafter, but very gradually (up to 47%) in 1998, after which it again began to fall.

⁸⁹ Record of the Registrar's office of The Supreme Court of Pakistan, Islamabad, viewed on 21 February 2003.

6.8 COMPOSITION IN MURDER CASES

As mentioned earlier, composition in murder cases was not a new concept that had been brought into Pakistani society by the law of 1990. It had always existed in one form or another, but in very small numbers and exceptional cases. Murderers, the accused, their relatives and their supporters had always tried to patch things up among themselves. They may have approached the deceased's family, asked for their forgiveness, offered money to them, brought about social pressure, offered the victim's family their women for marriage and even threatened the complainant and witnesses with dire consequences for following through with the case (and where the complainants were weak, threats often preceded other formalities). However, until October 1990, the State had never officially accepted composition in murder cases. It always contested every such effort at every level: during investigations, trial, and even at the appellate stage. When complainants decided to forgo prosecution, the State endeavoured to prove the guilt of the accused by means of other evidence. When witnesses resiled, the State prosecution agency would get the court to declare them 'hostile witnesses' and would try to prove the offence against the accused by means of other circumstantial evidence. Therefore, the compromise plea was officially foreign to the administration of the criminal justice system of Pakistan. Murder was an offence against the State and hence the State had to endeavour to get the accused punished by the court of law.

However, in a few cases even under the defunct law, the higher courts, taking note of the patch-up between the parties and the pardon by the aggrieved party as a mitigating circumstance, sentenced the accused with a lesser penalty. In *Khurshid Ahmad v. The State*,⁹⁰ for example, the Supreme Court reduced fourteen years' imprisonment to ten years, which by that stage had already been served. In *Pathana v. The State*,⁹¹ in view of the compromise and pardon of the accused by the aggrieved party, the High Court reduced the death sentence to life imprisonment (although this was a rare case). In 1982, after the judgment of the Peshawar High Court in *Gul Hassan v. The State* and the FSC's judgment in *Aftab Hussain v. The State*, the Lahore High Court held that the "death sentence, when reduced to life imprisonment, is in

⁹⁰ 1976 SCMR 193.

⁹¹ PLJ 1979 Cr.C. (Lah) 305.

harmony with Muslim Jurisprudence when the parents of the deceased accepted compensation from the accused.⁹² Since compensation had been paid and the accused were pardoned by the complainant, the alternative punishment of life imprisonment (provided under section 302 of the PPC) was imposed.

The 1990 law, however, legalised composition in murder cases. It also declared that some murders were not liable to *qisas* (under section 306 PPC) and that in some cases the *qisas* could not be enforced (section 307 PPC). Under section 345(2) of the CrPC, the offence under section 302 PPC is compoundable by the heirs of the victim with the permission of the court before which the prosecution is pending. Therefore, the police are bound to submit the *challan* before the trial court, irrespective of any compromise between the parties. Therefore, in order to get out of prison, the accused must endeavour, after reaching agreement with the complainant, to get the *challan* submitted before the trial court so that they may be able to compound the offence with the permission of the court under section 345 CrPC.

The law does not define the procedure by which the court may satisfy itself about the genuineness of compromise. Having attended various court proceedings, this researcher observed that the practice in general is that during proceedings, the court asks all the legal heirs of the accused individually whether they have pardoned the accused with or without compensation. If the deceased is a man, his legal heirs are his wife, children and parents, if he is married, and otherwise his parents, brothers and sisters. (For a complete discussion on the legal heirs and *wali*, see Chapter Four.) In order to gain an in-depth understanding regarding the issue of the satisfaction of the court of the genuineness of compromises, this researcher interviewed various Sessions Judges, High Court Judges and Judges of the Supreme Court.

Sessions Judges have to ascertain the authenticity and validity of any compromise in cases pending before them, as well as in those already decided by them but pending in higher courts, at which stage the parties took up the plea of compromise. The Sessions judges told this researcher that there is no structured and scientific way by which they may ascertain the genuineness of a compromise or declare it otherwise. At most, they can call the legal heirs into chambers and ask searching

⁹² *Mohammad Bashir v. The State*, NLR 1982 Cr 190.

questions to determine the *bona fide* of compromise and the truth of the statements made by the legal heir. They request them to submit their affidavits in this regard as well.

Justice Asif Saeed Khosa, a senior judge of the Lahore High Court who worked at the Multan Bench for two years, told this researcher that influential people often kidnap a close relative of the aggrieved party and release them only after the heirs depose before the court that they have taken blood money from and forgiven the accused and Justice Shahid Mahmood Siddiqui, also a judge of the Lahore High Court, said that powerful assailants also often take the compensation back once the compromise formalities have been completed and the accused have been released from prison.

A questionnaire⁹³ was prepared during field research and distributed amongst 1,000 lawyers practising criminal law in the sample area. Approximately 700 completed and returned the questionnaire. Most of the lawyers agreed that the legal heirs of the deceased are pressurised by all sides to enter into a compromise and drop the prosecution of the case. 507 of these lawyers affirmed that the deceased's family never forgive the accused whole-heartedly, and 171 lawyers alleged that the aggrieved party retaliate later, and that composition of murder only ameliorates the situation for the time being.

6.9 CONCLUSION

The study shows that the 1990 law has upset the various components of the machinery of the administration of criminal justice in Pakistan. The murder statistics of police records examined in the sample area lead to the conclusion that, after 1990, every police district availed of the loopholes in the new law and cancelled twice as many cases as it did before its promulgation. The cancellation of cases increased from 4% in 1981 to 11% in 2000. The overall attitude of the police and the complainants with regard to incriminating a vast number of people as suspects did not change. The percentage of cases that were actually sent for trial fell substantially, despite an increase in the homicide rate. The homicide rate that had come down by 1985 to five homicides per 100,000 went up to eight per 100,000 in the year 2000. The homicide

⁹³ See Appendix H.

rates in Pakistan on the whole and in the Punjab have also grown likewise.⁹⁴ Although data on the conviction of murder cases as recorded by the police is not very reliable, it does show signs of decline.

However, if we examine the statistics derived by the Sessions Courts, they reveal that the percentage of conviction at trial stage has also fallen, declining from 29% in 1981 to 12% of accused in 2000. This situation is alarming in the sense that 83% of people accused, i.e., real murderers, are released onto the streets without any obvious stigma attached. The situation seems particularly serious at the High Court level, where this researcher studied the rate of convictions based only on those decisions of Murder References in which the accused were proved guilty of murder by the trial court. The initial rate of 45% of conviction decreased to 33% by 2000.

The Supreme Court's records of appeal reveal an enormous change after the introduction of the 1990 law. From 79% of convictions in appeals in 1984, it fell to 35% by 2000, i.e., a reduction of 43%. This shows the huge impact caused by the change in law on the administration of the criminal justice system of Pakistan.

The change in conviction rate at the trial stage is not particularly large, probably as a kind of compromise already, though unofficially, existed at the trial court level, whereby the witnesses or complainants were intimidated by more influential accused persons. This would bring an unnatural end to prosecution and, as such, the accused would win the acquittal at the trial court.

At the trial stage, the accused can also win acquittal by proving their innocence before the court. The prevalence of corruption at the Sessions Court⁹⁵ has also probably resulted in the change of law not being particularly visible at this level as compared to the High Court level. The change in conviction rate at the High Court level in the second

⁹⁴ See Appendix G.

⁹⁵ See the report of the Gallup survey cited in Azhar Hassan Nadeem, *Pakistan: The Political Economy of Lawlessness*, Lahore, 2000, p. 83; *Indo Asian News Service*, available online at: <http://www.indialists.org/pipermail/corruption-issues/2003-June/000346.html>, accessed on 27 November 2003; also see a very interesting article by Hobel, which quotes a lawyer as saying, "below the level of High Courts, all is corruption. Neither the facts nor the law in the case have any bearing on the outcome. It all depends on who you know, who has influence and where you put money"; see Hobel, "Fundamental Culture Postulates and Judicial Lawmaking in Pakistan", *American Anthropologist, Special Publication*, vol. 67, no. 6, 1965, pp. 43–56. In interviews with lawyers at the trial courts of Pakistan from 2002–3, case parties and police officials constantly echoed the same statement.

decade is quite clear when compared to the rate of the first decade. Although it may be that with the passage of time the complainant's anger against the offenders lessens, a more probable explanation is that the accused party understands that if the High Court were to confirm the death sentence, it would greatly diminish any chances of acquittal or at least make it much more difficult. The amount of pressure the accused would be willing to impose on the complainant and also the quantity of the compensation they would be willing to give would thus increase substantially. Therefore, in many cases, the efforts of the accused succeed and they win acquittal.

At the Supreme Court level, the convict's party apparently shows its readiness to do anything to save the lives of their loved one(s). In the case of *Sadar Khan etc. v. The State*,⁹⁶ the four accused—Sadar Khan, Muhammad Akram Khan, Mohammad Ashraf Khan and Asmatullah Khan—were given death sentences in a double-murder case by the trial courts. The sentences were upheld by the superior courts and the President of Pakistan also rejected their mercy petition, filed under article 45 of the Constitution. Two weeks before execution of the death sentence, the parties compromised and filed a Review Petition before the Supreme Court. The convicts' relatives finally agreed to the demands of the deceased's party and compromised by giving 12 million rupees and eight girls of their family as compensation to the aggrieved party. However, upon the intervention of various influential parties and a human rights group, only two girls (aged 14 and 15) were given to the aggrieved family. They were then wedded to the 77-year old Atta Mohammad Khan and 55-year old father of six, Fida Mohammad Khan.

One must remember that there must have been a number of cases in which the accused party had nothing to offer the legal heirs of the deceased, either because of poverty or because they believed they were innocent. In such situations, one can safely infer that the law favours the 'haves' rather than the 'have-nots'. In the case of honour killings, where the murderers are relatives of the victim, the accused often invoke the compromise plea at the first instance and are released from prison as soon as the *challan* against them is submitted in the court. In the rural society of Pakistan, where the influential usually prevail over the poor, the law simply allows for any influential aggressors to pressurise

⁹⁶ An unreported case which was widely publicised in all the newspapers of Pakistan. For instance, see *Dawn*, 24 and 25 July 2002.

poorer aggrieved parties to enter into a compromise, and as such it has become a source of suffering, enabling the powerful to terrorise others in their locality. Given the high incidence of poverty in Pakistan and widespread illiteracy and intolerance, it should come as no surprise that the *qisas* and *diyat* law has often been misused, leading to exploitation of the poor and downtrodden.

Therefore, the re-conceptualisation of the Pakistani law of murder and homicide in 1990 (in the *qisas* and *diyat* law), to wit, that murder is an offence against the individual and not against the State, needs to be changed. This offence ought to be declared as being against the whole society and the State must thus prosecute the accused on society's behalf. The present rationale of the Pakistani *qisas* and *diyat* law effectively translates into the Government abdicating its responsibility to punish murderers, and is sowing the seeds for an increase in murder cases in the coming years.

CHAPTER SEVEN

CONCLUSION

In this book, we have examined the evolution and introduction of Shariah in the criminal law of Pakistan. By way of executive summary, the following three main conclusions can be drawn. The first must be recognition of the enormous complexity which this experiment with Islamisation entailed. This can be seen in the numerous contradictions inherent in the 'new law' and the many unforeseen consequences and unintended effects caused by it. The second conclusion is concerned with the process of Islamisation itself, namely, that it was political expediency which informed many aspects of this particular Islamisation project. The third conclusion demonstrates the impact of the new law of *qisas* and *diyat* on the administration of the criminal justice system of Pakistan. Rather than leading to a decline in crime and to just punishment, the new law has encouraged criminal homicide and murder. The *qisas* and *diyat* law has brought into existence a legal system where many can literally get away with murder.

Part One of the book provided a review and analysis of Zia-ul-Haq's Islamisation project. It proved that the process of Islamisation invoked by General Zia in 1979 was not primarily aimed to enforce Islamic order in the country, as he led the general public to believe, but was designed to achieve political ends—mainly the legitimacy for and extension of his dictatorship. It was during this phase of his rule that he promulgated the *hudud* Ordinances in the country and grafted Shariat Benches in the higher courts of Pakistan. The research found that Zia promulgated *hudud* laws but neglected to enforce an Islamic law of evidence. As discussed, this omission meant that the most prominent feature of the *hudud* laws, namely the severe *hadd* punishments, could not in fact be inflicted at all.

Secondly, the book examined the very peculiar timing of the introduction of the *qisas* and *diyat* law. Despite showing great interest and concern for the implementation of the *hudud* Ordinances, Zia deliberately prevented the law of *qisas* and *diyat* from going ahead. The most likely reason for his reluctance is political: his arch political rival Z.A. Bhutto, the deposed prime minister of the country, was facing a murder

trial under the 'un-Islamic' law of culpable homicide and murder provided in the PPC. Since a conviction for Bhutto under the Islamic law of *qisas* and *diyat* could not be guaranteed, the General deliberately prevented the promulgation of a complete set of Islamic criminal laws in the country and instead only enforced those that would not be detrimental to his rule.

Chapter Two identified the real reasons for the introduction of the *qisas* and *diyat* law. It was not Zia, but the Shariah Courts created by him, which forced the Government to implement the new law in a series of ground-breaking decisions. In fact, in the Supreme Court of Pakistan the Zia Government had challenged the decisions of the Shariat Courts, which declared that the law pertaining to offences of culpable homicide and murder provided in the PPC was against Shariah, on the ground that the judgments were inconsistent with the text and spirit of the injunctions of the Quran and Sunnah. The discussion further demonstrated that there were extreme differences among the judges of the three Shariat Courts about the true structure of the Islamic law of *qisas* and *diyat*. It was shown that in their eagerness to declare the law provided in the PPC as un-Islamic, the Shariat Courts widely transgressed their powers and jurisdiction. In fact, they assumed the role of the legislature and outlined the new law for the State. Furthermore, they deviated from their constitutional mandate and did not use the principles of the Quran and Sunnah as the benchmark to examine the impugned law, but instead employed sectarian doctrines to support their judgments.

Chapter Three then examined how successive Pakistani Governments struggled in order to comply with the judgments of the Shariah Courts. The process of drafting a religiously sound and socially appropriate law was marked by disagreement and controversy. The first concern of the third chapter was thus to identify the reasons for the timing of the introduction of the *qisas* and *diyat* law. The particular timing of the bill makes it possible to reasonably conclude that the promulgation of the first draft, *The Criminal Law (Second Amendment) Ordinance, 1990*, was actually a part of a bargain made with the court, which had for many years demanded its introduction. The character of this bargain was simple: in return for the Supreme Court's refusal to reinstate the Benazir Bhutto Government, the Ishaq Khan Government would promulgate the *qisas* and *diyat* Ordinance.

The analysis of the Assembly debates presented in Chapter Four bears out that there was always a strong, logical and rational opposition to the

introduction of the new law within the country. Whenever the law was presented in the Parliament, it encountered strong opposition in both houses. Conservative MPs, who always advocated the introduction of the new law in the State, were never able to answer the concerns and suspicions raised by more liberal Muslim parliamentarians regarding the application of the law. The analysis indicates the accuracy of the argument of the liberal parliamentarians made ten years ago, i.e., that a law structured on the medieval interpretation of Islam which did not take into account the contemporary complexion of society would not be able to meet the demands of justice, equity, fair play and the rule of law, and would instead permeate injustice in society.

The critical examination of a large number of reported and unreported judgments, produced in Chapter Five, confirms that the law is being largely abused by people in positions of power and influence. The most disconcerting aspect of this conclusion is the impact of the *qisas* and *diyat* law on murders within families, especially the honour killings of women. Furthermore, it showed that the way the law is structured and the manner in which it is applied means that the perpetrators of violence against women enjoy virtual immunity from prosecution and punishment.

However, even 'ordinary murderers' tend to go unpunished. In fact, not a single murderer, since the introduction of the *qisas* and *diyat* law in 1990, could be convicted under *qisas*. An examination of the effects of the new law's application on the administration of the criminal justice system is shown in Chapter Six. The empirical evidence presented here shows that due to the compromise provision in the new law, an average of 83% of murderers escaped punishment for their crimes. Sadly, the homicide rate of the country is escalating and numerous murderers have won their acquittals by entering into compromises with the heirs of the deceased.

This research shows that the new law is primarily based on the tribal values of a traditional society. Under section 310, the new law recognised the tribal custom of giving away females in *badl-i-sulh* (exchange for peace). The concepts of killing in self-defence or under grave and sudden provocation are not given any place. There is no provision in the law under which a plea of mitigation could be considered by courts for the purposes of sentencing. The law allows parties involved in homicide cases to enter into compromise at any stage of the case proceedings, even before the trial or a minute prior to the execution of the sentence. This feature of the law introduced an indefinite uncertainty into the

punishment of the crime of murder. Under section 338-F of the PPC, the law empowers courts to interpret the provisions in accordance with the injunctions of the Quran and Sunnah. Therefore, instead of following a consistent approach in the interpretation and construction of law, the judges interpret it either in accordance with their own personal faith or in the light of interpretations made within the schools of thought they followed. This situation has made the law a farrago of extravagant rhetoric of religio-traditional phrases, obsolete ideas, unpractical doctrines and contradictory interpretations.

This uncertain legal environment has been heavily misused by the privileged sections of the society, which abused the new law to escape punishment of their crimes. On average, eight out of ten convicted murderers got away with their crimes. This research hence bears out that the reconceptualisation of the homicide law by introducing 'Islamic law' into it has had a detrimental effect on the administration of the criminal justice system of Pakistan.

The study also reflects that the new law is permeated by anomalous, flawed and obsolete reasoning. It has significantly changed popular understandings of the murder in society. Presently, murder is a crime only when one has no power to settle the matter with the heirs of a victim, or through a civil dispute if one can handle the legal heirs of the deceased.

There are three striking features in the new law that made it totally outmoded legislation. First, the law introduced the concept of compoundability in murder cases. Second, it abolished the punishment of *qisas* in certain cases of intentional murder. Last, it excluded any exception that would either make homicide justifiable or turn murder into culpable homicide. By introducing the provision of compromise, it showed more concern with the civil liability of murder than with its criminal liability. Unfortunately, the new law failed to recognise the effects of murder on society as a whole. Undoubtedly, classical interpretations of Islamic criminal law give preponderance to personal rights in certain cases, but to conclude that it absolutely diminishes society's rights to punish a culprit of murder in any way was an unreasonable extension of the private right of the victim's family.

By stating that certain murders would not be liable to *qisas* and that *qisas* would not be applicable in certain cases of criminal homicide, the law showed uncalled-for leniency towards such murderers. These provisions reinforce liberal Muslims' argument that the law is based on primitive social norms. In modern society, it is difficult to make anyone

understand that the killing of a wife with whom one has had children is different to killing one who has not given birth to a child, or that a father who kills his son should be dealt with more leniency than if he kills any other person (sections 309 and 310). Such provisions have made a mockery of the Islamic concept of criminal homicide, according to which the killing of one person is equal to killing the whole race of human beings.

The acceptance of compromise at any stage is having insidious effects on society. Unfortunately, influential offenders often get their cases compromised at the initial stage of the case without being legally determined as murderers, whereas poor offenders are more likely to get their cases compromised at the last stage of the case by selling the last straw of their possessions and offering their females to the victim's family.

Further, the other shortcomings in the law are related to the defective definition of certain terms. For instance, the word '*wali*' is defined as the legal heirs of a victim. Such a definition, however, does not take into account that the legal heirs of a person are different within different schools of thought. Constructively speaking, the State is also a *wali* of every citizen, but has been excluded from the definition of *wali* and thus is barred from taking interest in the well-being of its citizens, who may have been affected by a murder but were not the legal heirs of the deceased.

Under the new law, *diyat* becomes part of the deceased's estate. In such a system, the wife of the deceased, who is affected most by the death of her husband, gets only a one-eighth share of the *diyat* while other relatives get larger shares. In the case of the death of a wife, however, the husband gets half of the share of *diyat*, despite being economically less dependant on her.

This legislation, on the one hand, belies its stated purpose, *to bring the specific provisions of the PPC into conformity with the injunctions of the Quran and Sunnah*, since many of its provisions are unrelated to the Quran and Sunnah. On the other hand, it also contradicts its underpinning aim: to have a deterrent effect and bring about a real Islamic Society. The new law has been formulated against all the theories of Islamic criminal law presented in Chapter One of this book. Thus, the new law is factually an anthology of Arabic terms, juristic opinions of the medieval scholars of Islam and selections from the old law, thus rendering it defective and ineffective. It should be noted that the framers of the new law were aware of many known shortcomings and therefore added an overriding provision which empowered courts

to interpret the law by seeking guidance from the Quran and Sunnah. This means that the law does not contain the merits of a codified law, i.e., precision, clarity and certainty. On what principles the Quran and Sunnah will be interpreted has also not been defined by the new law. In the end, it can be safely concluded that the law in its present shape and application is actually delegitimising Shariah.

The difficulty with introducing any law in the name of Islam is that it closes all the doors of subsequent legislative reforms, or at least make it exceedingly difficult to consider further change. The attempt to apply Shariah in the law of culpable homicide and murder in Pakistan has been completely unsuccessful. Since its introduction, neither a single person has been punished under *qisas*, nor has the law been able to control or even reduce the crime of homicide. Rather, the homicide rate increased after the introduction of the new law and controlling crime has become more difficult, as the new law has diminished the deterrent effect of the punishment. It reflects that the best possible way to control the crime of murder is to 'delegislate' the present law and 'relegislate' the law of culpable homicide and murder, keeping in view the principles of the Quran and Sunnah, taking into account modern theories of crime and punishment, and considering the indigenous social norms of society.

Some of the most obvious areas for reform are as follows. The definition of *wali* should be amended to include the State as a *wali* of the deceased/victim for the purposes of entering into a compromise. The *diyat* should be treated as compensation to the aggrieved party. Similarly, compromise should only be allowed after the conclusion of the trial; it should be considered as a mitigating circumstance and should not result in the acquittal of the convict. All murders should be considered grave offences and punished equally. Offenders punished with *diyat* only should be provided with opportunities to work and earn money in order to enable them to pay the compensation rather than incarcerating them for life in default of *diyat*.

APPENDIX A

CHRONOLOGY OF EVENTS

- 5 July 1977 General Zia removes Prime Minister Zulfikar Ali Bhutto and appoints himself Chief Martial Law Administrator of the country. Bhutto, along with many other politicians, is detained.
- 7 July 1977 Martial Law Authorities prompt the complainant of the *Nawab Mohammad Ahmad Khan Kasuri* murder case to move an application before the prosecution agencies in order to open the case and commence criminal proceedings against Bhutto.
- 13 July 1977 Moulvi Mushtaq Hussain is appointed Chief Justice of the Lahore High Court.
- 21 August 1977 Division Bench of the Lahore High Court hears evidence against Bhutto in the *Kasuri* murder case.
- 3 September 1977 Bhutto is arrested on charges of conspiring to murder his political opponent, Nawab Ahmed Raza Khan Kasuri.
- 13 September 1977 Justice Samdani of the Lahore High Court releases Bhutto on bail.
- 17 September 1977 Bhutto is re-arrested from Larkana in the *Kasuri* Murder Case.
- 20 September 1977 Nusrat Bhutto challenges Bhutto's detention order in the Supreme Court of Pakistan. The Court admits the petition for regular hearing and orders to shift the detainee to Rawalpindi so that he can personally appear before the court.
- 22 September 1977 Zia-ul-Haq asks the Judges of the superior Judiciary to take oath under the Provisional Constitutional Order (*Provisional Constitutional Order 1 of 1977*).
- 26 September 1977 Justice Afzal Cheema of the Supreme Court of Pakistan is given an additional charge of the chairmanship of the Council of Islamic Ideology.

- 1 October 1977 Elections are postponed indefinitely on the pretext that all major political groups, except the Pakistan Peoples Party, were demanding to complete the process of accountability first and then hold the elections.
- 11 October 1977 Bhutto is formerly charged in the court of law with plotting to murder Ahmad Raza Kasuri.
- 10 November 1977 The Supreme Court of Pakistan in *Begum Nusrat Bhutto* case unanimously validates the imposition of martial law, under the doctrine of necessity (PLD 1977 SC 657).
- 31 December 1977 Justice Afzal Cheema retires from the Supreme Court of Pakistan and carries on his duties as the Chairman of the Council of Islamic Ideology.
- 18 March 1978 The Lahore High Court sentences Bhutto and four FSF officials to death in the *Nawab Mohammad Ahmad Khan Qasuri* murder case. Justice Aftab Hussain authors the judgment (PLD 1978 Lah 428).
- 25 March 1978 Bhutto and his co-accused file an appeal in the Supreme Court of Pakistan.
- 6 May 1978 The Supreme Court commences hearing of the appeal against the judgment of the Lahore High Court in the *Kasuri* murder case.
- 5 July 1978 On the first anniversary of the imposition of martial law, General Zia announces a 22-member federal cabinet comprised of politicians, technocrats and army men. Four points are declared as the objectives of the new cabinet: (a) to work for the implementation of an Islamic system; (b) to prepare the ground for general elections at the earliest possible date; (c) to plan improvement of the country's economic conditions; and (d) to work for stability at home and Pakistan's prestige abroad.
- 14 August 1978 General Zia addresses the nation:
 "In the light of the views and suggestions received about the Shariat Benches, the relevant law has been amended and enforced as part of the Constitution. It means that every citizen can now move the

- judiciary to declare a law either wholly or partially un-Islamic. In other words, the supremacy of the Shariat (Islamic law) has been established over the law of the land.” (Address to the Nation, 14 August 1978)
- 16 September 1978 President Fazal Ilahi Khan passes an ordinance authorising the CMLA to appoint the President of the country. (*President’s Succession Order, 1978, PLD 1978 CS 156*).
- 17 September 1978 President Fazal Ilahi resigns from his office.
- 18 September 1978 General Zia takes oath of the President of Pakistan.
- 2 December 1978 In a nationwide address, General Zia accuses politicians of exploiting the name of Islam, stating: “many a ruler did what they pleased in the name of Islam. After assuming power the task that the present Government set to was its public commitment to enforce *Nizam-e-Islam*.” As a preliminary measure to establish an Islamic society in Pakistan, General Zia announces the establishment of Shariah Benches. On the jurisdiction of the Shariah Benches, he said: “Every citizen will have the right to present any law enforced by the Government before the ‘Shariah Bench’ and obtain its verdict whether the law is wholly or partly Islamic or un-Islamic” (Zia’s public address on the first day of the *Hijra* calendar). But General Zia did not mention that the Shariah Benches’ jurisdiction was curtailed by the following overriding clause: “(Any) law does not include the Constitution, Muslim personal law, any law relating to the procedure of any court or tribunal or, until the expiration of three years, any fiscal law, or any law relating to the collection of taxes and fees or insurance practice and procedure.” It meant that all important laws which affect each and every individual directly remained outside the purview of the Shariah Benches. However, he did not have a smooth sailing even with the clipped Shariah Benches. The Federal Shariat Court

- declared *rajm*, lapidation, to be un-Islamic; Zia reconstituted that court which declared *rajm* as Islamic.
- 6 February 1979 The Supreme Court upholds the judgment of the Lahore High Court in the *Kasuri* murder case. The Supreme Court gives a split verdict of four in favour and three against the conviction.
- 10 February 1979 General Zia regrets that the people of Pakistan had gone astray from the path prescribed by Islam. They are to be brought back to the 'right path' by the promulgation of legal measures based on Islamic penal (*hudud*) laws; the establishment of Shariat Benches dealing with Shariat (Islamic) law in every provincial High Court of the country is the most crucial consequence of that endeavour, announcing the foundation of an 'Islamic system' in Pakistan.
- 13 February 1979 Bhutto and his co-accused file a Review Petition in the Supreme Court of Pakistan.
- 25 March 1979 The Supreme Court rejects Bhutto's and all four co-accused's Review Petitions. The trial takes approximately 17 months to complete.
- 1 April 1979 Mercy Petitions filed on behalf of Bhutto are dismissed by General Zia as President of the State.
- 4 April 1979 Z.A. Bhutto is hanged.
- 1 October 1979 The Shariat Bench of the Peshawar High Court decides Shariat Petition Number 7 of 1979, *Gul Hassan Khan v. The Government of Pakistan*, and declares some sections of PPC and CrPC un-Islamic. (PLD 1980 Peshawar 1).
- 21 January 1980 Justice Afzal Cheema, Chairman Council of Islamic Ideology, hands over to the President a copy of the amended draft of the *qisas* and *diyat* law.
- 26 February 1980 The Federal Shariat Court is constituted with a chairman and four other members.
- 12 March 1980 Justice Tanzilur Rehman is nominated by General Zia for the chairmanship of the Council of Islamic Ideology to fill in the position vacated by Justice Afzal Cheema.
- 17 May 1980 Justice Tanzilur Rahman takes charge of the Council of Islamic Ideology.

- 26 May 1980 Justice Cheema formally leaves the Council of Islamic Ideology.
- 27 May 1980 Four Shariat Benches are replaced by the Federal Shariat Court at the Capital of Pakistan, Islamabad.
- 5 June 1980 The President amends the Constitution to insert the provisions of the Federal Shariat Court (Chapter 3A, Articles 203–203J).
- 20 June 1980 *Zakat and Ushr Ordinance* is promulgated.
- 6 July 1980 Justice Tanzilur Rehman dispatches *Qisas* and *Diyat Ordinance* to Zia-ul-Haq.
- 28 August 1980 The Ministry of Religious Affairs asks for the comments and views of the Ministry of Law on the draft law of *qisas* and *diyat* prepared with the consultation of the Ministry of Law.
- 30 August 1980 The President directs the Ministry of law to elicit public opinion on the law.
- 23 September 1980 The Federal Shariat Court, in *Muhammad Riaz v. The Federal Government*, declares some provisions of *The Penal Code, 1860*, and *The Criminal Procedure Code, 1898*, pertaining to the law of culpable homicide and murder, as against the injunctions of Islam. (PLD 1980 FSC 1).
- 6 July 1980 Tanzilur Rahman sends a copy of the draft ordinance on *Qisas* and *Diyat* law to the President (CMLA) Secretariat for further action. Copy available.
- 17 July 1980 The Joint Secretary CMLA sends the copy of the draft to the Ministry of Religious and Minorities Affairs to examine it in consultation with the other concerned Federal Ministries and the Provincial Governments and submit their recommendations to the CMLA Secretariat for further processing.
- 28 July 1980 Amanullah Vaseer, Director General of Ministry of Religious & Minorities Affairs, dispatches the draft copy of the ordinance to the five Chief Secretaries of the country for their comments/views.
- 22 September 1980 Fiaz Mohammad Khan, Law Secretary of the Government of NWFP, submits two pages of comments/views.

- 12 October 1980 The Federal Government appeals against the judgments of the Shariat Bench of the Peshawar High Court and the FSC.
- 30 October 1980 The Law division sends back the revised draft of the law to the Council of Islamic Ideology.
- November 1980 Points raised by the law division are resolved in meetings with the law division by the Council of Islamic Ideology.
- 1 December 1980 The final draft, prepared and agreed upon, is sent to the law division by the Council of Islamic Ideology.
- 13 December 1980 After approval of the President, the law is published in the Gazette for eliciting public opinion.
- 24 March 1981 General Zia promulgates a new law, authorising him to amend the Constitution.
- 25 March 1981 Zia dismisses the Chief Justice of the Supreme Court of Pakistan, along with other eight judges of the Court who refused to take oath under the *Provisional Constitutional Order, 1981*.
- 17 May 1981 After examining the suggestions and comments of the public, received in response to the publication of the draft law in the Gazette, the draft law is revised by the Chairman of the Council of Islamic Ideology in consultation with *ulema* and sent to the President for promulgation.
- 31 May 1981 The Council for Islamic Ideology is reconstituted and the draft law placed before it.
- 23–27 June 1981 The draft law is approved by the Council of Islamic Ideology and again sent back to the President for its enforcement.
- 31 December 1980 Mohammad Irshad Khan, Joint Secretary of Ministry of Interior, submits his report on behalf of the Interior Government.
- 24 December 1981 Zia constitutes the *Majlis-i-Shoora* (Federal Council) and announces the names of its 287 members. Among them were *ulema*, farmers, landlords, minority groups, women and professionals. Members of other political parties who had switched loyalties towards Zia are also nominated. Accord-

- ing to one estimate, 100 members from PPP, 40 from Muslim League factions, and 4–5 from other political parties were included in the total of 287 *Majlis-i-Shoora* members.
- 25 December 1981 The Women's Division submits its report.
- 18 September 1984 The Ministry of Religious and Minority Affairs prepare a report to be submitted before the Cabinet.
- 1 December 1984 General Zia holds a referendum on Islam to legitimise his dictatorial rule.
- 25 February 1985 Elections for the national and provincial assemblies are held on a non-party basis. 40 out of 70 members of *Majlis-i-Shoora* who take part in the elections of National Assembly win their seats in the Parliament.
- 23 March 1985 General Zia appoints Mohammed Khan Junejo as the civilian Prime Minister of the country, while martial law remained in force.
- 9 November 1985 The *Majlis-e-Shoora* approves the controversial *Eighth Amendment Bill* to the Constitution under the threat of martial law.
- 31 December 1985 Martial law is lifted.
- 14 May 1986 The cabinet division sends back to the Council of Islamic Ideology 50 draft copies of the new law and approves amendments in sections 5, 9, 27, 31 and 91 of the draft Ordinance. Formal approval of the Law Department is also solicited.
- 12 June 1986 The justice division agrees to modify clauses 5, 9, 27, 31 and 91 of the draft bill, as shown in the comparative statement. Some other small suggestions are also advised.
- 20 June 1986 Chaudhry Shaukat Ali, Additional Secretary in charge of the cabinet, states Tahirul Qadri's point of view on *Diyat* and other controversial provisions.
- 19 February 1987 The revised summary for the Prime minister is prepared.
- 16 February 1988 Again, a summary of the *Bill of Qisas and Diyat* is presented to the Prime Minister by the Ministry of Religious and Parliamentary Affairs.

- 29 May 1988 Zia sacks Prime Minister Mohammad Khan Junejo soon after he returned from a foreign tour and dismissed his Government.
- 16 November 1988 Benazir Bhutto's Pakistan Peoples Party emerges as the largest party in the general elections.
- 2 December 1988 Benazir is sworn in as Prime Minister; Ghulam Ishaq Khan is elected as the President.
- 5 July 1989 The Shariat Appellate Bench of the Supreme Court of Pakistan dismisses the Government's appeals in the cases of *Gul Hassan*, *Mohammad Riaz* and of others and declared that the provisions of the PPC with regard to the offences affecting human body and life were against the injunctions of Islam as laid down in the Quran and Sunnah. The Court declares that the law would cease to have effect from 23 March 1990.
- 14 July 1989 The Federal Government files a Review Petition in the Supreme Court of Pakistan against the judgment in *Gul Hasan* and other cases (*Federal Government of Pakistan v. Peshawar High Court, Federation of Pakistan v. Gul Hasan Khan*, PLD 1989 SC 633).
- 16 July 1990 The Shariat Appellate Bench in the Supreme Court of Pakistan extends the time for the promulgation of the *qisas* and *diyat* law.
- 6 August 1990 Ghulam Ishaq Khan sacks Benazir's Government and dissolves the national and provincial assemblies.
- 6 August 1990 Ghulam Mustafa Jatoi is appointed caretaker Prime Minister by President Ghulam Ishaq Khan.
- 17 August 1990 The Attorney General appointed by the caretaker Government makes a conceding statement before the Supreme Court of Pakistan in *Gul Hasan*, that the Islamic law of *qisas* and *diyat* in obedience to the Supreme Court's verdict would be promulgated shortly.
- 5 September 1990 The *Qisas and Diyat Ordinance* [*Criminal Law (Second Amendment) Ordinance, 1990*] is promulgated by Ghulam Ishaq Khan.

- 15 August 1990 Ishaq Khan promulgates the *Criminal Law (Amendment) Ordinance, 1990* (see section 5.1, footnote 535).
- 3 October 1990 The *Qisas and Diyat Ordinance [Criminal Law (Second Amendment) Ordinance, 1990]* promulgated on 5 September 1990 comes into force.
- October 1990 Islamic Jamhoori Ittehad captures majority seats in the National Assembly of Pakistan.
- 6 November 1990 Nawaz Sharif wins the majority of seats in the National Assembly of Pakistan.
- 6 November 1990 The Transport Union of Pakistan organises a wheel jam strike against the *qisas* and *diyat* law and brings the country to a standstill.
- 15 December 1990 Nawaz Sharif is sworn in as the Prime Minister of Pakistan.
- 4 January 1991 The Government accept the demands of the transporters' union and introduces amendments to the *qisas* and *diyat* law (see section 5.3).
- 18 April 1993 Nawaz Sharif's Government is dismissed. During his tenure, his Government repeatedly re-promulgated the *qisas* and *diyat* law but could not get the bill passed by the Parliament.
- 19 April 1993 Mir Balakh Sher Khan Mazari is appointed the Caretaker Prime Minister. General Elections are scheduled to be held on 14 July 1993.
- 26 May 1993 Nawaz Sharif is reinstated by the Supreme Court of Pakistan.
- 10 June 1993 The *Criminal Law (Amendment) Bill, 1993* is introduced in the National Assembly at its 17th Session by Chaudhry Abdul Ghafoor (then Law Minister).
- 11 July 1993 Assembly session is prorogued by the President Ghulam Ishaq Khan under powers conferred upon him by virtue of article 54 of the Constitution of Pakistan.
- 18 July 1993 Moin Qureshi is appointed caretaker Prime Minister of Pakistan.
- 6 October 1993 General Elections are held in the country, but none of the political parties won an overall majority. The

- PPP wins majority seats in the National Assembly as well as in the Punjab and Sind provinces.
- 19 October 1993 Benazir Bhutto is sworn in as Prime Minister of Pakistan for the second time.
- 13 November 1993 Farooq Ahmad Khan Leghari is elected as President.
- 5 November 1996 Benazir Bhutto's Government is again dismissed by the President, Farooq Khan Leghari.
- 6 November 1996 Malik Meraj Khalid, Rector of the International Islamic University, is appointed as caretaker Prime Minister of Pakistan.
- 17 February 1997 Nawaz Sharif is again elected Prime Minister of the Country.
- 7 April 1997 The *Criminal Law (Fourth Amendment) Bill, 1996* is moved in the National Assembly by Syed Zafar Ali Shah (Nawaz Sharif Assembly).
- 2 December 1997 President Farooq Leghari resigns.
- 1 January 1998 Rafiq Tarar is elected the President of Pakistan.
- 12 October 1999 General Pervaiz Musharraf removes Nawaz Sharif from power and imposed martial law in the country.

APPENDIX B

DRAFT ORDINANCE

The First Draft of the *Qisas* and *Diyat* Ordinance prepared
by the Council of Islamic Ideology under the chairmanship of
Justice Afzal Cheema¹

An Ordinance to bring into conformity with the Injunction of Islam
the law relating to offences affecting the human body.

WHEREAS it is necessary to modify the existing law relating to certain
offences affecting the human body so as to bring it into conformity with
the Injunctions of Islam as set out in the Holy Quran and Sunnah:

AND WHEREAS the President is satisfied that circumstances exist
which render it necessary to take immediate action:

NOW, THEREFORE, in pursuance of the proclamation of the fifth day
of July, 1997, read with the Laws (Continuance In Force) Order, 1977
(CMLA Order No. 1 of 1977), and in exercise of all powers enabling
him on that behalf, the President is pleased to make and promulgate
the following Ordinance:—

1. Short title, extent, application and commencement:—
 - i. This ordinance may be called the Offences against Human body (Enforcement of Qisas and Diyat Ordinance, 1980).
 - ii. It extends to the whole of Pakistan and shall also apply to every citizen of Pakistan in any place outside Pakistan and any person or any ship or aircraft registered in Pakistan wherever it may be.
 - iii. It shall come into force at once.

¹ The original text lists all Arabic terms in both Arabic and Roman-English scripts. For ease of reference, the Arabic script versions have been omitted.

2. Definitions:—In this ordinance, unless there is anything repugnant in the subject or context,
- a) ‘adult’ means a person who has attained the age of eighteen years or puberty;
 - b) ‘authorised medical officer’ means a medical officer, howsoever designated, authorised by the Provincial Government;
 - c) ‘*daman*’ means the amount of compensation determined by the court to be paid by the convict for causing hurt not liable to *ursh*;
 - d) ‘*diyat*’ means the compensation specified in Section 25 to be paid by the convict or his ‘*aqilah*’ to the heirs of the victim as compensation for committing *qatl*;
 - e) ‘*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;
 - f) ‘*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;

Explanation:

A person finally held guilty of *qatl-e -amd* shall be *ghair masoom-ud-dam* for the legal heirs of the victim but shall be *masoom-ud-dam* for any other person.

- g) ‘grandfather’ means paternal grandfather, how high so ever;
- h) ‘*masoom*’ means a person other than a *ghair-masoom*;
- i) ‘*itlaf*’ means *itlaf-e-udw* or *itlaf-e-salaheet-e-ud*;
- j) ‘*masoom-ud-dam*’ means a citizen of Pakistan, a Muslim citizen of any other State or a *mutamin* who is not guilty of an offence punishable with death;
- k) ‘*mustamin*’ means a non-muslim citizen of a non-muslim State who is on lawful temporary visit to Pakistan;
- l) ‘*qatl*’ means *qatl-i-amd*, *qatl-e-shib-hul-amd* or *qatl-e-khata*;
- m) ‘*qisas*’ means punishment by causing similar hurt at the same part of the body of the offender 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 *wali* or *awliya*;
- n) ‘*tazir*’ means punishment other than *qisas*, *diyat*, *ursh*, *daman*, or *Hadd*;

- o) ‘*ursh*’ means an amount of compensation to be paid by the convict or his *aqila* to the victim or his heirs for causing hurt; and
- p) ‘*wali*’ or ‘*awliya*’ means a person or persons entitled to claim *qisas*.

and all other terms and expressions not defined in this ordinance shall have the same meaning as in the Pakistan Penal Code (Act XLV of 1860), or the Code of Criminal Procedure, 1898 (Act V of 1898).

3. Ordinance to override another law:—The provisions of this ordinance shall have effect notwithstanding anything contained in any other law for the time being in force.
4. *Qatl-i-amd*—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 *qatal-e-amd*.

Explanation 1: The use of deadly weapon, heavy stone, club or hammer, or strangulating or administering poison, are included in the acts which ordinarily cause death.

Explanation 2: Death caused by fire or throwing into water shall amount to *qatl-i-amd* if under ordinary circumstances it is not possible for the victim to escape death.

Explanation 3: In order to determine whether an act by which death was caused was ordinarily fatal or not, the means by which the death was caused, environments, weather, health, and physical condition of the offender and the victim shall be taken into consideration.

5. Punishment for *qatal-e-amd*:—Whoever commits *qatal-e-amd* shall be:—
 - i. punished with *qisas*, if the victim is *masoom-ud-dam*, or
 - ii. to *tazir* and punished with imprisonment for life and whipping not exceeding thirty nine stripes, or with death, if:
 - a. the victim is *ghair-masoom-udam*, or
 - b. the proof in either of the forms mentioned in section 10 is not available, or
 - c. the offender is not liable to *qisas* under section 12, or
 - d. the *qisas* is not enforced under section 3, or

- iii. Punished with *diyat* in the cases provided under sections 12, 14, 15 and 17.

Provided the court may, in addition of the punishment of *diyat*, punish the offender with *tazir* punishable with imprisonment of either description which may extend to twenty-five years.

(2) Punishment of *qisas* or death by way of *tazir* under sub-section (1) shall not be executed unless it is confirmed by the High Court, and until the punishment is confirmed and executed, the convict shall, subject to the provisions of the code of Criminal Procedure 1898 (Act V of 1898), relating to the grant of bail or suspension of sentence, be dealt with in the same manner as if sentenced to simple imprisonment.

6. Where *qatl* is committed conjointly:—(1) Where two or more persons in furtherance of a plan or a common intention conjointly cause death of any other person, each one of them who causes hurt to the victim shall be guilty of *qatl-i-amd*.

Illustration

A, B and C, armed with a hatchet, club and a stick, respectively, attack Z in order to cause his death in furtherance of a plan and each causes hurt to Z resulting in his death. Each of them shall be guilty of *qatl-i-amd* regardless of the nature of hurt caused.

- (2) Where two or more persons conjointly cause death of any other person without plan:
- a) each one of them shall be guilty of *qatal-e-amd*, if the hurt caused by him was individually sufficient to cause death and the person whose hurt was not sufficient to cause death shall be liable for the hurt caused by him, and
 - b) all such persons shall be guilty of *qatal-e-shibul-amd*, if the hurt caused each one of them can not be ascertained or distinguished or was not individually sufficient to cause death.

7. Death caused by consecutive acts of different persons:—Where two or more persons cause hurt one after the other without a plan and such hurt results in the death of the victim, the person causing the fatal blow shall be guilty of *qatal-e-amd* and the other offenders shall be liable for the hurt caused by them:

Provided that where the hurt caused by the first assailant is sufficient to cause death, he shall be guilty of *qatl-i-amd*.

Illustration

A causes hurt to Z by stabbing, which is not sufficient to cause immediate death. Thereafter B comes and cuts Z's throat or shoots him and thereby causes his death. Here B shall be guilty of *qatl-i-amd* and A shall be liable for the hurt caused by him, but if after the hurt caused by A, Z's death becomes imminent, A shall be guilty of *qatal-e-amd*.

8. Death caused under *ikrah-e-tam* and *ikrah-e-naqis*:—whoever causes the death of any other person:
- a) under *ikrah-e-tam* shall be punished with rigorous imprisonment for a term which shall not be less than seven years nor more than twenty-five years, and whipping not exceeding thirty-nine stripes, or with death, and the person causing *ikrah-e-tam* shall be guilty of *qatl-i-amd*, and
 - b) under *ikrah-e-naqis* shall be guilty of *qatl-i-amd* and the person causing *ikrah-e-naqis* shall be punished with rigorous imprisonment for a term which shall not be less than seven years nor more than twenty-five years and whipping not exceeding thirty nine stripes, or with death.

Explanation

- a) *ikrah-e-tam* means putting any person, his spouse or any of his blood relations within the prohibited degree of marriage, in fear of death or permanent impairing of organ of the body or being subjected to sodomy or *Zina-bil-jabr*, and
 - b) *ikrah-e-naqis* means any form of duress which does not amount to *ikrah-e-tam*.
9. Punishment for aiding the commission of *qatal-e-amd*:—Whoever aids or conspires in commission of *qatal-e-amd* and *qatal-e-amd* is committed in consequence thereof shall be liable to *tazir* and punished with imprisonment for life and with whipping not exceeding thirty-nine stripes, or with death.

Explanation

For the purpose of this section, 'aid' includes persuasion, inducement or instigation.

Illustration

A and B attack Z in order to cause his death in furtherance of a plan. A holds his hands while B stabs him, resulting in his death. B shall

be guilty of *qatal-e-amd* and A shall be liable to *tazir* for aiding the commission of such offence.

10. Proof of *qatal-e-amd* liable to *qisas*:—Notwithstanding anything contained in the Evidence Act, 1872 (1 of 1872), or any other law for the time being in force, proof of *qatal-e-amd* liable to *qisas* shall be in any of the following forms, namely:
- i. the accused makes before a court a confession of the commission of the offence; or
 - ii. at least two Muslim adult male witnesses, about whom the court is satisfied, having regard to the requirements of *tazkiya al-shuhood* that they are truthful persons and abstain from major sins (*kabair*) give evidence as eye witnesses of the commission of the offence or give such other evidence which proves guilt of the accused beyond any reasonable doubt.

Provided further that if the accused is a non-Muslim, the witness may be non-Muslims.

Explanation

In this section *tazkiya-shuhood* means the mode of enquiry adopted by a court to satisfy itself as to the credibility of a witness.

Illustration

Two adult male Muslims give evidence that they saw A coming out of Z's room with a blood-stained dagger in his hand, stains of fresh blood on his clothes, and his face having signs of perplexity. Immediately thereafter they find Z lying dead in the room with fresh blood oozing from his breast. There was no other exit of that room except the one from which A had gone out. In these circumstances, if the court is satisfied that it was sufficient proof of the offence, A may be held guilty of *qatal-e-amd*.

11. *Wali* in case of *qatal*:—In case of *qatal* the *wali* shall be:
- i. the heir or heirs of the victim according to his personal law, and
 - ii. the State, if there is no heir.
12. *Qatal-e-amd* not liable to *qisas*:—The *qatal-e-amd* shall not be liable to *qisas* in the following cases:

- i. When the offender is minor and insane.
Provided that he shall be liable to *diyat* payable by his *aqila*.
 - ii. When a person causes the death of his child or a grandchild, how low so ever.
Provided that he shall be liable to *diyat*.
 - iii. When any of the heirs of the victim is a child or a grandchild, how-low-so-ever of the offender.
Provided that such person shall be liable to *diyat*.
 - iv. When the *wali* of the victim is not known and the court is satisfied that all reasonable efforts to find the *wali* have failed; and
 - v. When an offender at the instance of the victim causes his death:
Provided that the offender shall be liable to *diyat*.
13. Cases in which *qisas* shall not be enforced:—The *qisas* shall not be enforced in the following cases namely:
- i. When the offender dies before the enforcement of the *qisas*.
 - ii. When any of the *awliya* waives the right of *qisas* under section 14 or compounds under section 15.
 - a) When the right of *qisas* devolves on: the offender as a result of the death of the *wali* of the victim, or,
 - b) the person who cannot claim *qisas* against the offender:
Provided that the offender shall be liable to *tazir* and punished with imprisonment for life and whipping not exceeding forty stripes or death.

Illustrations

- (a) Z has no heirs except his two sons, B and C. B kills Z, here C has the right of *qisas* from B. But if C dies before exercising the right of *qisas* the *qisas* cannot be enforced because in the absence of any other heir the right of *qisas* has devolved on the offender B.
- (b) A kills Z, the maternal uncle of his son B. Z has no other heir except D, the wife of A. D has the right of *qisas* from A. But if D dies, the right of *qisas* shall devolve on her son B, who is the son of the offender A. B cannot demand *qisas* from his father. Therefore, the *qisas* cannot be enforced.

- (c) B kills Z, the brother of her husband A. Z has no other heir except A. Here A can demand *qisas* from his wife B. If A dies, the right of *qisas* shall devolve on his son D and as D is also son of B, the *qisas* cannot be enforced.

14. Waiver of *qisas* (*Afw*):—(1) An adult sane *wali* may, in writing, in the presence of the court or the authorised officer of the court present at the time of the execution of *qisas*, without demanding any compensation, waive his right of *qisas*.

Provided that such right shall not be waived where State is a *wali*.

- (2) The right of *qisas* vested in a minor or an insane *wali* shall not be waived by the persons exercising the right of *qisas* on behalf of such minor or *wali*.
- (3) Where a victim has more than one *wali*, any one of them may waive his right of *qisas*.

Provided that the remaining *Awliya* who do not waive the right of *qisas* shall be entitled to their shares of *diyat*.

- (4) Where all *awliya* waive their right of *qisas*, the right to claim *diyat* or *ursh* shall also stand waived.
- (5) Where there is more than one victim, the waiver of the right of *qisas* by the *wali* of one victim shall not affect the right of *qisas* by the *wali* of the other victim.
- (6) Where there is more than one convict, the waiver of the right of *qisas* against one convict shall not affect the right of *qisas* against the other convict.
- (7) The right of *qisas* may be waived anytime before the execution of *qisas*.

15. Compounding of *qisas* (*Sulh*):—(1) An adult sane *wali* may, in the presence of the court or authorised officer of the court present at the time of execution of *qisas*, on accepting *badl-e-sulh* compound the *qisas*.

- (2) Where a *wali* is a minor or insane, his father or grandfather may compound the *qisas* on behalf of such minor or insane *wali*.

Provided that where the *wali* is a minor or an insane person, the value of *badl-e-sulh* shall not be less than the value of *diyat*.

- (3) Where *badl-e-sulh* is not determined the convict shall be liable to pay *diyat*.
- (4) Where *badl-e-sulh* is a thing without value or is a property or a right which cannot be determined in terms of money under *Shariah*, the *qisas* shall be deemed to have been waived without any compensation and the convict shall be liable to *tazir* and punished with imprisonment for life and whipping not exceeding forty stripes.
- (5) *Badl-e-sulh* may be paid on demand or on any deferred date as may be agreed upon by the convict and a *wali*.

Explanation

- (a) In this section, *badl-e-sulh* means the mutually agreed compensation according to *Shariah*, to be paid by the convict to a *wali* in cash, kind, or in the shape of moveable or immovable property or any right.
 - (b) Where a *wali* or a convict is a Muslim, all alcoholic drinks and wine shall be considered to be goods without any value, but where both the *wali* and convict are non-Muslims the values of these goods may be determined in terms of money.
16. *Tazir* after waiver or compounding of *qisas*:—Notwithstanding anything contained in section 14 or section 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.
 17. *Qatl-i-amd* after waiver or compounding of *qisas*:—Where a *wali* commits *qatl-i-amd* of an offender or a convict against whom the right of *qisas* has been waived under section 14 or compounded under section 15, such *wali* shall be punished with:
 - (a) *qisas*, if he had himself waived or compounded the *qisas* against the convict or had such knowledge of such a waiver or compounding by another *wali* and
 - (b) *diyat*, if he had no knowledge of such waiver or compounding.
 18. Exercise of the right of *qisas*:—

- (1) where there is only one *wali*, he alone has the right of *qisas* in *qatl-i-amd*, but if there is more than one, the right of *qisas* vests in each one of them individually.

Provided that the right of *qisas* shall not be exercised until all the *awliya* are present at the time of the execution of *qisas*, personally or through their representatives authorised by them in writing on this behalf.

Provided further that *wali* or *awliya* or their representatives fail to present themselves on the date, time and place of the execution of *qisas* after being informed of the date, time and place by a notice in writing by registered post (acknowledgement due), they shall be deemed to have authorised the State to exercise the right of *qisas* on their behalf.

Provided also that if any *wali* is minor or insane the other adult *wali* or *awliya* may exercise his or their right of *qisas* and such *wali* or *awliya* need not wait for a minor to become adult or an insane to become sane.

- (2) If the victim has no *wali*: (a) The State shall exercise the right of *qisas*; and
 (b) other than a minor or insane, the father or the grandfather of such *wali* may exercise the right of *qisas* on his behalf:

Provided that if the minor or insane *wali* has no father or grandfather alive, the State shall exercise the right of *qisas* on his behalf.

19. Execution of *qisas* in *qatl-i-amd*:—

- (1) The *qisas* shall be executed in public in the presence of *awliya* or their authorised representatives and an officer of the court authorised by the Government on this behalf by beheading with a sword or killing the convict by some other mode capable of causing him the least possible pain
- (2) The *awliya* or authorised representatives present at the execution, and if no such *awliya* or his authorised representatives are present, a representative of the State, shall give permission for the execution of *qisas*.
- (3) If the convict is a woman who is pregnant, the execution of *qisas* shall be postponed until the expiration of a period of

two years after the birth of the child or miscarriage, as the case may be.

20. *Qatle-shib-hul-amd*:—Whoever with intent to cause harm to body or mind of any other person but without any intention to cause death, causes his death, by means of a weapon or an act which in the ordinary case of nature is not likely to cause death is said to commit *qatl-e-shib-hulamd*.

Illustrations

- (a) A, in order to cause hurt, strikes Z with a stick or stone which in the ordinary course of nature does not cause death. Z dies as result of such hurt. A shall be guilty of *qatl-e-shib-hul-amd*.
- (b) A aimed a pistol at Z in order to frighten him without any intention to kill him. Here, if Z dies out of fear, or if accidentally a bullet is fired with the result that Z dies, A shall be guilty of *qatl-e-shib-hul-amd*.
21. Punishment of *Qatl-e-shib-hul-amd*:—Whoever commits *Qatl-e-shib-hul-amd* shall be liable to:
- i. *tazir* and punished with imprisonment for a term which may extend to twenty-five years and his *aqila* shall be liable to *diyat*, if the person killed is a *masoom-ud-dam* and
 - ii. *tazir* and punished with rigorous imprisonment for a term which may extend to twenty-five years and whipping not exceeding thirty stripes, if the person killed is a *ghair-masoom-ud-dam*.
22. *Qatal-e-khata*:—Whoever causes the death of a person without any intention to cause harm to such person, is said to commit *qatal-e-khata*.

Illustrations

- i. A aims at a deer but due to a bad shot causes the death of Z. A is guilty of *qatal-e-khata*.
- ii. A causes the death of Z believing him in good faith to be a *ghair-masoom-ud-dam* though actually Z was a *masoom-ud-dam*. A is guilty of *qatl-i-khata*.
- iii. A, while asleep, falls on Z and Z dies in consequence. A is guilty of *qatal-e-khata*.

23. Punishment for *qatal-e-khata*:—Whoever commits *qatl-e-khata* shall be punished with
- i. *diyat* payable by his *aqila* if the person killed a *masoom-ud-dam*.
Provided that where *qatl-e-khata* is committed by any rash or negligent act, the offender shall also be punished with imprisonment of either description for a term which may extend to five years, and
 - ii. Imprisonment of either description for a term, which may extend to ten years if the person killed is *ghair-masoom-ud-dam*.
24. Punishment for *qatl-e-khata* by rash or negligent driving:—Whoever commits *qatl-e-khata* by rash or negligent driving may, shall be punished with imprisonment of either description for a term which may extend to ten years and with *diyat*.
25. Value of *diyat*:—
- (1) The court shall, keeping in view the financial position of the convict, *aqila* and the heirs of the victim, fix the value of *diyat* in accordance with one of the following scales, namely:
 - i. Ten thousand *dirham shar'i*, equivalent to 30.63 grams of silver or its value in money, or
 - ii. One thousand *dirham shar'i*, equivalent to 4.36 grams of gold or its value in money.
 - (2) Where the victim is female, her *diyat* shall be one-half of the scale specified in subsection (1).
26. Liability of *diyat* in *qatl*:—The *diyat* in *qatl-i-amd* shall be paid by the convict himself and that of *qatl-e-shib-hul-amd* or *qatl-e-khata* or *qatl-e-bil-sabab* shall be paid by his *aqila*.
Provided that where a convict of *qatl-e-shib-hul-amd* or *qatl-e-khata* or *qatl-i-bil-sabab* is convicted on his own confession, the *diyat* shall be paid by himself.
27. Disbursement of *diyat*:—The *diyat* shall be disbursed among the heirs of the victim according to their respective shares in inheritance:
Provided that where an heir forgoes his share, the *diyat* shall abate to the extent of his share.

28. Person committing *qatl* debarred from succession:—Where a person committing *qatl* is an heir or beneficiary under a will of the victim, he shall, unless the personal law of the victim provides otherwise, be debarred from succeeding to the estate of the victim as an heir of a beneficiary.
29. *Aqila*:—In this Ordinance, an *aqila* 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.

Explanation

Having regard to the facts and circumstances of each case, the court shall determine the *aqila*.

30. Payment of *diyat* by convict:—(1) Where an *aqila* is made liable for payment of *diyat*, the convict, whether male or female, adult or minor, sane or insane, shall be deemed to be a member of such *aqila* and shall pay the proportionate share of the *diyat*.
(2) Where a convict is not a member of *aqila* and it is not possible to determine his *aqila*, the offender convict shall himself pay the *diyat*.
31. Period of payment of *diyat*:—(1) The *diyat* shall be paid in lump sum or in instalments within a period of three years from the date of the final judgment.
(2) Where a convict or his *aqila* fails to pay *diyat* or any part thereof within the period specified in sub-section (1), it shall be recovered as arrears of land revenue:

Provided that until the *diyat* is paid in full to the extent of his liability, the convict shall be kept in jail and dealt with in the same manner as if sentenced to simple imprisonment.
(3) Where a convict liable to *diyat* dies before the payment of *diyat* or any part thereof, it shall be recovered from the property left by him.
74. Cases in which *qisas* shall not be enforced:—(1) The *qisas* shall not be enforced in the following cases:

- i. When the convict dies or his limb or organ liable to *qisas* is lost or becomes physically imperfect before the execution of *qisas*.
- ii. When any of *awliya* waives the right of *qisas* under section 14 or compounds under section 15.
- iii. When the right of *qisas* devolves on:
 1. The convict as a result of death of the *wali*, or
 2. The person who can not claim *qisas* against the convict.

Provided that the convict shall be liable to *tazir* provided for the kind of hurt caused.

- (2) If, at the time of execution of *qisas*, the authorised medical officer is of the opinion that the execution of *qisas* may cause the death of the offender, the execution of *qisas* shall be postponed until such time as the apprehension of death ceases.

Provided that if such apprehension of death is of a permanent nature, the offender shall be liable to *ursh*.

75. *Wali* in case of hurt:—In case of hurt, the *wali* shall be:
 - a) The victim: Provided that if a victim is a minor or insane the right of *qisas* shall be exercised by his guardian.
 - b) The heirs of the victim, if he dies before the execution of *qisas*, and
 - c) The State, in the absence of the victim or heirs.

76. Execution of *qisas* for hurt:—

The *qisas* shall be executed:

- a) In the public after the wound of the victim is healed; and
- b) by an authorised medical officer who shall, before such execution, examine the convict and take due care so as to ensure that the execution of *qisas* shall not cause the death of the convict nor shall it exceed the hurt caused by the convict to the victim.

The *awliya* or their authorised representatives present at the time of execution, and, if no *awliya* or their representatives are present, the representative of the State, shall give permission for the execution of *qisas*.

If the convict is a woman who is pregnant, the execution of *qisas* shall be postponed until the expiration of a period of two months after the birth of the child or miscarriage, as the case may be.

100. *Oath (qasamat)* where the offender is not known:—
- (a) Where the offender committing *qatl* is not known or is not traceable after adequate enquiry, the person or persons in the vicinity where the dead body is found shall, to the demand of *wali* or *awliya*, be required to take oath (*qasamat*), before judicial officer authorised by the Provincial Government in this behalf, in the following form:
 “I, _____, do solemnly swear before Almighty Allah that I have neither killed the victim, namely, _____, nor do I have any knowledge as to who has killed him.”
 - (b) If the number of persons required to take oath (*qasamat*) is fifty, every one of them shall take oath (*qasamat*) once, and if the number of such persons is less than fifty, they shall swear as many times as to make the number of oaths to be fifty.
105. Application of certain other provisions of the Pakistan Penal Code (Act XLV of 1860):—Unless otherwise expressly provided in this Ordinance, the provisions of sections 57, 60 and 79 of chapter III, sections 76 to 78 and 88 to 93 of Chapter IV of the Pakistan Penal Code 1860 (Act XLV of 1860), shall, *mutatis mutandis* apply in respect of offence under this Ordinance.
106. Application of Code of Criminal Procedure, 1898 (Act V of 1898):—
- (1) The provisions of the Code of Criminal Procedure, 1898 (Act V of 1898), shall, *mutatis mutandis*, apply in respect of cases under this Ordinance:

 Provided that, if it appears in evidence that the offender has committed a different offence under any other law, he may, if the court is competent to try that offence and to award punishment therefore, be convicted and punished for that offence.
 - (2) The provision of the Code of Criminal Procedure, 1898 (Act V of 1898), relating to the confirmation of the sentence of

death, shall, *mutatis mutandis*, apply to confirmation of sentence under this Ordinance.

- (3) The provisions of section 345, sub-section (3) of section 391, section 393, sections 401 to 402B, section 544A and section 546 of the Code of Criminal Procedure, 1898 (Act V of 1898), shall not apply in respect of the punishments awarded under this Ordinance.

107. Presiding Officer of Court to be a Muslim:—

The Presiding Officer of the court by which a case is tried, or an appeal is heard, under this Ordinance shall be a Muslim.

Provided that, if the accused is non-Muslim, the Presiding Officer may be a non-Muslim.

108. Saving:—Nothing in this Ordinance shall be deemed to apply to cases pending before any court immediately before the commencement of this Ordinance or to offences committed before such commencement.

APPENDIX C

THE ORDINANCE 1990

The First Ordinance of the Qisas and Diyat Law Promulgated by the President of Pakistan Ghulam Ishaq Khan during the Interim Government of Ghulam Mustafa Jatoi, the Prime Minister of Pakistan, on 5 September 1990¹

The Gazette of Pakistan
EXTRAORDINARY
PUBLISHED BY AUTHORITY

ISLAMABAD, WEDNESDAY, SEPTEMBER 5, 1990

PART 1

Acts, Ordinances, President's Orders and Regulations including
Martial Law
Orders and Regulations

GOVERNMENT OF PAKISTAN

MINISTRY OF LAW, JUSTICE AND PARLIAMENTARY AFFAIRS
(Law and Justice Division)

Islamabad, the 5th September, 1990

No. F. 2(2)/90-Pub.—The following Ordinance made by the President on 5 September 1990 is hereby published for general information:

¹ The original text lists all Arabic terms in both Arabic and Roman-English scripts. For ease of reference, the Arabic script versions have been omitted.

ORDINANCE No. VII OF 1990

AN

ORDINANCE

further to amend the Pakistan Penal Code and the Code of Criminal Procedure. 1898.

WHEREAS it is expedient further to amend the Pakistan Penal Code (Act XLV of 1860) and the Code of Criminal Procedure, 1898 (Act of 1898) to bring them into conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah:

AND WHEREAS the National Assembly is not in session and the President is satisfied that circumstances exist which render it necessary to take immediate action:

Now, THEREFORE in exercise of the powers conferred by clause (1) of Article 89 of the Constitution of the Islamic Republic of Pakistan, the President is pleased to make and promulgate the following Ordinance:

1. Short title and commencement:—(1) This Ordinance may be called the Criminal Law (Second Amendment) Ordinance, 1990.
2. Substitution of section 53, Act XLV of 1860:—In the Pakistan Penal Code (Act XLV of 1860), hereinafter referred to as the said Code, for section 53 the following shall be substituted, namely:

“53. *Punishments*:—The punishments to which offenders are liable under the provisions of this Code are,

- | | |
|------------|--|
| Firstly, | Qisas; |
| Secondly, | Tazir; |
| Thirdly, | Diyat; |
| Fourthly, | Arsh; |
| Fifthly, | Daman; |
| Sixthly, | Death; |
| Seventhly, | Imprisonment for life; |
| Eighthly, | Imprisonment which is of two descriptions namely:— |
| | i. Rigorous, i.e., with hard labour; |
| | ii. Simple; |
| Ninthly, | Forfeiture of property; |
| Tenthly, | Fine.” |

3. Amendment of section 109, Act XLV of 1860:—In the said Code, in section 109, for the full-stop at the end a colon shall be substituted and thereafter the following proviso shall be added, namely:

“Provided that, except in case of *Ikrah-i-Tam*, the abettor of an offence referred to in Chapter XVI shall be liable to punishment of *tazir* specified for such offence including death.”

4. Substitution of sections 299 to 338, Act XLV of 1860:—(1) In the said Code for sections 299 to 338 the following shall be substituted, namely:

“299. *Definitions.*—In this Chapter, unless there is anything repugnant in the subject or context,—

- (a) ‘*adult*’ means a person who has attained, being a male, the age of eighteen years, or, being a female, the age of sixteen years, or has attained puberty, whichever is earlier;
- (b) ‘*arsh*’ means the compensation specified in this Chapter to be paid by the offender to the victim or his heirs;
- (c) ‘*authorised medical officer*’ means a medical officer or a Medical Board, howsoever designated, authorised by the Provincial Government;
- (d) ‘*daman*’ means the compensation determined by the Court to be paid by the offender to the victim for causing hurt not liable to *arsh*;
- (e) ‘*diyat*’ means the compensation specified in section 323 payable to the heirs of the victim by the offender;
- (f) ‘*Government*’ means the Provincial Government;
- (g) ‘*ikrah-e-tam*’ means putting any person, his spouse or any of his blood relations within the prohibited degree of marriage in fear of instant death or instant permanent impairing of any organ of the body or instant fear of being subjected to sodomy or *zina-bil-jabr*;
- (h) ‘*ikrah-e-naqis*’ means any form of duress which does not amount to *ikrah-i-tam*;
- (i) ‘*minor*’ means a person who is not an adult;
- (j) ‘*qatl*’ means causing death of a person;
- (k) ‘*tazir*’ means punishment other than *qisas*, *diyat*, *arsh* or *daman*; and
- (l) ‘*wali*’ means a person entitled to claim *qisas*.”

300. *Qatl-i-amd*:—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-i-amd*.
301. *Causing death of a person other than the person whose death was intended*.—Where a person, by doing anything which he intends or knows to be likely to cause death, causes death of any person whose death he neither intends nor knows himself to be likely to cause, such an act committed by the offender shall be liable for *qatl-i-amd*.
302. *Punishment of qatl-i-amd*:—Whoever commits *qatl-i-amd* shall, subject to the provisions of this Chapter, be:
- i. punished with death as *qisas*;
 - ii. punished with death or imprisonment for life as *tazir* having regard to the facts and circumstances of the case, if the proof in either of the forms specified in section 304 is not available; or
 - iii. punished with imprisonment of either description for a term which may extend to twenty-five years, where according to the Injunctions of Islam the punishment of *qisas* is not applicable.
303. *Qatl committed under 'ikrah-i-tam' or 'ikrah-i-naqis'*:—Whoever commits *qatl*:
- i. under 'ikrah-i-tam' shall be punished with imprisonment for a term which may extend to twenty-five years but shall not be less than ten years and the person causing 'ikrah-i-tam' shall be punished for the kind of *qatl* committed as a consequence of his 'ikrah-i-tam'; or
 - ii. under 'ikrah-i-naqis' shall be punished for the kind of *qatl* committed by him and the person causing 'ikrah-i-naqis' shall be punished with imprisonment for a term which may extend to ten years.

304. *Proof of qatl-i-amd liable to qisas, etc.*:—(1) Proof of *qatl-i-amd* liable to *qisas* shall be in any of the following forms:
- i. the accused makes before a Court competent to try the offence a voluntary and true confession of the commission of the offence; or
 - ii. by the evidence as provided in Article 17 of the *Qanun-e-Shahadat*, 1984 (P.O. no. 10 of 1984).
- (2) The provisions of sub-section (1) shall, *mutatis mutandis*, apply to a hurt liable to *qisas*.
305. *Wali*:—In case of a *qatl*, the *wali* shall be:
- i. the heirs of the victim, according to his personal law; and
 - ii. the Government, if there is no heir.
306. *Qatl-i-amd* not liable to *qisas*:—*Qatl-i-amd* shall not be liable to *qisas* in the following cases:
- i. when an offender is a minor or insane:
Provided that, where a person liable to *qisas* associates with himself in the commission of the offence a person not liable to *qisas* with the intention of saving himself from *qisas*, he shall not be exempted from *qisas*.
 - ii. when an offender causes the death of his child or grandchild, how low so ever, and
 - iii. when any *wali* of the victim is a direct descendant, how low so ever, of the offender.
307. *Cases in which qisas for qatl-i-amd shall not be enforced*:—*Qisas* for *qatl-i-amd* shall not be enforced in the following cases:
- i. when the offender dies before the enforcement of *qisas*;
 - ii. when any *wali*, voluntarily and without duress, to the satisfaction of the Court, waives the right of *qisas* under section 309 or compounds under section 310; and
 - iii. when the right of *qisas* devolves on the offender as a result of the death of the *wali* of the victim, or on the person who has no right of *qisas* against the offender.

Illustrations

- (i) A kills Z, the maternal uncle of his son B. Z has no other *wali* except D, the wife of A. D has the right of *qisas* from A. But if D dies, the right of *qisas* shall devolve on her

son B, who is also the son of the offender, A. B cannot claim *qisas* against his father. Therefore, the *qisas* cannot be enforced.

- (ii) B kills Z, the brother of her husband, A. Z has no heir except A. Here A can claim *qisas* from his wife B. But if A dies, the right of *qisas* shall devolve on his son D, who is also the son of B. The *qisas* cannot be enforced against B.

308. *Punishment in qatl-i-amd not liable to qisas, etc.*:—(1) Where an offender guilty of *qatl-i-amd* is not liable to *qisas* under section 306 or the *qisas* is not enforceable under clause (c) of section 307, he shall be liable to *diyat*:

Provided that, where the offender is minor or insane, *diyat* shall be payable either from his property or by such person as may be determined by the Court.

Provided further that where at the time of committing *qatl-i-amd* the offender, being a minor, had attained sufficient maturity, or being insane, had a lucid interval so as to be able to realise the consequences of his act, he may also be punished with imprisonment of either description for a term which may extend to fourteen years as *tazir*.

Provided further that where the *qisas* is not enforceable under clause (c) of section 307, the offender shall be liable to *diyat* only if there is any *wali* other than offender and if there is no *wali* other than the offender, he shall be punished with imprisonment of either description for a term which may extend to fourteen years as *tazir*.

- (2) Notwithstanding anything contained in subsection (1), the Court, having regard to the facts and circumstances of the case in addition to the punishment of *diyat*, may punish the offender with imprisonment of either description for a term which may extend to fourteen years as *tazir*.

309. *Waiver-Afw of qisas in qatl-i-amd*:—(1) In the case of *qatl-i-amd* an adult sane *wali* may, at any time and without any compensation, waive his right of *qisas*:

Provided that the right of *qisas* shall not be waived—

- a. where the Government is the *wali*; or
 - b. where the right of *qisas* vests in a minor or insane.
- (2) Where a victim has more than one *wali*, any one of them may waive his right of *qisas*:
Provided that the *wali* who does not waive the right of *qisas* shall be entitled to his share of *diyat*.
- (3) Where there is more than one victim, the waiver of the right of *qisas* by the *wali* of one victim shall not affect the right of *qisas* of the *wali* of the other victim.
- (4) Where there is more than one offender, the waiver of the right of *qisas* against one offender shall not affect the right of *qisas* against the other offender.

310. *Compounding of qisas (Sulh) in qatl-i-amd*:—(1) In the case of *qatl-i-amd*, an adult sane *wali* may, at any time on accepting *badal-i-sulh*, compound his right of *qisas*:

Provided that only giving a female in marriage shall not be a valid *badal-i-sulh*.

- (2) Where a *wali* is a minor or an insane, the *wali* of such minor or insane *wali* may compound the right of *qisas* on behalf of such minor or insane *wali*:
Provided that the value of *badal-i-sulh* shall not be less than the value of *diyat*.
- (3) Where the Government is the *wali* it may compound the right of *qisas*:
Provided that the value of *badal-i-sulh* shall not be less than the value of *diyat*.
- (4) Where the *badal-i-sulh* is not determined or is a property or a right the value of which cannot be determined in terms of money under *Shariah* the right of *qisas* shall be deemed to have been compounded and the offender shall be liable to *diyat*.
- (5) *Badal-i-sulh* may be paid or given on demand or on a deferred date as may be agreed upon between the offender and the *wali*.

Explanation

In this section, *badal-i-sulh* means the mutually-agreed compensation according to *Shariah* to be paid or given by

the offender to a *wali* in cash or in kind or in the form of movable or immovable property.

311. *Tazir after waiver or compounding of right of qisas in qatl-i-amd*:—Notwithstanding anything contained in section 309 or section 310 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 which may extend to ten years as *tazir*.

Provided that the Court may punish an offender who is a previous convict, habitual or professional criminal, with imprisonment of either description for a term which may extend to fourteen years as *tazir*.

312. *Qatl-i-amd after waiver or compounding of qisas*:—Where a *wali* commits *qatl-i-amd* of a convict against whom the right of *qisas* has been waived under section 309 or compounded under section 310, such *wali* shall be punished with:

- (a) *qisas*, if he had himself waived or compounded the right of *qisas* against the convict or had knowledge of such waiver or composition by another *wali*; or
- (b) *diyat*, if he had no knowledge of such waiver or composition.

313. *Right of qisas in qatl-i-amd*:—(1) Where there is only one *wali*, he alone has the right of *qisas* in *qatl-i-amd*, but if there is more than one, the right of *qisas* vests in each of them.

(2) If the victim

- (a) has no *wali*, the Government shall have the right of *qisas*; or
- (b) has no *wali* other than a minor or insane or one of the *walis* is a minor or insane, the father or if he is not alive the paternal grandfather of such *wali* shall have the right of *qisas* on his behalf:

Provided that, if the minor or insane *wali* has no father or paternal grandfather, how high so ever, alive and no guardian has been appointed by the court, the Government shall have the right of *qisas* or his behalf.

314. *Execution of qatl-i-amd*:—(1) *Qisas* in *qatl-i-amd* shall be executed by a functionary of the Government by causing death of the convict as the Court may direct.
- (2) *Qisas* shall not be executed until all the *walis* are present at the time of execution, either personally or through their representatives authorised by them in writing on this behalf:

Provided that where a *wali* or his representatives fails to present himself on the date, time and place of execution of *qisas* after having been informed of the date, time and place as certified by the Court, an officer authorised by the Court shall give permission for the execution of *qisas* and the Government shall cause execution of *qisas* in the absence of such *wali*.

- (3) If the convict is a woman who is pregnant, the Court may, in consultation with an authorised medical officer, postpone the execution of *qisas* up to a period of two years after the birth of the child and during this period she may be released on bail on furnishing of security to the satisfaction of the Court, or, if she is not so released she shall be dealt with as if sentenced to simple imprisonment.
315. *Qatl shibh-i-amd*:—Whoever, with intent to cause harm to the body or mind of any person, causes the death of that or of any other person by means of a weapon or an act which in the ordinary course of nature is not likely to cause death is said to commit *qatl-shibh-i-amd*.

Illustrations

A, in order to cause hurt, strikes Z with a stick or stone, which in the ordinary course of nature is not likely to cause death. Z dies as a result of such hurt. A shall be guilty of *qatl shibh-i-amd*.

316. *Punishment for qatl shibh-i-amd*:—Whoever commits *qatl shibh-i-amd* shall be liable to *diyat* and may also be punished with imprisonment of either description for a term which may extend to fourteen years as *tazir*.
317. Person committing *qatl* debarred from succession. Where a person committing *qatl-i-amd* or *qatl shibh-i-amd* is an heir or a

beneficiary under a will, he shall be debarred from succeeding to the estate of the victim as an heir or a beneficiary.

318. *Qatl-i-khata*:—Whoever, without any intention to cause the death of or cause harm to a person, causes death of such person, either by mistake of act or by mistake of fact, is said to commit *qatl-i-khata*.

Illustrations

- (a) A aims at a deer but misses the target and kills Z, who is standing by. A is guilty of *qatl-i-khata*.
 (b) A shoots at an object to be a boar but it turns out to be a human being. A is guilty of *qatl-i-khata*.

319. *Punishment for qatl-i-khata*:—Whoever commits *qatl-i-khata* shall be liable to *diyat*:

Provided that, where *qatl-i-khata* is committed by any rash or negligent act, other than rash or negligent driving, the offender may, in addition to *diyat*, also be punished with imprisonment of either description for a term which may extend to five years as *tazir*.

320. *Punishment for qatl-i-khata by rash or negligent driving*:—Whoever commits *qatl-i-khata* by rash or negligent driving shall, having regard to the facts and circumstances of the case, in addition to *diyat*, be punished with imprisonment of either description for a term which may extend to ten years.

321. *Quatl-bis-sabab*:—Whoever, without any intention to cause death of or cause harm to any person, does any unlawful act which becomes a cause for the death of another person, is said to commit *qatl-bis-sabab*.

Illustration

A unlawfully digs a pit in the thoroughfare, but without any intention to cause the death of, or harm to, any person. B, while passing from there, falls in it and is killed. A has committed *qatl-bis-sabab*.

322. *Punishment for qatl-bis-sabab*:—Whoever commits *qatl-bis-sabab* shall be liable to *diyat*.
323. *Value of diyat*:—(1) The Court shall, subject to the Injunctions of Islam as laid down in the Holy Quran and Sunnah and keeping in view the financial position of the convict and the heirs of the victim, fix the value of *diyat* which shall not be less than one hundred seventy thousand and six hundred and ten rupees, being the value of 30.630 grams of silver.
(2) For the purposes of subsection (1), the Federal Government shall, by notification in the official Gazette, declare the value of silver on the first day of July each year.
324. *Attempt to commit qatl-i-amd*:—Whoever does any act with such intention or knowledge, and under such circumstances, that if he by that act caused *qatl*, he would be guilty of *qatl-i-amd*, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, and, if hurt is caused to any person by such act, the offender shall be liable to the punishment provided for the hurt caused:

Provided that, where the punishment for the hurt is *qisas* which is not executable, the offender shall be liable to *arsh* and may also be punished with imprisonment of either description for a term which may extend to seven years.
325. *Attempt to commit suicide*:—Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.
326. *Thug*:—Whoever shall have been habitually associated with any other or others for the purpose of committing robbery or child-stealing by means of or accompanied with *qatl*, is a *thug*.
327. *Punishment*:—Whoever is a *thug*, shall be punished with imprisonment for life, and shall also be liable to fine.

328. *Exposure and abandonment of a child under twelve years by parent or person having care of it:*—Whoever being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Explanation

This section is not intended to prevent the trial of the offender for *qatl-i-amd* or *qatl-i-shibh-amd* or *qatl-bis-sabab*, as the case may be, if the child dies in consequence of the exposure.

329. *Concealment of birth by secret disposal of dead body:*—Whoever, by secretly burying or otherwise disposing of the dead body of a child, whether such child dies before or after or during its birth, or intentionally conceals or endeavours to conceal the birth of such child, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

330. *Disbursement of diyat:*—The *diyat* shall be disbursed among the heirs of the victim according to their respective shares in inheritance:

Provided that, where an heir foregoes his share, the *diyat* shall not be recovered to the extent of his share.

331. *Payment of diyat:*—(1) The *diyat* may be made payable in lump sum or in instalments spread over a period of three years from the date of the final judgment.

(2) Where a convict fails to pay *diyat* or any part thereof within the period specified in subsection (1), the convict may be kept in jail and dealt with in the same manner as if sentenced to simple imprisonment until the *diyat* is paid in full, or may be released on bail if he furnishes security equivalent to the amount of *diyat* to the satisfaction of the Court.

(3) Where a convict dies before the payment of *diyat* or any part thereof, it shall be recovered from his estate.

[Provisions relating to 'hurt' not being covered in this book have also been omitted.]

- 338D. *Confirmation of sentence of death by way of qisas as tazir, etc.*—A sentence of death awarded by way of *qisas* or *tazir*, or a sentence of *qisas* awarded for causing hurt, shall not be executed unless it is confirmed by the High Court.
- 338E. *Waiver or compounding of offences.*—Subject to the provisions of this Chapter and notwithstanding anything contained in section 345 of the Code of Criminal Procedure, 1898, all offences under this Chapter may be waived or compounded and the provisions of sections 309 and 310 shall *mutatis mutandis* apply to the waiver or compounding of such offences:
- Provided that, where an offence has been waived or compounded, the court may in its discretion, having regard to the facts and circumstances of the case, acquit or award *tazir* to the offender according to the nature of the offence.
- 338F. *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.
- 338G. *Rules.*—The Government may in consultation with the Council of Islamic Ideology, by notification in the official Gazette, make such rules as it may consider necessary for carrying out the purposes of this Chapter.
- 338H. *Savings.*—(1) Nothing in this Chapter except sections 309, 310 and 33SE, shall apply to cases pending before any court immediately before the commencement of the Criminal Law (Second Amendment) Ordinance, 1990 (VII of 1990), or to the offences committed before such commencement.

APPENDIX D

THE ACT OF 1997

Complete text of the *qisas* and *diyat* law enacted in 1997¹

ACT II OF 1997

CRIMINAL LAW (AMENDMENT) ACT, 1997

An Act further to amend the Pakistan Penal Code,
1860 and the Code of Criminal Procedure, 1898
[Gazette of Pakistan, Extraordinary, Part I, 11 April 1997]

The following Act of *Majlis-e-Shoora* (Parliament), which received the assent of the President on 10 April 1997, is hereby published for general information.

Whereas it is expedient further to amend the Pakistan Penal Code, 1860 (Act XLV of 1860), and the Code of Criminal Procedure, 1898 (Act V of 1898), to bring them into conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, it is hereby enacted as follows:

1. Short title and commencement:—(1) This Act may be called the Criminal Law (Amendment) Act, 1997.
(2) It shall come into force at once.
2. Substitution of section 53, Act XLV of 1860: In the Pakistan Penal Code, 1860 (Act XLV of 1860), hereafter referred to as the Penal Code, for section 53, the following shall be substituted:

¹ The original text lists all Arabic terms in both Arabic and Roman-English scripts. For ease of reference, the Arabic script versions have been omitted.

“53. Punishments: The punishments to which offenders are liable under the provisions of this Code are:

- | | |
|------------|---|
| Firstly, | Qisas; |
| Secondly, | Diyat; |
| Thirdly, | Arsh; |
| Fourthly, | Daman; |
| Fifthly, | Tazir; |
| Sixthly, | Death; |
| Seventhly, | Imprisonment for life; |
| Eighthly, | Imprisonment which is of two descriptions, namely:— |
| | (i) Rigorous, i.e., with hard labor; |
| | (ii) Simple; |
| Ninthly, | Forfeiture of property; |
| Tenthly, | Fine.” |

3. Amendment of section 54, Act XLV of 1860: In the Penal Code, in section 54, for the full-stop at the end a colon shall be substituted and thereafter the following provision shall be added:—

“Provided that, in a case in which sentence of death shall have been passed against an offender convicted for an offence of *qatl*, such sentence shall not be commuted without the consent of the heirs of the victim.”

4. Amendment of section 55, Act XLV of 1860: In the Penal Code, in section 55, for the full-stop at the end a colon shall be substituted and thereafter the following provision shall be added:—

“Provided that, in a case in which sentence of imprisonment for life shall have been passed against an offender convicted for an offence punishable under Chapter XVI, such punishment shall not be commuted without the consent of the victim or, as the case may be, of his heirs.”

5. Amendment of section 55-A, Act XLV of 1860: In the Penal Code, in section 55-A, for the full-stop at the end a colon shall be substituted and thereafter the following proviso shall be added:—

“Provided that such right shall not, without the consent of the victim as the case may be, or the heirs of the victim, be exercised for any sentence awarded under Chapter XVI.”

6. Amendment of section 109, Act XLV of 1860: In the Penal Code, in section 109, for the full-stop at the end a colon shall be substituted and thereafter the following provision shall be added:

“Provided that, except in case of *ikrah-i-tam*, the abettor of an offence referred to in Chapter XVI shall be liable to punishment of *tazir* specified for such offence including death.

7. Substitution of sections 299 to 338, Act XLV of 1860: (1) In the Penal Code, for sections 299 to 338, the following shall be substituted namely:—

“299. Definitions: In this Chapter, unless there is anything repugnant in the subject or context:

- (a) ‘adult’ means a person who has attained the age of eighteen years;
- (b) ‘*arsh*’ means the compensation specified in this Chapter to be paid to the victim or his heirs under this Chapter;
- (c) ‘authorised medical officer’ means a medical officer or a Medical Board, howsoever designated, authorised by the Provincial Government;
- (d) ‘*daman*’ means the compensation determined by the Court to be paid by the offender to the victim for causing hurt not liable to *arsh*;
- (e) ‘*diyat*’ means the compensation specified in section 323 payable to the heirs of the victim;
- (f) ‘Government’ means the Provincial Government;
- (g) ‘*ikrah-i-tam*’ means putting any person, his spouse or any of his blood relations within the prohibited degree of marriage in fear of instant death or instant permanent impairing of any organ of the body or instant fear of being subjected to sodomy or *zina-bil-jabr*;
- (h) ‘*ikrah-e-naqis*’ means any form of duress which does not amount to *ikrah-i-tam*;
- (i) ‘minor’ means a person who is not an adult;
- (j) ‘*qatl*’ means causing death of a person;

- (k) ‘*qisas*’ means 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*;
 - (l) ‘*tazir*’ means punishment other than *qisas*, *diyat*, *arsh*, or *daman* and
 - (m) ‘*wali*’ means a person entitled to claim *qisas*.
300. *Qatl-i-amd*:—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-i-amd*.
301. *Causing death of person other than the person, whose death was intended*:—Where a person, by doing anything which he intends or knows to be likely to cause death, causes death of any person whose death he neither intends nor knows himself to be likely to cause, such an act committed by the offender shall be liable for *qatl-i-amd*.
302. *Punishment of qatl-i-amd*:—Whoever commits *qatl-i-amd* shall, subject to the provisions of this Chapter, be:
- (a) punished with death as *qisas*;
 - (b) punished with death or imprisonment for life as *tazir* having regard to the facts and circumstances of the case, if the proof in either of the forms specified in section 304 is not available, or,
 - (c) punished with imprisonment of either description for a term which may extend to twenty-five years, where according to the Injunctions of Islam the punishment of *qisas* is not applicable.
303. *Qatl committed under ikrah-i-tam or ikrah-i-naqis*:—Whoever commits *Qatl*:
- (a) Under *ikrah-i-tam* shall he punished with imprisonment for a term which may extend to twenty-five years but shall not be less than ten years and the person causing ‘*ikrah-i-tam*’ shall

be punished for the kind of *qatl* committed as a consequence of his *ikrah-i-tam*, or,

- (b) Under '*ikrah-i-naqis*' shall be punished for the kind of *qatl*, committed by him and the person causing *ikrah-i-naqi*' shall be punished with imprisonment for a term which may extend to ten years.

304. *Proof of qatl-i-amd liable to qisas, etc.*:—(1) Proof of *qatl-i-amd* shall be in any of the following forms:

- (a) The accused makes before a court competent to try the offence a voluntary and true confession of the commission of the offence; or
 - (b) By the evidence as provided in Article 17 of the *Qanun-e-Shahadat*, 1984 (P.O. no. 10 of 1984).
- (2) The provisions of subsection (1) shall, *mutatis mutandis*, apply to hurt liable to *qisas*.

305. *Wali*: In case of *qatl*, the *wali* shall be:

- (a) The heirs of the victim, according to his personal law; and
- (b) The Government, if there is no heir.

306. *Qatl-i-amd not liable to qisas*:—*Qatl-i-amd* shall not be liable to *qisas* in the following cases:

- (a) When an offender is a minor or insane:

Provided that, where a person liable to *qisas* associates himself in the commission of the offence with a person not liable to *qisas* with the intention of saving himself from *qisas*, he shall not be exempted from *qisas*;

- (b) When an offender causes death of his child or grandchild, how- low-so-ever; and
- (c) When any *wali* of the victim is a direct descendant, how-low-so-ever, of the offender.

307. *Cases in which qisas for qatl-i-amd shall not be enforced*:—*Qisas* for *qatl-i-amd* shall not be enforced in the following cases:—

- (a) When the offender dies before the enforcement of *qisas*;
- (b) When any *wali* voluntarily and without duress, to the satisfaction of the Court, waives the right of *qisas* under section 309 or compounds under section 310; and

- (c) When the right of *qisas* devolves on the offender as a result of the death of the *wali* of the victim, or on the person who has no right of *qisas* against the offender.
- (2) To satisfy itself that the *wali* has waived the right of *qisas* under section 309 or compounded the right of *qisas* under section 310 voluntarily and without duress, the Court shall take down the statement of the *wali* and such other persons as it may deem necessary on oath and record an opinion that it is satisfied that the waiver or, as the case may be, the composition, was voluntary and not the result of any duress.

Illustrations

- (i) A kills Z, the maternal uncle of his son, B. Z has no other *wali* except D, the wife of A. D has the right of *qisas* from A. But if D dies, the right of *qisas* shall devolve on her son B, who is also the son of offender A. B cannot claim *qisas* against his father. Therefore, the *qisas* cannot be enforced.
- (ii) B kills Z, the brother of her husband A. Z has no heir except A. Here A can claim *qisas* from his wife B. But if A dies, the right of *qisas* shall devolve on his son D, who is also son of B. The *qisas* cannot be enforced against B.

308. *Punishment in qatl-i-amd not liable to qisas, etc.*—(1) Where an offender guilty of *qatl-i-amd* is not liable to *qisas* under section 306 or the *qisas* is not enforceable under clause (c) of section 307, he shall be liable to *diyat*:

Provided that, where the offender is a minor or insane, *diyat* shall be payable either from his property or by such person as may be determined by the Court.

Provided further that, where at the time of committing *qatl-i-amd* the offender, being a minor, had attained sufficient maturity, or being insane had a lucid interval so as to be able to realise the consequences of his act, he may also be punished with imprisonment of either description for a term which may extend to fourteen years as *tazir*:

Provided further that, where the *qisas* is not enforceable under clause (c) of section 307, the offender shall be liable to *diyat* only

if there is any *wali* other than offender and if there is no *wali* other than the offender, he shall be punished with imprisonment of either description for a term which may extend to fourteen years as *tazir*.

- (2) Notwithstanding anything contained in subsection (1), the Court, having regard to the facts and circumstances of the case in addition to the punishment of *diyat*, may punish the offender with imprisonment of either description for a term which may extend to fourteen years as *tazir*.

309. *Waiver-Afw of qisas in qatl-i-amd*:—(1) in the case of *qatl-i-amd*, an adult sane *wali* may, at any time and without any compensation, waive his right of *qisas*:

Provided that the right of *qisas* shall not be waived

- (a) where the Government is the *wali*; or
 (b) where the right of *qisas* vests in a minor or insane.
 (2) Where a victim has more than one *wali*, any one of them may waive his right of *qisas*:

Provided that the *wali* who does not waive the right of *qisas* shall be entitled to his share of *diyat*.

- (3) Where there is more than one victim, the waiver of the right of *qisas* by the *wali* of one victim shall not affect the right of *qisas* of the *wali* of the other victim.
 (4) Where there is more than one offender, the waiver of the right of *qisas* against one offender shall not affect the right of *qisas* against the other offender.

310. *Compounding of qisas (Sulh) qatl-i-amd*:—(1) In the case of *qatl-i-amd*, an adult sane *wali* may, at any time, on accepting *badl-i-sulh*, compound his right of *qisas*:

Provided that giving a female in marriage shall be not valid *badl-i-sulh*.

- (2) Where a *wali* is a minor or insane, the *wali* of such minor or insane *wali* may compound the right of *qisas* on behalf of such minor or insane *wali*.

Provided that the value of *badal-i-sulh* shall not be less than the value of *diyat*.

- (3) Where the Government is the *wali*, it may compound the right of *qisas*:

Provided that the value of *badal-i-sulh* shall not be less than the value of *diyat*.

- (4) Where the *badal-i-sulh* is not determined or is a property or a right the value of which cannot be determined in terms of money under *Shariah*, the right of *qisas* shall be deemed to have been compounded and the offender shall be liable to *diyat*.
- (5) *Badal-i-sulh* may be paid or given on demand or on a deferred date, as may be agreed upon between the offender and the *wali*.

Explanation

In this section, *badl-i-sulh* means the mutually-agreed compensation according to *Shariah* to be paid or given by the offender to a *wali* in cash or in kind or in the form of movable or immovable property.

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 which may extend to fourteen years as *tazir*:

Explanation

For the purpose of this section, the expression *fasad-fil-arz* shall include the past conduct of the offender, or whether he has any previous convictions, or the brutal or shocking manner in which the offence has been committed which is outrageous to the public conscience, or if the offender is considered a potential danger to the community.

312. *Qatl-i-amd after waiver or compounding of qisas*:—Where a *wali* commits *qatl-i-amd* of a convict against whom the right of *qisas* has been waived under section 309 or compounded under section 310, such *wali* shall be punished with:

- (a) *qisas*, if he had himself waived or compounded the right of *qisas* against the convict or had knowledge of such waiver of composition by another *wali*; or
- (b) *diyat*, if he had no knowledge of such waiver or composition.

313. *Right of qisas in qatl-i-amd*:—(1) Where there is only one *wali*, he alone has the right of *qisas* in *qatl-i-amd*, but if there is more than one, the right of *qisas* vests in each of them.

(2) If the victim:

- (a) has no *wali*, the Government shall have the right of *qisas*; or
- (b) has no *wali* other than a minor or insane or one of the *walis* is a minor or insane, the father, or if he is not alive, the paternal grandfather of such *wali* shall have the right of *qisas* on his behalf:

Provided that, if the minor or insane *wali* has no father or paternal grandfather alive, how high so ever, and no guardian has been appointed by the Court, the Government shall have the right of *qisas* on his behalf.

314. *Execution of qisas in qatl-i-amd*: *Qisas* in *qatl-i-amd* shall be executed by a functionary of the Government by causing death of the convict as the Court may direct.

(2) *Qisas* shall not be executed until all the *walis* are present at the time of execution, either personally or through their representative authorised by them in writing on this behalf.

Provided that where a *wali* or his representative fails to present himself on the date, time and place of execution of *qisas* after having been informed of the date, time and place as certified by the court, an officer authorised by the Court shall give permission for the execution of *qisas* and the Government shall cause execution of *qisas* in the absence of such *wali*.

- (3) If the convict is a woman who is pregnant, the Court may, in consultation with an authorised medical officer, postpone the execution of *qisas* for up to a period of two years after the birth of the child and during this period she may be released on bail after the furnishing of security to the satisfaction of the Court or, if she is not so released, she shall be dealt with as if sentenced to simple imprisonment.

315. *Qatl shibh-i-amd*:—Whoever, with intent to cause harm to the body or mind of any person, causes the death of that or of any other person by means of a weapon or an act which in the ordinary course of nature is not likely to cause death, is said to commit *qatl shibh-i-amd*.

Illustration

A, in order to cause hurt, strikes Z with a stick or stone which in the ordinary course of nature is not likely to cause death Z dies as a result of such hurt. A shall be guilty of *qatl shibh-i-amd*.

316. *Punishment for qatl-shibh-i-amd*:—Whoever commits *qatl-shibh-i-amd* shall be liable to *diyat* and may also be punished with imprisonment of either description for a term which extend to fourteen years as *tazir*.
317. *Person committing qatl debarred from succession*:—Where a person committing *qatl-i-amd* or *qatl-shibh-i-amd* is an heir or a beneficiary under a will, he shall be debarred from succeeding to the estate of the victim as an heir or a beneficiary.
318. *Qatl-i-khata*:—Whoever, without any intention to cause death of or cause harm to a person causes death of such person either by mistake of act or by mistake of fact, is said to commit *qatl-i-khata*.

Illustration

- (a) A aims at a deer but misses the target and kills Z, who is standing by. A is guilty of *qatl-i-khata*.
- (b) A shoots at an object to be a boar but it turn out to be a human being. A is guilty of *qatl-i-khata*.

319. *Punishment for qatl-i-khata*:—Whoever commits *qatl-i-khata* shall be liable to *diyat*.

Provided that, where *qatl-i-khata* is committed by an rash or negligent act, other than rash or negligent driving, the offender may, in addition to *diyat*, also be punished with imprisonment of either description for a term which may extend to five years as *tazir*.

320. *Punishment for qatl-i-khata by rash or negligent driving*:—Whoever commits *qatl-i-khata* by rash or negligent driving shall, having regard to the facts and circumstances of the case, in addition to *diyat*, be punished with imprisonment of either description for a term which may extend to ten years.

321. *Qatl-bis-sabab*:—Whoever, without any intention to cause death of, or cause harm to, any person, or does any unlawful act which becomes a cause for the death of another person, is said to commit *Qatl-bis-sabab*.

Illustration

A unlawfully digs a pit in the thoroughfare, but without any intention to cause the death of, or harm to, any person. B, while passing from there, falls in it and is killed. A has committed *qatl-i-sabab*.

322. *Punishment for qatl-bis-sabab*:—Whoever commits *qatl-bis-sabab* shall be liable to *diyat*.

323. *Value of diyat*:—(1) The court shall, subject to the Injunctions of Islam as laid down in the Holy Quran and Sunnah and keeping in view the financial position of the convict and heirs of the victim, fix the value of *diyat*, which shall not be less than the value of thirty thousand, six hundred and thirty grams of silver.

(2) For the purpose of sub-section (1), the Federal Government shall by notification of the official Gazette, declare the value of silver on the first day of July each financial year.

324. *Attempt to commit qatl-i-amd*: Whoever does any act with such intention or knowledge, and in such circumstances, that if he by act caused *qatl*, he would be guilty of *qatl-i-amd*, shall be punished

with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, and if hurt is caused to any person by such act, the offender shall in addition to the imprisonment and fine as aforesaid be liable to the punishment provided for the hurt caused.

Provided that, where the punishment for the hurt is *qisas* which is not executable, the offender shall be liable to *arsh* and may also be punished with the imprisonment of either description for a term which may extend to seven years.

325. *Attempt to commit suicide*:—Whoever attempts to commit suicide and does any act towards to the commission of such offence shall be punished with imprisonment for a term which may extend to one year, or with fine, or with both.
326. *Thug*.—Whoever shall have been habitually associated with any other or others for the purpose of committing robbery or child-stealing by means or accompanied with *qatl*, is a *thug*.
327. *Punishment*:—Whoever is a thug, shall be punished with imprisonment for life, and shall also be liable to fine.
328. *Exposure and abandonment of child under twelve by parent person having care of it*:—Whoever, being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with the imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Explanation

This section is not intended to prevent the trial of the offender for *qatl-i-amd* or *qatl-i-shib-i-amd* or *qatl-bis-sabab*, as the case may be, if the child dies in consequence of the exposure.

329. *Concealment of birth by secret disposal of dead body*:—Whoever, by secretly burying or otherwise disposing of the dead body of a child, whether such child dies before or after or during its birth, or intentionally conceals or endeavours to conceal the birth of the

child, shall be punishable with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

330. *Disbursement of diyat*:—The diyat shall be disbursed among the heirs of the victim according to their respective shares in inheritance.

Provided that, where an heir foregoes his share, the, *diyat* shall not be recovered to the extent of his share.

331. *Payment of diyat*:—(1) The *diyat* may be made payable in lump sum or in instalment spread over a period of three years from the date of the final judgment.

(2) Where a convict fails to pay *diyat* or any part thereof within the period specified in subsection (1), the convict may be kept in jail and dealt with in the same manner as if sentenced to simple imprisonment until the *diyat* is paid in full, or may he released on bail if he furnishes security equivalent to the amount of *diyat* to the satisfaction of the Court.

(3) Where a convict dies before the payment of *diyat* or any part thereof, it shall be recovered from his estate.

332. *Hurt*:—(1) Whoever causes pain, harm, disease, infirmity or injury to any person, or impairs, disables or dismembers any organ of the body or part thereof of any person without causing his death, is said to cause hurt.

(2) The following are the kinds of hurt:

- (a) *itlaf-i-udw*;
- (b) *itlaf-i-salahiyyat-i-udw*;
- (c) *shajjah*;
- (d) *jurh*; and
- (e) all kinds of other hurts.

333. *Itlaf-i-udw*:—Whoever dismembers, amputates, or severs any limb or organ of the body of another person is said to cause *itlaf-i-udw*.

334. *Punishment of itlaf-i-udw*:—Whoever, by doing any act with the intention of thereby causing hurt to any person, or with the

knowledge that he is likely thereby to cause hurt to any person, causes *itlaf-i-udw* of any person, shall in consultation with the authorised medical officer be punished with *qisas* and if the *qisas* is not executable keeping in view the principles of equality in accordance with the Injunctions of Islam, the offender shall be liable to *arsh* and may also be punished with imprisonment of either description for a term which may extend to ten years as *tazir*.

335. *Itlaf-salahiyyat-i-udw*:—Whoever destroys or permanently impairs the functioning, power or capacity of an organ of the body of another person, or causes permanent disfigurement, is said to be *itlaf-salahiyyat-i-udw*.

336. *Punishment for itlaf-salahiyyat-i-udw*:—Whoever, by doing any act with the intention of causing hurt to any person, or with the knowledge that he is likely to cause hurt to any person, causes *itlaf-salahiyyat-i-udw* of any person, shall, in consultation with the authorised medical officer, be punished with *qisas* and if the *qisas* is not executable, keeping in view of the principles of equality in accordance with the Injunctions of Islam, the offender shall be liable to *asrh* and may also be punished with imprisonment of either description for a term which may extend to ten years as *tazir*.

337. *Shajjah*:—Whoever causes, on the head or face of any person, any hurt which does not amount to *itlaf-i-udw* is said to cause *shajjah*.

(2) The following are the kinds of *shajjah*, namely:

- (a) *Shajjah-i-khaffah*;
- (b) *Shajjah-i-mudiahah*;
- (c) *Shajjah-i-hashimah*;
- (d) *Shajjah-i-munaqqilah*;
- (e) *Shajjah-i-ammah*; and
- (f) *Shajjah-i-damighah*.

(3) Whoever causes *Shajjah*:

- (i) Without exposing bone of the victim is said to cause *shajjah-i-khaffah*;
- (ii) by exposing any bone of the victim without causing fracture, is said to cause *shajjah-i-mudihah*;

- (iii) by fracturing the bone of the victim, without dislocating it, is said to cause *shajjah-i-hashimah*;
- (iv) by causing fracture of the bone of the victim and thereby the bone is dislocated, is said to cause *shajjah-i-munaqqilah*;
- (v) by causing fracture of the skull of the victim so that the wound touches the membrane of the brain, is said to cause *shajjah-i-ammah*; and
- (vi) by causing fracture of the skull of the victim and the wound ruptures the membrane of the brain, is said to cause *shajjah-i-damighah*.

337-A. *Punishment of shajjah*:—Whoever, by doing any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, causes:

- (i) *shajjah-i-khafifah* to any person shall be liable to *daman* and may also be punished with imprisonment of either description for a term which may extend to two years as *tazir*;
- (ii) *shajjah-i-mudiahah* to any person shall, in consultation with the authorised medical officer, be punished with *qisas*, and if the *qisas* is not executable keeping in view the principles of equality in accordance with the injunctions of Islam, the convict shall be liable to *arsh* which shall be five percent of the *diyat* and may also be punished with imprisonment of either description for a term which may extend to five years as *tazir*;
- (iii) *shajjah-i-hashimah* to any person shall be liable to *arsh* which shall be ten percent of the *diyat* and may also be punished with imprisonment of either description for a term which may extend to ten years as *tazir*;
- (iv) *shajjah-i-munaqqilah* to any person, shall be liable to *arsh* which shall be fifteen percent of the *diyat* and may also be punished with imprisonment of either description for a term which may extend to ten years as *tazir*;
- (v) *shajjah-i-ammah* to any person shall be liable to *arsh* which shall be one-third of the *diyat* and may also be punished with imprisonment of either description for a term which may extend to ten years as *tazir*; and

- (vi) *shajjah-i-damighah* to any person shall be liable to *arsh* which shall be one-half of *diyat* and may also be punished with imprisonment of either description for a term which may extend to fourteen years as *tazir*.
- 337-B. *Jurh*:—(1) whoever causes on any part of the body of a person other than the head or face, a hurt which leaves a mark of wound, whether temporary or permanent, is said to cause *jurh*.
 (2) *Jurh* is of two kinds, namely:
 (a) *jaifah*; and
 (b) *ghayr-jaifah*.
- 337-C. *Jaifah*:—Whoever causes *jurh* in which the injury extends to the body cavity of the trunk, is said to cause *jaifah*.
- 337-D. *Punishment for jaifah*:—Whoever by doing any act with the intention of causing hurt to a person or with the knowledge that he is likely to cause hurt to such person, causes *jaifah* to such person, shall be liable to *arsh* which shall be one-third of the *diyat* and may also be punished with imprisonment of either description for a term which may extend to ten years as *tazir*.
- 337-E. *Ghayr-jaifah*: (1) whoever causes *jurh* which does not amount to *jaifah* is said to cause *ghayr-jaifah*.
 (2) The following are the kinds of *ghayr-jaifah*, namely:
 (a) *damiyah*;
 (b) *badiyah*;
 (c) *mutalahimah*;
 (d) *mudihah*;
 (d) *hashimah*; and
 (e) *munaqqilah*.
 (3) Whoever causes *ghayr-jaifah*:
 (i) in which the skin is ruptured and bleeding occurs is said to cause *damiyah*;
 (ii) by cutting or incising the flesh without exposing the bone is said to cause *badiyah*;
 (iii) by lacerating the flesh is said to cause *mutalahimah*;
 (iv) by exposing the bone is said to cause *mudihah*;

- (v) by causing the fracture of a bone without dislocating it is said to cause *hashimah*; and
 - (vi) by fracturing and dislocating the bone is said to cause *munaqqilah*.
- 337-F. *Punishment of ghayr-jaifah*:—Whoever, by doing any act with the intention of causing hurt to any person, or with the knowledge that he is likely to hurt any person, causes:
- (i) *damiyah* to any person shall be liable to *daman* and may also be punished with the imprisonment of either description for a term which may extend to one year as *tazir*;
 - (ii) *badiah* to any person shall be liable to *daman* and may also be punished with imprisonment of either description for a term which may extend to three years as *tazir*;
 - (iii) *mutalahimah* to any person shall be liable to *daman* and may also be punished with imprisonment of either description for a term which may extend to three years as *tazir*;
 - (iv) *mudihah* to any person shall be liable to *daman* and may also be punished with imprisonment of either description for a term which may extend to five years as *tazir*;
 - (v) *hashimah* to any person shall be liable to *daman* and may also be punished with imprisonment of either description for a term which may extend to five years as *tazir*;
 - (vi) *munaqqilah* to any person shall be liable to *daman* and may also be punished with imprisonment of either description for a term which may extend to seven years as *tazir*.
- 337-G. *Punishment for hurt by rash or negligent driving*:—(1) Whoever causes hurt by rash or negligent driving shall be liable to *arsh* or *daman* specified for the kind of hurt caused, and may also be punished with imprisonment of either description for a term which may extend to five years as *tazir*.
- 337-H. *Punishment for hurt by rash or negligent act*: (1) Whoever causes hurt by rash or negligent act, other than rash or negligent driving, shall be liable to *arsh* or *daman* specified for the kind of hurt caused and may also be punished with imprisonment of either description for a term which may extend to three years as *tazir*.

- (2) Whoever does any act so rashly or negligently as to endanger human life or the personal safety of others shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.
- 337-I. *Punishment for causing hurt by mistake (khata)*:—Whoever causes hurt by mistake (*khata*) shall be liable to *arsh* or *daman* specified for the kind of hurt caused.
- 337-J. *Causing hurt by means of a poison*:—Whoever administers to, or causes to be taken by any person, any poison or any stupefying, intoxicating or unwholesome drug, or such other thing with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence, or knowing it to be likely that he will thereby cause hurt, may, in addition to the punishment or *arsh* or *daman* provided for the kind of hurt caused, be punished having regard to the nature of the hurt caused, with imprisonment of either description for a term which may extend to ten years.
- 337-K. *Causing hurt to extort confession, or to compel restoration of property*: Whoever causes hurt for the purpose of extorting from the sufferer or any person interested in the sufferer any confession or any information which may lead to the detection of any offence or misconduct, or for the purpose of constraining the sufferer, or any person interested in the sufferer, to restore, or to caused the restoration of any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall, in addition to the punishment of *qisas*, *arsh* or *daman*, as the case may be, provided for the kind of hurt caused, be punished, having regard to the nature of hurt caused, with imprisonment of either description for a term which may extend to ten years as *tazir*.
- 337-L. *Punishment for other hurt*:—(1) Whoever causes hurt, not mentioned hereinbefore, which endangers life or which causes the sufferer to remain in severe bodily pain for twenty days or more or renders him unable to follow his ordinary pursuits for twenty days or more, shall be liable to *daman* and also be punished with imprisonment of either description for a term which may extend to seven years.

- (2) Whoever causes hurt not covered by subsection (1) shall be punished with imprisonment of either description for a term which may extend to two years, or with *daman*, or with both.

337-M. *Hurt not liable to qisas*:—Hurt shall not be liable to *qisas* in the following cases:

- (a) When the offender is a minor or insane:

Provided that he shall be liable to *arsh* and also to *tazir*, to be determined by the court, having regard to the age of offender, circumstances of the case and the nature of hurt caused.

- (b) When an offender at the instance of the victim causes hurt to him:

Provided that the offender may be liable to *tazir* provided for the kind of hurt caused by him.

- (c) When the offender has caused *itlaf-i-udw* of a physically imperfect organ of the victim and the convict does not suffer from any similar physical imperfection of such organ:

Provided that the offender shall be liable to *arsh* and may also be liable to *tazir* provided for the kind of hurt caused by him; and

- (d) When the organ of the offender liable to *qisas* is missing,

Provided that the offender shall be liable to *arsh* and may also be liable to *tazir* provided for the kind of hurt caused by him.

Illustration

- (i) A amputates the right ear of Z, half of which was already missing. If A's right ear is perfect, he shall be liable to *arsh* and not *qisas*.
- (ii) If in the above illustration, Z's ear is physically perfect but without power of hearing, A shall be liable to *qisas* because the defect in Z's ear was not physical.
- (iii) If in illustration (i) Z's ear is pierced, A shall be liable to *qisas* because such minor defect is not physical imperfection.

337-N. *Cases in which qisas for hurt shall not be enforced:* (1) The *qisas* for a hurt shall not be enforced in the following cases:

- (a) when the offender dies before execution of *qisas*;
- (b) when the organ of the offender liable to *qisas* is lost before the execution of *qisas*.

Provided that the offender shall be liable to *arsh*, and may also be liable to *tazir* provided for the kind of hurt caused by him;

- (c) when the victim waives the *qisas* or compounds the offence with *badl-i-sulh*; or
- (d) when the right of *qisas* devolves on the person who cannot claim *qisas* against the offender under this Chapter:

Provided that, the offender shall be liable to *arsh*, if there is any *wali* other than the offender and if there is no *wali* other than the offender he shall be liable to *tazir* provided for the kind of hurt caused by him.

- (2) Notwithstanding anything contained in this chapter, in all cases of hurt the court may, having regard to the kind of hurt caused by him, in addition to payment of *arsh*, award *tazir* to an offender who is a previous convict, habitual or hardened, desperate or dangerous criminal.

337-O. *Wali in case of hurt:*—In the case the *wali* shall be—

- (a) the victim

provided that, if the victim is minor or insane, his right of *qisas* shall be exercised by his father or paternal grandfather, how-high-so-ever;

- (b) the heirs of the victim, if the latter dies before the execution of *qisas*; and
- (c) the Government, in absence of the victim or the heirs of the victim.

337-P. *Execution of qisas for hurt:*—(1) *Qisas* shall be executed in public by an authorised medical officer who shall before such execution examine the offender and take due care so as to ensure that the

execution of *qisas* does not cause the death of the offender or exceed the hurt caused by him to the victim.

- (2) The *wali* shall be present at the time of execution and if the *wali* or his representative is not present, after having been informed of the date, time and place by the court, an officer authorised by the court on his behalf shall give permission for the execution of *qisas*.
- (3) If the convict is a woman who is pregnant, the court may, in consultation with an authorised medical officer, postpone the execution of *qisas* up to a period of two years after the birth of the child and during this period she may be released on bail on furnishing of security to the satisfaction of the court or, if she is not so released, shall be dealt with as if sentenced to simple imprisonment.

337-Q. *Arsh for single organs*:—The *arsh* for causing *itlaf* of an organ which is found singly in a human body shall be equivalent to the value of *diyat*.

Explanation: Nose and tongue are included in the organs which are found singly in a human body.

337-R. *Arsh for organs in pairs*:—The *arsh* for causing *itlaf* of organs found in a human body in pairs shall be equivalent to the value of *diyat* and if *itlaf* is caused to one of such organs the amount of *arsh* shall be one-half of the *diyat*.

Provided that, where the victim has only one such organ or his other organ is missing or has already become incapacitated, the *arsh* for causing *itlaf* of the existing or capable organ shall be equal to the value of *diyat*.

Explanation:

Hands, feet, eyes, lips and breasts are included in the organs found in human body in pairs.

337-S. *Arsh for the organs in quadruplicate*:—(1) The *arsh* for causing *itllaf* of organs found in a human body in a set of four shall be equal to:

- (a) one-fourth of the *diyat*, if the *itlaf* is one of such organs;
- (b) one-half of the *diyat*, if the *itlaf* is of two of such organs;

- (c) three-fourths of the *diyat*, if the *itlaf* is of three of such organs; and
- (d) full *diyat*, if the *itlaf* is of all four organs.

Explanation

Eyelids are organs which are found in a human body in a set of four.

- 337-T. *Arsh for fingers*:—(1) The *arsh* for causing *itlaf* of a finger of a hand or foot shall be one-tenth of the *diyat*.
 (2) The *arsh* for causing *itlaf* of a joint of a finger shall be one-thirtieth of the *diyat*.

Provided that, where the *itlaf* is of a joint of a thumb, the *arsh* shall be one-twentieth of the *diyat*.

- 337-U. *Arsh for teeth*:—(1) The *arsh* for causing *itlaf* of a tooth other than a milk tooth shall be one-twentieth of the *diyat*.

Explanation

The impairment of the portion of a tooth outside the gum amounts to causing *itlaf* of a tooth.

- (2) The *arsh* for causing *itlaf* of twenty or more teeth shall be equal to the value of *diyat*.
- (3) Where the *itlaf* is of a milk tooth, the accused shall be liable to *daman* and may also be punished with imprisonment of either description for a term which may extend to one year.

Provided that, where *itlaf* of a milk tooth impedes the growth of a new tooth, the accused shall be liable to *arsh* specified in subsection (1).

- 337-V. *Arsh for hair*:—(1) Whoever uproots
- (a) all the hair of the head, beard, moustaches, eyebrows, eyelashes or any other part of the body shall be liable to *arsh* equal to *diyat* and may also be punished with imprisonment of either description for a term which may extend to three years as *tazir*.
 - (b) One eyebrow shall be liable to *arsh* equal to one-half of the *diyat* and

- (c) One eyelash shall be liable to *arsh* equal to one-fourth of the *diyat*.

337-W. *Merger of arsh*:—(1) Where an accused caused more than one hurt, he shall be liable to *arsh* specified for each hurt, separately:

Provided that, where:

- (a) hurt is caused to an organ, the accused shall be liable to *arsh* for causing hurt to such organ and not to *arsh* for causing hurt to any part of such organ; and
- (b) the wounds join together and form a single wound, the accused shall be liable to *arsh* for one wound.

Illustration

- (i) A amputates Z's fingers of the right hand and then at the same time amputates that hand from the joint of his wrist. There is a separate *arsh* for hand and for fingers. A shall, however, be liable to *arsh* specified for hand only.
 - (ii) A stabs Z twice on his thigh. Both wounds are so close to each other that they form one wound. A shall be liable to *arsh* for one wound only.
- (2) Where, after causing hurt to a person, the offender causes death of such person by committing *qatl* liable to *diyat*, *arsh* shall merge into such *diyat*.

Provided that, the death is caused before the healing of the wound caused by such hurt.

337-X. *Payment of arsh*:—(1) The *arsh* may be made payable in a lump sum or in instalment spread over a period of three years from the date of final judgment.

- (2) Where a convict fails to pay *arsh* or any part thereof within the period specified in subsection (1), the convict may be kept in jail and dealt with in the same manner as if sentenced to simple imprisonment until *arsh* is paid in full, or may be released on bail if he furnishes security equal to the amount of *arsh* to the satisfaction of the court.
- (3) Where a convict dies before the payment of *arsh* or any part thereof, it shall be recovered from his estate.

- 337-Y. *Value of daman*:—(1) The value of *daman* may determined by the court keeping in view:
- (a) the expenses incurred in the treatment of victim;
 - (b) loss or disability caused in the functioning or power of any organ; and
 - (c) compensation for the anguish suffered by the victim.
- (2) In case of non-payment of *daman*, it shall be recovered from the convict and until *daman* is paid in full to the context of his liability, the convict may be kept in jail and dealt with in the same manner as if sentenced to simple imprisonment or may be released on bail if he furnishes security equal to the amount of *daman* to the satisfaction of the court.

338. *Isqat-i-Haml*: Whoever causes a woman with child whose organs have not been formed to miscarry, if such miscarriage is not caused in good faith for the purpose of saving the life of the woman, or providing necessary treatment to her, is said to cause *isqat-i-haml*.

Explanation

A woman who causes herself to miscarry is within the meaning of this section.

- 338-A. *Punishment for isqat-i-haml*:—Whoever causes *isqat-i-haml* shall be liable to punishment as *tazir*:
- (a) with imprisonment of either description for a term which may extend to three years, if *isqat-i-haml* is caused with the consent of the woman; or
 - (b) with imprisonment of either description for a term which may extend to ten years, if *isqat-i-haml* is caused without the consent of the woman:

Provided that, if as a result of *isqat-i-haml* any hurt is caused to the woman or she dies, the convict shall also be liable to the punishment provided for such hurt or death, as the case may be.

- 338-B. *Isqat-i-Janin*:—Whoever causes a woman with child, some of whose limbs or organs have been formed, to miscarry, if such miscarriage is not caused in good faith for the purpose of saving the life of the woman, is said to cause *isqat-i-janin*.

Explanation

A woman who causes herself to miscarry is within the meaning of this section.

338-C. *Punishment for isqat-i-janin*:—Whoever causes *isqat-i-janin* shall be liable to:

- (a) one-twentieth of the *diyat* if the child is born dead;
- (b) full *diyat* if the child is born alive but dies as a result of any act of the offender; and
- (c) imprisonment of either description for a term which may extend to seven years as *tazir*.

Provided that, if there is more than one child in the womb of the woman, the offender shall be liable to separate *diyat* or *tazir* as the case may be for every such child.

338-D. *Confirmation of sentence of death by way of qisas or tazir, etc.* A sentence of death awarded by way of *qisas* or *tazir*, or a sentence of *qisas* awarded for causing hurt, shall not be executed unless it is confirmed by the High Court.

338-E. *Waiver or compounding of offences*: (1) Subject to the provisions of this Chapter and section 345 of the Code of Criminal Procedure, 1898 (Act V of 1898), all offences under this Chapter may be waived or compounded and the provisions of sections 309 and 310 shall, *mutatis mutandis*, apply to the waiver or compounding of such offence.

Provided that, where an offence has been waived or compounded, the Court may, in its discretion, having regard to the facts and circumstances, acquit or award *tazir* to the offender according to the nature of the offence.

- (2) All questions relating to waiver or compounding of an offence or awarding of punishment under section 310, whether before or after the passing of any sentence, shall be determined by trial court:

Provided that, where the sentence of *qisas* or any other sentence is waived or compounded during the pendency of an appeal, such questions may be determined by the Appellate Court.

- 338-F. *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.
- 338-G. *Rules*:—The Government may, in consultation with the Council of Islamic Ideology, by notification in the official Gazette, make such rules as it may consider necessary for carrying out the purposes of this Chapter.
- 338-H. *Saving*:—(1) Nothing in this Chapter, except sections 309, 310 and 338E, shall apply to cases pending before any Court immediately before the commencement of the Criminal Law (Second Amendment) Ordinance, 1990 (V11 of 1990), or to the offences committed before such 'commencement' [.]

APPENDIX E

TABLES OF THE TEN DISTRICT'S POLICE RECORDS

Table E.1 District Multan Police Records¹

YEAR	FIRS ²	NO. OF DECEASED ³	NO. OF ACCUSED ⁴	CASES CANCELLED & UN-TRACED	CHALLENGED (SENT-UP FOR TRIALS) ⁵	CASES DECIDED BY THE COURTS ⁶	CONVICTION
1981	142	158	319	5	130	130	56
1982	165	202	379	5	151	151	72
1983	141	150	280	3	128	128	55
1984	132	139	274	6	148	148	68
1985	74	75	172	3	104	104	38
1986	100	111	221	5	91	91	32
1987	96	102	211	11	76	76	20
1988	105	115	204	11	90	90	30
1989	119	131	276	12	95	95	25
1990	82	89	187	13	55	55	22
<i>Sum</i>	<i>1156</i>	<i>1272</i>	<i>2523</i>	<i>74</i>	<i>1068</i>	<i>1068</i>	<i>418 (39%)</i>
1991	97	105	226	15	90	90	33
1992	84	99	156	10	93	93	38
1993	113	122	238	8	93	93	38
1994	116	125	229	12	90	72	21
1995	141	148	284	24	110	53	15
1996	127	159	258	20	114	104	31
1997	135	155	295	14	111	71	32

Table E.1 (cont.)

YEAR	FIRS	NO. OF DECEASED	NO. OF ACCUSED	CASES CANCELLED & UN-TRACED	CHALLANED (SENT-UP FOR TRIALS)	CASES DECIDED BY THE COURTS	CONVICTION
1998	146	166	342	10	114	97	44
1999	142	171	332	18	116	99	39
2000	122	133	264	21	114	114	26
Sum	1223	1383	2624	152	1045	886	317 (36%)

¹ Data derived from the records of Superintendent of Police Office, Multan.

² First Information Reports of murder cases written under section 154 of the Criminal Procedure Code.

³ The persons murdered and reported in the FIRs.

⁴ Numbers of the accused mentioned in the FIRs.

⁵ Numbers of cases that were sent for trial. The rest of the cases are still pending investigation.

⁶ The cases that have been decided by the trial courts. The numbers of the pending trials have been subtracted from the *challans* submitted by police to the trial courts.

Table E.2 District Khanewal Police Records

YEAR	FIRS ⁷	NO. OF DECEASED ⁸	NO. OF ACCUSED ⁹	CASES CANCELLED & UN-TRACED	CHALLANED (SENT-UP FOR TRIALS) ¹⁰	CASES DECIDED BY THE COURTS ¹¹	CONVICTION
1985 ¹²	24	24	26	0	24	24	4
1986	53	55	117	0	53	53	19
1987	64	64	154	5	59	59	16
1988	70	78	184	0	70	70	21
1989	80	98	225	1	76	76	16
1990	79	79	188	1	78	78	14
Sum	370	398	894	7	360	360	90 (25%)
1991	81	84	189	2	79	79	16
1992	80	90	221	6	74	74	20
1993	74	77	176	3	71	71	18
1994	84	86	197	10	74	71	16
1995	110	114	197	11	99	97	32
1996	116	130	256	6	110	107	38
1997	104	117	235	6	98	93	29
1998	99	113	222	8	91	84	20
1999	94	134	247	10	84	72	21
2000	99	119	208	8	91	56	22
Sum	941	1064	2148	70	871	804	232 (29%)

⁷ First Information Reports of murder cases written under section 154 of the *Criminal Procedure Code*.

⁸ The people murdered and reported in the FIRs.

⁹ Numbers of the accused mentioned in the FIRs.

¹⁰ Numbers of cases that were sent for trial. The rest of the cases are still pending investigation.

¹¹ The cases that have been decided by the trial courts. The numbers of pending trials have been subtracted from the *challans* submitted by police to the trial courts.

¹² The district was established in 1985. Prior to this the district was part of the Multan district.

Table E.3 District Vehari Police Records
Data Derived from the Police Records of the District

YEAR	REPORTED	NO. OF DECEASED	NO. ACCUSED	CASES CANCELLED & UN-TRACED	CHALLANED (SENT-UP FOR TRIAL)	CASES DECIDED BY THE COURTS	CONVICTION
1981	47	47	97	2	45	45	15
1982	43	45	141	2	41	41	13
1983	51	51	154	6	45	45	20
1984	50	52	163	4	46	46	20
1985	65	71	191	5	60	60	15
1986	74	88	239	5	69	69	21
1987	90	98	269	8	82	82	29
1988	83	87	244	10	73	72	21
1989	100	103	271	5	85	84	19
1990	101	106	285	14	87	87	24
Sum	704	748	2054	61	633	631	197 (31%)
1991	96	104	242	12	84	83	25
1992	83	93	239	13	70	70	26
1993	104	111	295	7	97	97	38
1994	108	113	187	11	97	94	41
1995	127	153	345	16	111	104	42
1996	115	137	271	18	97	87	34
1997	115	130	319	17	98	73	29
1998	115	121	269	18	97	58	23
1999	93	96	217	10	83	42	18
2000	86	90	235	12	74	27	9
Sum	1042	1148	2619	134	908	735	285 (39%)

Table E.4 District Sahiwal Police Records

YEAR	REPORTED	NO. OF DECEASED	NO. ACCUSED	CANCELLED & UN-TRACED	CHALLANED (SENT-UP FOR TRIAL)	CASES DECIDED BY THE COURTS	CONVICTION
1981	186	191	289	13	173	173	65
1982	101	110	181	9	84	84	26
1983	93	101	181	9	84	84	26
1984	98	100	140	4	94	94	28
1985	118	126	172	8	110	110	18
1986	120	126	186	9	111	111	38
1987	140	144	282	7	133	133	39
1988	136	142	284	13	123	123	33
1989	179	198	396	13	166	166	54
1990	146	175	377	9	137	137	45
Sum	1317	1413	2488	94 (7%)	1215	1215	372 (31%)
1991	129	145	254	7	122	122	39
1992	120	134	306	5	115	115	33
1993	130	157	261	12	118	118	41
1994	163	169	316	21	142	141	51
1995	122	139	245	18	104	102	19
1996	107	122	170	12	95	91	29
1997	117	124	196	19	98	92	26
1998	135	152	208	19	116	94	20
1999	84	135	323	14	70	46	10
2000	142	157	339	15	124	35	8
Sum	1249	1434	2618	142 (11%)	1104	956	276 (29%)

Table E.5 District Pakpattan Police Records

YEAR	FIRS	NO. OF DECEASED	NO. ACCUSED	CANCELLED & UN-TRACED	CHALLANED	CASES DECIDED BY THE COURTS	CONVICTION
1990 ¹³	36	36	74	1	19	19	16
Sum	36	36	74	1	19	19	16 (84%)
1991	24	25	58	0	24	24	15
1992	41	83	58	5	36	36	21
1993	42	45	72	1	41	41	18
1994	92	97	107	18	74	74	31
1995	86	90	150	9	77	75	35
1996	90	98	98	7	83	81	46
1997	85	90	209	11	74	71	31
1998	103	106	175	11	92	86	28
1999	93	95	206	11	82	74	20
2000	88	99	204	7	81	70	12
Sum	744	828	1337	81	664	670	257 (38%)

¹³ The district was established in 1990. Prior to this the district was part of the Sahiwal district; data is collected by researcher.

Table E.6 District Lodhran Police Records

YEAR	FIRS	NO. OF DECEASED	NO. ACCUSED	CANCELLED & UN-TRACED	CHALLANED (SENT-UP FOR TRIAL)	CASES DECIDED BY THE COURTS	CONVICTION
1991 ¹⁴	37	37	48	8	19	19	16
1992	51	52	69	13	38	37	25
1993	55	55	76	11	44	44	27
1994	57	59	68	9	48	47	33
1995	47	48	58	8	39	39	27
1996	57	57	72	13	54	53	25
1997	63	65	81	9	54	53	25
1998	54	56	69	7	47	40	18
1999	72	84	98	11	61	56	20
2000	51	59	63	9	41	27	14
<i>Sum</i>	<i>544</i>	<i>572</i>	<i>702</i>	<i>98</i>	<i>445</i>	<i>415</i>	<i>230 (55%)</i>

¹⁴ The district was established in 1991. Prior to this the district was part of the Multan district; data is collected by researcher.

Table E.7 District DG Khan Police Records

YEAR	NO. OF FIRS	NO. OF DECEASED	NO. OF ACCUSED	CANCELLED & UN-TRACED	CHALLANNED (SENT-UP FOR TRIAL)	CASES DECIDED BY THE COURTS	CONVICTION
1981	46	46	64	0	46	46	12
1982	36	36	58	2	34	34	11
1983	31	32	47	4	27	27	12
1984	41	43	58	0	41	41	18
1985	48	50	65	1	47	47	19
1986	47	49	61	0	47	47	17
1987	43	46	78	2	41	41	18
1988	43	43	67	2	41	41	20
1989	76	76	104	3	73	73	28
1990	50	51	74	2	49	49	20
Sum	461	472	676	16	446	446	175 (39%)
1991	57	59	72	3	54	44	24
1992	56	57	69	2	54	41	16
1993	47	50	58	2	45	34	14
1994	54	57	67	2	52	43	19
1995	63	64	78	5	58	45	21
1996	56	54	66	2	52	36	11
1997	52	53	64	3	49	23	8
1998	61	62	73	9	52	24	10
1999	66	70	84	2	64	26	11
2000	59	60	69	3	56	46	19
Sum	571	586	700	33	536	362	153 (42%)

Table E.8 District Rajanpur Police Records

YEAR	FIRS	NO. OF DECEASED	NO. ACCUSED	CANCELLED & UN-TRACED	CHALLANED (CASES SENT-UP FOR TRIAL)	CASES DECIDED BY THE COURTS	CONVICTION
1982 ¹⁵	76	81	181	1	75	75	33
1983	73	78	137	1	72	72	21
1984	76	79	101	0	76	76	26
1985	76	79	112	0	76	76	31
1986	67	71	113	1	66	66	13
1987	82	91	99	3	79	79	20
1988	75	79	111	1	74	74	20
1989	88	92	117	2	86	86	26
1990	91	95	121	2	89	89	32
Sum	704	745	1092	11 (2%)	693	693	222 (32%)
1991	77	104	142	2	75	75	12
1992	87	96	159	11	76	76	22
1993	89	99	146	6	83	83	34
1994	99	107	116	11	83	83	10
1995	113	120	95	10	103	103	15
1996	98	103	152	3	95	95	16
1997	111	113	175	2	103	92	11
1998	87	94	143	5	82	67	13
1999	102	198	122	5	97	71	8
2000	109	115	197	9	87	71	34
Sum	972	1149	1447	64 (7%)	884	816	175 (21%)

¹⁵ The district was established in 1982. Prior to this the district was part of the DG Khan district; data is collected by researcher.

Table E.9 District Layyah Police Records

YEAR	NO. OF FIRS	NO. OF DECEASED	NO. ACCUSED	CASED CANCELLED & UN-TRACED	CHALLAN (SENT-UP FOR TRIAL)	CASES DECIDED BY THE COURTS	CONVICTION
1982 ¹⁶	34	36	39	1	33	33	9
1983	19	20	22	1	18	18	6
1984	22	24	25	2	20	20	6
1985	18	21	21	0	18	18	6
1986	33	36	36	1	32	32	14
1987	22	23	26	1	21	21	6
1988	22	24	25	0	22	22	7
1989	37	40	38	3	34	34	8
1990	28	32	29	4	24	24	8
Sum	235	256	261	13 (6%)	222	222	70 (32%)
1991	31	32	40	4	27	27	10
1992	36	34	46	2	34	34	25
1993	35	38	41	9	26	26	18
1994	40	49	53	3	37	37	10
1995	31	32	65	1	30	30	9
1996	40	42	93	1	39	38	26
1997	42	46	58	6	36	35	8
1998	46	53	97	10	36	32	21
1999	38	37	72	2	34	28	8
2000	36	44	91	6	30	23	7
Sum	375	407	656	44 (12%)	329	310	142 (46%)

¹⁶ The district was established in 1982. Prior to this the district was the part of the Muzaffargh district; data is collected by researcher.

Table E.10 District Muzaffargah Police Records

YEAR	NO. OF FIRS	NO. OF DECEASED	NO. OF THE ACCUSED	CANCELLED & UN-TRACED	CHALLENGED (SENT-UP FOR TRIAL)	CASES DECIDED BY THE COURTS	CONVICTION
1981	62	65	168	0	62	62	28
1982	52	70	165	0	52	52	19
1983	38	38	127	4	34	34	11
1984	39	41	98	4	35	35	13
1985	40	42	129	6	34	34	15
1986	51	58	122	6	45	45	18
1987	64	76	130	4	72	72	29
1988	53	53	115	6	47	47	18
1989	58	70	115	5	53	53	22
1990	59	60	129	8	51	51	23
Sum	516	573	1298	43 (8%)	485	485	196 (40%)
1991	58	61	166	7	51	51	19
1992	77	84	180	8	69	69	18
1993	62	89	162	8	54	52	17
1994	73	84	170	10	63	61	11
1995	64	68	162	10	54	51	19
1996	76	79	146	9	67	61	14
1997	100	109	245	10	90	82	27
1998	96	105	207	17	79	68	24
1999	82	100	201	9	73	49	18
2000	82	87	205	10	71	27	7
Sum	770	866	1844	98 (13%)	671	571	174 (30%)

APPENDIX F

TABLES OF THE TEN DISTRICT'S SESSION COURTS RECORDS

Table F.1 Sessions Courts Multan¹

YEARS	DECISIONS	ACCUSED	ACCUSED AWARDED DEATH SENTENCES	ACCUSED AWARDED LIFE SENTENCES	TOTAL CONVICTIONS	TOTAL ACCUSED ACQUITTED ON COMPROMISES	ACCUSED ON MERIT	ACQUITTALS	TOTAL ACQUITTALS
1981	151	310	33	45	78	0	232	232	232
1982	104	299	45	23	68	0	231	231	231
1983	152	281	43	18	61	0	220	220	220
1984	124	224	24	31	55	0	169	169	169
1985	152	339	27	31	58	0	281	281	281
1986	88	250	27	24	51	0	199	199	199
1987	70	181	12	20	32	0	149	149	149
1988	64	174	11	19	30	0	144	144	144
1989	77	200	27	16	43	0	157	157	157
1990	57	152	12	18	30	0	122	122	122
<i>Sum</i>	<i>1039</i>	<i>2410</i>	<i>261</i>	<i>245</i>	<i>506</i>	<i>0</i>	<i>1904</i>	<i>1904</i>	<i>1904</i>
1991	108	314	22	28	50	39	225	225	264
1992	82	180	15	9	24	38	118	118	156
1993	68	191	9	7	16	36	139	139	175
1994	73	181	11	12	23	34	124	124	158

¹ Data derived from the Sessions Courts Records and District Attorneys' Offices.

Table F.1 (cont.)

YEARS	DECISIONS	ACCUSED	ACCUSED AWARDED DEATH SENTENCES	ACCUSED AWARDED LIFE SENTENCES	TOTAL CONVICTIONS	TOTAL ACCUSED ACQUITTED ON COMPROMISES	ON MERIT ACQUITALS	TOTAL ACQUITALS
1995	55	129	5	9	14	27	88	115
1996	115	286	16	21	37	47	202	249
1997	61	146	14	12	26	27	93	120
1998	120	283	31	37	68	32	183	215
1999	85	185	13	24	37	39	109	148
2000	62	153	10	16	26	49	78	127
<i>Sum</i>	829	2048	146	175	321	368	1359	1727

Table F.2 Sessions Courts Khanewal
 Data Derived From the Sessions Courts Records and District Attorneys Offices

YEARS	DECISIONS	ACCUSED	ACCUSED AWARDED DEATH SENTENCES	ACCUSED AWARDED LIFE SENTENCES	TOTAL CONVICTIONS	TOTAL ACCUSED ACQUITTED ON COMPROMISES	ACQUITTALS ON MERIT	TOTAL ACQUITTALS
1985	14	32	1	2	3	0	29	29
1986	59	131	18	6	24	0	107	107
1987	67	149	24	7	31	0	118	118
1988	42	71	16	7	23	0	48	48
1989	65	191	19	33	52	0	139	139
1990	69	127	7	12	19	0	108	108
Sum	316	701	85	67	152	0	549	549
1991	70	157	15	7	22	43	92	135
1992	69	161	9	31	40	25	96	121
1993	55	112	8	17	25	41	46	87
1994	51	109	4	1	5	31	73	104
1995	72	163	6	8	14	44	105	149
1996	69	105	7	8	15	60	30	90
1997	54	122	7	10	17	68	37	105
1998	43	191	3	17	20	115	56	171
1999	37	108	4	8	12	58	38	96
2000	63	283	33	31	64	104	115	219
Sum	583	1511	96	138	234	589	688	1277

Table F.3 Sessions Courts Vehari
Data Derived From the Sessions Courts Records and District Attorneys Offices

YEARS	DECISIONS	ACCUSED	ACCUSED AWARDED DEATH SENTENCES	ACCUSED AWARDED LIFE SENTENCES	TOTAL CONVICTIONS	TOTAL ACCUSED ACQUITTED ON COMPROMISES	ACQUITTALS ON MERIT	TOTAL ACQUITTALS
1981	35	59	5	11	16	0	43	43
1982	48	52	4	15	19	0	33	33
1983	59	130	14	29	43	0	87	87
1984	48	137	16	21	37	0	100	100
1985	27	110	4	15	14	0	96	96
1986	43	71	4	18	22	0	49	49
1987	65	157	12	21	33	0	24	24
1988	57	152	13	9	22	0	130	130
1989	48	145	15	8	23	0	122	122
1990	57	129	5	5	10	0	119	119
Sum	487	1042	92	152	239	0	803	803
1991	97	271	13	38	51	24	196	220
1992	77	287	0	17	17	26	244	270
1993	74	220	8	23	31	31	158	189
1994	81	158	8	20	28	27	103	130
1995	78	252	9	14	23	37	192	229
1996	64	256	6	15	21	25	210	235
1997	61	299	3	15	18	22	259	281
1998	68	260	5	15	20	35	205	240
1999	68	219	7	4	11	27	181	208
2000	100	231	26	7	33	37	161	198
Sum	768	2453	85	168	253	291	1909	2200

Table F.4 Sessions Courts Sahiwal
Data Derived From the Sessions Courts Records and District Attorneys Offices

YEARS	DECISIONS	ACCUSED	ACCUSED AWARDED DEATH SENTENCES	ACCUSED AWARDED LIFE SENTENCES	TOTAL CONVICTIONS	TOTAL ACCUSED ACQUITTED ON COMPROMISES	ACQUITTALS ON MERIT	TOTAL ACQUITTALS
1981	186	289	25	141	166	0	123	123
1982	101	179	30	55	85	0	94	94
1983	93	181	22	38	60	0	121	121
1984	98	140	14	41	55	0	85	85
1985	110	172	11	37	48	0	124	124
1986	120	186	15	31	46	0	140	140
1987	140	282	10	33	43	0	239	239
1988	136	284	14	26	40	0	244	244
1989	179	396	13	27	40	0	356	356
1990	146	377	13	11	24	0	353	353
Sum	1309	2486	167	440	607	0	1879	1879
1991	129	254	27	91	118	0	136	136
1992	120	306	8	3	11	100	195	295
1993	130	261	6	32	38	60	163	223
1994	163	316	16	47	63	73	180	253
1995	122	245	27	33	60	93	92	185
1996	107	170	17	28	45	31	94	125
1997	117	196	15	23	38	43	115	158
1998	135	208	15	26	41	112	55	167
1999	84	223	21	24	45	79	99	178
2000	142	339	21	24	45	85	209	294
Sum	1249	2518	173	331	504	676	1338	2014

Table F.5 Sessions Courts Pakpattan
Data Derived From the Sessions Courts Records and District Attorneys Offices

YEARS	DECISIONS	ACCUSED	ACCUSED AWARDED DEATH SENTENCES	ACCUSED AWARDED LIFE SENTENCES	TOTAL CONVICTIONS	TOTAL ACCUSED ACQUITTED ON COMPROMISES	ACQUITTALS ON MERIT	TOTAL ACQUITTALS
1990	16	50	1	6	7	0	43	43
<i>Sum</i>	<i>16</i>	<i>50</i>	<i>1</i>	<i>6</i>	<i>7</i>	<i>0</i>	<i>43</i>	<i>43</i>
1991	40	118	16	12	28	37	53	90
1992	44	104	17	10	27	13	64	77
1993	28	81	7	8	15	19	47	66
1994	31	78	5	5	10	34	34	68
1995	32	95	5	3	8	69	18	87
1996	43	81	7	3	10	67	4	71
1997	81	168	13	15	28	82	58	140
1998	62	143	19	16	35	57	51	108
1999	49	130	4	8	12	102	16	118
2000	98	259	14	20	34	135	90	225
<i>Sum</i>	<i>540</i>	<i>1357</i>	<i>109</i>	<i>112</i>	<i>221</i>	<i>615</i>	<i>521</i>	<i>1136</i>

Table F.6 Sessions Courts Lodhran

YEARS	DECISIONS	ACCUSED	ACCUSED AWARDED DEATH SENTENCES	ACCUSED AWARDED LIFE SENTENCES	TOTAL CONVICTIONS	TOTAL ACCUSED ACQUITTED ON COMPROMISES	ACQUITTALS ON MERIT	TOTAL ACQUITTALS
1991	16	42	2	3	5	17	20	37
1992	94	98	11	18	29	15	54	69
1993	26	71	10	7	17	17	37	54
1994	39	122	9	28	37	32	53	85
1995	53	169	7	31	38	48	83	131
1996	27	75	10	18	28	6	41	47
1997	67	152	11	26	37	9	106	115
1998	42	102	8	10	18	35	49	84
1999	43	122	6	19	25	23	74	97
2000	52	108	12	24	36	9	63	72
Sum	459	1061	86	184	270	211	580	791

Table F.7 Sessions Courts DG Khan

YEARS	DECISIONS ACCUSED	ACCUSED AWARDED DEATH SENTENCES	ACCUSED AWARDED LIFE SENTENCES	TOTAL CONVICTIONS	TOTAL ACCUSED ACQUITTED ON COMPROMISES	ACQUITTALS ON MERIT	TOTAL ACQUITTALS
1981	92	22	17	39	0	237	237
1982	65	45	23	68	0	159	159
1983	82	43	18	61	0	268	268
1984	60	14	31	45	0	135	135
1985	23	27	31	58	0	25	25
1986	7	1	1	2	0	12	12
1987	27	10	20	30	0	32	32
1988	22	11	19	30	0	43	43
1989	28	9	16	25	0	39	39
1990	27	9	3	12	0	60	60
Sum	446	191	179	370	0	1010	1010
1991	72	22	23	45	18	251	269
1992	95	15	28	43	23	114	137
1993	42	9	9	18	17	108	125
1994	10	7	11	18	6	7	13
1995	22	5	12	17	21	32	53
1996	29	89	9	25	23	41	64
1997	20	65	21	35	14	16	30
1998	94	283	12	43	13	227	240
1999	38	133	37	50	13	70	83
2000	24	93	24	34	25	34	59
Sum	446	142	186	328	173	900	1073

Table F.8 Sessions Courts Rajanpur

YEARS	DECISIONS	ACCUSED	ACCUSED AWARDED DEATH SENTENCES	ACCUSED AWARDED LIFE SENTENCES	TOTAL CONVICTIONS	TOTAL ACCUSED ACQUITTED ON COMPROMISES	ACQUITTALS ON MERIT	TOTAL ACQUITTALS
1982	76	181	7	10	17	0	164	164
1983	73	137	8	11	19	0	118	118
1984	76	101	11	10	21	0	80	80
1985	76	112	12	15	27	0	85	85
1986	67	113	8	5	13	0	100	100
1987	82	99	2	3	5	0	94	94
1988	75	111	4	3	7	0	104	104
1989	88	117	2	4	6	0	111	111
1990	91	121	10	7	17	0	104	104
Sum	704	1092	64	68	132	0	960	960
1991	77	142	7	5	12	0	130	130
1992	87	159	7	15	22	58	79	137
1993	89	146	16	18	34	43	69	112
1994	99	116	9	6	15	35	66	101
1995	113	95	8	7	15	17	63	80
1996	98	152	6	10	16	79	57	136
1997	111	175	5	6	11	107	57	164
1998	87	145	5	8	13	77	55	132
1999	102	122	4	4	8	34	80	114
2000	109	197	19	15	34	88	75	163
Sum	972	1449	86	94	180	538	731	1269

Table F.9 District Layah

YEARS	DECISIONS	ACCUSED	ACCUSED AWARDED DEATH SENTENCES	ACCUSED AWARDED LIFE SENTENCES	TOTAL CONVICTIONS	TOTAL ACCUSED ACQUITTED ON COMPROMISES	ACQUITTED ON MERIT	TOTAL ACQUITALS
1982	33	7	3	0	3	0	4	4
1983	18	70	4	7	11	0	59	59
1984	20	83	3	6	9	0	74	74
1985	18	43	3	4	7	0	36	36
1986	32	56	0	7	7	0	49	49
1987	21	93	2	8	10	0	83	83
1988	22	16	0	1	1	0	15	15
1989	34	53	2	0	2	0	51	51
1990	24	84	4	6	10	0	74	74
Sum	222	505	21	39	60	0	445	445
1991	27	103	4	15	19	0	84	84
1992	34	84	4	4	8	0	76	76
1993	26	109	3	5	8	41	60	101
1994	37	97	0	4	4	34	59	93
1995	30	67	3	3	6	0	61	61
1996	39	48	3	4	7	8	33	41
1997	36	59	6	1	7	10	42	52
1998	36	128	0	5	5	23	100	123
1999	34	73	5	4	9	23	41	64
2000	30	126	5	10	15	20	91	111
Sum	329	894	33	55	88	159	647	806

Table F.10 Sessions Courts District Muzaffargarh

YEARS	DECISIONS	ACCUSED	ACCUSED AWARDED DEATH SENTENCES	ACCUSED AWARDED LIFE SENTENCES	TOTAL CONVICTIONS	TOTAL ACCUSED ACQUITTED ON COMPROMISES	ACQUITTALS ON MERIT	TOTAL ACQUITTALS
1981	46	116	3	7	10	0	106	106
1982	25	96	2	6	8	0	88	88
1983	18	64	1	5	6	0	58	58
1984	19	48	11	28	39	0	9	9
1985	77	200	4	19	23	0	177	177
1986	31	107	3	25	28	0	79	79
1987	44	128	8	19	27	0	101	101
1988	52	161	2	8	10	0	151	151
1989	28	73	27	21	48	0	25	25
1990	60	156	10	25	35	0	121	121
Sum	400	1149	71	163	234	0	915	915
1991	36	114	24	18	42	15	57	72
1992	53	130	10	11	21	24	85	109
1993	40	100	4	9	13	7	80	87
1994	38	104	10	5	15	7	82	89
1995	58	131	8	28	36	2	93	95
1996	47	135	6	11	17	1	117	118
1997	41	117	5	5	10	8	99	107
1998	38	72	7	10	17	4	51	55
1999	52	101	9	14	23	14	64	78
2000	76	225	15	17	32	33	160	193
Sum	479	1229	98	128	226	115	888	1003

APPENDIX G

HOMICIDE RATE OF PAKISTAN

Table G.1 Homicide Rate in Pakistan¹

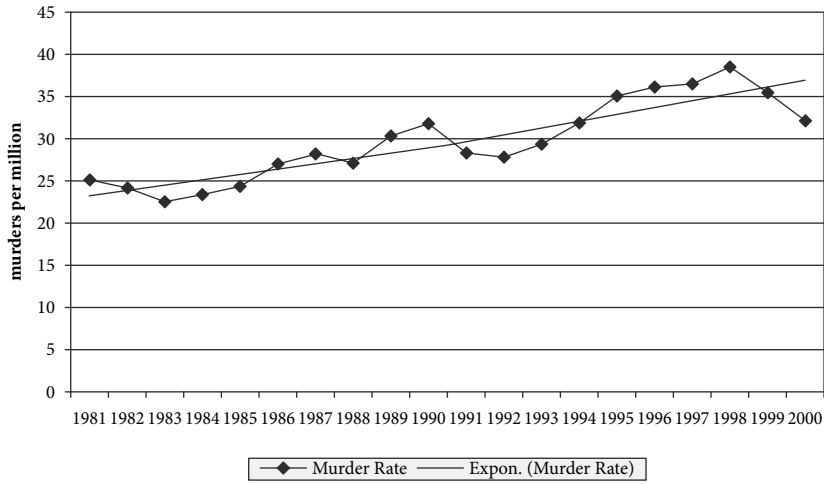
YEAR	TOTAL NUMBERS OF CULPABLE HOMICIDE AND MURDER IN PAKISTAN ²	RATE OF CULPABLE HOMICIDE AND MURDER PER 100,000 POPULATION
1981	2149	25
1982	2133	24
1983	2050	23
1984	2189	23
1985	2353	24
1986	2686	27
1987	2896	28
1988	2868	27
1989	3310	30
1990	3581	32
1991	3283	28
1992	3324	28
1993	3624	30
1994	4050	32
1995	4570	35
1996	4846	36
1997	4703	37
1998	5050	39
1999	4797	36
2000	4566	32

Table G.2 Average Homicide Rate per 100,000 Population
in Two Decades

YEARS	MURDER PER 100,000 POPULATION IN PAKISTAN
1981–1990	50
1991–2000	61

¹ Figures of homicide published every year by the Interior ministry of Pakistan.

² Developed by the researcher.



Graph 6.13 Homicide Rates in Pakistan since 1981

APPENDIX H

QUESTIONNAIRE

1. City _____ Please circle the correct answer:
2. Name (Optional) _____ Male Female
3. Year practice started _____
4. Field of practice: Criminal Civil Both
5. Approximate number of murder cases conducted:
6. Murder was made a compoundable offence in the year 1990. Since then, accused parties resort to all means to affect the compromise with the legal heirs of the murdered. Do you agree with this statement? Yes No
7. In murder cases, what are the main reasons of compromise in our society?
(A) Social pressure (B) Terror/Influence of the accused party
(C) Financial constraints (D) All of the above (E) Other _____
8. In case of compromise, the heirs/relatives of the murdered forgive the accused:
(A) Forever (B) For the time being (C) Retaliate later
9. Has the provision of compromise diminished the fear of the offence of murder? Yes No
10. The offence of murder affects:
(A) The heirs/relatives of victim (B) Society (C) Both
11. The existence of Islamic values is a prerequisite for the application of Islamic penal law in a society. Do you agree with this statement?
Yes No
12. Can our society be termed an Islamic Society? Yes No
13. Has any witness been subjected to *Tazkiya al-Shahud* in any case conducted by you? Yes No If yes, please cite the case/s _____

14. Has any accused of *qatal-i-amd* been punished and executed under *qisas* in cases conducted by you? Yes No If yes, please cite the case/s _____
15. Does the present law of murder take into consideration our ethos? Yes No
16. Are accused and victims getting justice under the present scheme of the law of murder? Yes No
17. If you hold an independent opinion about the present law of murder, please explain it on the back of this sheet, or email it to researchlawpk@yahoo.co.uk.

APPENDIX I

LIST OF CASES

- Abdul Ghafoor v. The State*, 1992 SCMR 1218
Abdul Ghafoor v. The State, 2000 PCrLJ 1841
Abdul Jabbar v. The State, PLD 1991 SC 172
Abdul Majid v. The State, 1992 ALD 258
Abdul Malik v. The State, PLD 1996 FSC 1
Abdul Razzaq v. The State, 1996 PCrLJ 1237
Abdul Salam v. The State, 1997 SCMR 29
Abdul Wahad v. The State, 1991 MLD 1875
Abdul Zahir v. The State, 2000 SCMR 406
Abdus Salam v. The State, 2000 SCMR 338
Abid Hussain v. The Chairman, Pak Bait -ul-Mal, PLD 2002 Lahore 482
Addul Waheed v. The State, 1992 PCrLJ 1596
Aftab Ahmed Sherpao v. The Governor of NWFP, PLD 1990 Peshawar 192
Ahmad Tariq Rahim v. Federation of Pakistan, PLD 1990 Lahore 505
Akbar Khan v. The State, 2002 SCMR 1676
Ali Ahmad v. The State, 1992 ALD 349(1)
Allah Ditta v. The State, PLD 2002 Lah 406
Almar Shah v. The State, 1999 SCMR 2047
Amir Nazar Khan v. Government of Pakistan, PLD SC 1989 633
Amraish v. Government of Pakistan, PLD SC 1989 633
Asghar Ali v. The State, 2003 YLR 1156
Azmat Ullah Khan v. The State, 1993 PCrLJ 1220
Bashir Ahmad v. The State, 2004 SCMR 236
Begum Nusrat Bhutto v. The Chief of Army Staff, PLD 1977 SC 657
Dawar and Another v. The State, 1991 MLD 1864
Faqir Ullah v. Khalil-uz-Zaman, 1999 SCMR 2203
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Furrukh Ikram v. The State, PLD 1987 FSC 5
Ghulam Ali v. Mst. Ghulam Sarwar Naqvi, PLD 1990 SC 1
Ghulam Ali v. The State, PLD 1986 SC 741
Ghulam Haider v. The State, 1992 ALD 298

- Ghulam Haider v. The State*, 1996 PCrLJ 2021
Ghulam Hussain v. The State, NLR 1993 Cr 203
Ghulam Murtaza v. The State, PLD 1989 Kar 293
Ghulam Sajjad v. The State, 1997 SCMR 1526
Ghulam Shabbir v. The State, 2003 SCMR 663
Ghulam Shabir v. Mst. Zanib Bibi, 1999 MLD 581
Ghulam Shabir v. The State, 2003 SCMR 663
Ghulam Yasin v. The State, PLD 1994 Lah 392
Gul Hasan Khan v. The Governement of Pakistan, PLD 1979 Peshwar 1
Gul Hassan and Another v. The State, 1987 PCrLJ 1325
Gul Hassan v. The State, PLD 1989 SC 633
Gulam Sajjad v. The State, 1997 SCMR 1526
Hakim Ali v. The State, 1992 ALD 209
Hamid Khan v. The State, 1992 ALD 383(1)
Hasan Din v. The State, PLD 1992 SC 246
Hasan Muhammad v. The State, 1994 SCMR 1212
Hussain Bux v. The State, PLD 2003 Karachi 127
Ibrahim and 2 others v. The State, 1995 SCMR 1296
Ijaz Ahmad v. The State, 1994 SCMR 1247
Ijaz Ahmed v. The State, 2000 PCrLJ 116
Ishaq alias Kali v. The State, 1994 PSC (CrI) 213
Jan Muhammad v. The State, 2001 MLD 1244
Javaid Masih v. The State, 1993 SCMR 1574
Khalid Malik v. The Federation of Pakistan, PLD 1991 Karachi 1
Khalid Nawaz v. The State, 1999 SCMR 933
Khalil-uz-Zaman v. Supreme Appellate Bench, PLD 1994 SC 885
Khan Badshah v. The State, PLJ 1978 SC 342
Khawja A Tariq Rahim v. The Federation of Pakistan, PLD 1992 SC 64
M Shafi Muhammadi v. Federation of Pakistan, PLD 1989 SC 633
Machi Singh and others v. The State, AIR 1983 SC 957
Mahmood Alam v. The State, 1999 MLD 2282
Mahmood v. The State, 1993 PCrLJ 1047
Mansoor Ali v. The State, 1997 PCrLJ 247
Manzoor Ahmad alias Shami v. The State, 1991 PCrLJ 1480
Manzor Hussain v. The State, 1994 SCMR 1327
Mehr Khan and Another v. The State, 1987 MLD 1919
Mohammad Ali v. Government of Pakistan, PLD SC 1989 633
Mohammad Amin etc., v. The State, PLD 1979 CS 51
Mohammad Amin etc., v. The State, 1971 SCMR 766

- Mohammad Arshad etc., v. Additional Sessions Judge*, PLD 2003 SC 547
Mohammad Aslam v. Shaukat Ali, 1997 SCMR 1307
Mohammad Irshad v. The State, 1997 SCMR 951
Mohammad Mazhar v. The State, 1992 PCrLJ 443
Mohammad Rafiq v. The State, 1994 PSC (CrI) 405
Mohammad Rafique v. The State, 1993 PCrLJ 1403
Mohammad Riaz etc., v. The Federation of Pakistan, PLD 1980 FSC 1
Mohammad Suleman v. The State, 1992 PCrLJ 1093
Mohammad Zial-Huq v. The State, 1996 SCMR 869
Moula Bux v. The State, 1992 MLD 1590
Mst Bashiran v. Haq Nawaz and 6 others, 1994 SCMR 1145
Mst Raia Bibi v. Muhammad Arshad, 1994 MLD 1
Mudassar v. The State, 1996 SCMR 3
Muhammad Afzal alias Seema v. The State, 1999 SCMR 2652
Muhammad Akram v. The State, 2003 SCMR 855
Muhammad Akram v. The State, 1992 ALD 383(2)
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Muhammad Feroze v. The State, PLD 2003 Karachi 355
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Muhammad Iqbal v. The State, 2002 MLD 596
Muhammad Iqbal v. The State, 1996 PCrLJ 1740
Muhammad Iqbal v. The State, 1999 SCMR 403
Muhammad Ishaq v. The State, 1993 SCMR 1989
Muhammad Ishaq v. The State, PLD 1992 Pesh 187
Muhammad Jabbar v. The State, 2000 PCrLJ 1687
Muhammad Latif v. The State, PLJ 1989 Cr.C. (Lah) 185
Muhammad Mumtaq Khan v. The Sate, 1999 SCMR 837
Muhammad Naeem v. The State, PLJ 2002 Cr.C. (Lahore) 667
Muhammad Nawaz v. The State, 1992 PCrLJ 1664
Muhammad Nawaz v. The State, 1998 MLD 1
Muhammad Nazir v. The State, PLD 2001 Lah 212
Muhammad Pervaiz v. The State, 2000 PCrLJ 147

- Muhammad Rafique Kamboh v. The State*, 1993 PCrLJ 1403
Muhammad Rafique v. The State, 1993 SCMR 1990
Muhammad Ramzan v. The State, 1996 SCMR 906
Muhammad Riaz v. Federation of Pakistan, PLD 1980 FSC 1
Muhammad Saleem v. The State, PLD 2003 SC 512
Muhammad Sarqar v. The State, 1990 ALD 753
Muhammad Sharif v. The State, 1994 PCrLJ 2477
Muhammad Suleman v. The State, 1992 PCrLJ 1093
Muhammad Tufail v. The State, 1994 SCMR 1211
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Muhammad Yaqub v. The State, 1998 PCrLJ 638
Muhammad Akbar v. The State, PLD 1996 Quetta 56
Mujibur Rehman and Others v. Federation of Pakistan, PLD 1984 FSC 1
Mushtaq v. The State, 1990 ALD 675
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Naikzada v. Government of Pakistan, PLD SC 1989 633
Naseer Ahmad v. The State, 1999 YLR 2012
Nasir Khan v. The State, 2003 YLR 727
Nasiruddin v. The State, PLD 2002 Quetta 42
Nasreen Akhtar v. The State, 1999 SCMR 1744
Niaz Ahmad v. The State, PLD 1997 Quetta 17
Niazoo v. Government of Pakistan, PLD SC 1989 633
Nisar Ahmad v. The State, 1994 PCrLJ 1587
Nisar alias Nisarai v. Government of Pakistan, PLD SC 1989 633
Parvaiz alias Paja v. The State, 1992 PCrLJ 830
Rafiq v. The State, 1994 PSC (CrI) 405
Rehmat Ali v. The State, 2002 MLD 918
Saeed Ahmad v. The State, 1999 MLD 581
Saeedullah Soomro v. The State, 2004 SCMR 660
Safdar Ali v. The State, PLD 1991 SC 202
Sambli Khan v. The State, PLD 1998 Peshawar 101
Sanaullah v. The State, PLD 1991 FSC 186
Sardar Ali v. The State, PLD 1991 SC 202
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Sarfraz v. The State, 200 SCMR 1758
Sarwar Khan v. The State, 1994 SCMR 1262
Sarwar Khan v. The State, 1994 PSC CrI 212
Shabbir Ahmad v. The State, 1997 PCrLJ 1920

- Shabbir Ahmad v. The State*, 1992 ALD 265
Shah Behram v. The State, PLD 1995 Lah 610
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Zulfiqar Ali Bhutto v. The State, PLD 1979 SC 741
Zulfiqar v. The State, 1991 MLD 2408

APPENDIX J

LIST OF STATUTES

Adaptation of Central Acts and Ordinances Order, 1949
Anti-Terrorism Act, 1997
Code of Criminal Procedure, 1898
Constitution (Amendment) Order, 1979
Constitution (Amendment) Order, 1980
Constitution (Amendment) Order, 1981
Constitution (Amendment) Order, 1984
Constitution (Eighth Amendment) Act, 1985
Constitution (First Amendment) Act, 1974
Constitution (Fourteenth Amendment) Act, 1997
Constitution (Second Amendment) Act, 1974
Constitution (Second Amendment) Order, 1981
Constitution (Second Amendment) Order, 1982
Constitution (Second Amendment) Order, 1983
Constitution (Second Amendment) Order, 1984
Constitution (Third Amendment) Order, 1982
Constitution (Third Amendment) Order, 1983
Constitution (Third Amendment) Order, 1985
Contract Act, 1872
Criminal Law (Amendment) Act, 1997
Criminal Law Amendment Ordinance, 1990
Criminal Law (Second) Amendment Ordinance, 1990
Criminal Law (Second) Amendment Ordinance, 1991
Criminal Law (Second) Amendment Ordinance, 1992
Criminal Law (Second) Amendment Ordinance, 1993
Criminal Law (Second) Amendment Ordinance, 1994
Criminal Law (Second) Amendment Ordinance, 1995
Criminal Law (Second) Amendment Ordinance, 1996
Criminal Law (Second) Amendment Ordinance, 1997
Criminal Procedure Code, 1898
Ehtesab Act, 1997
Enforcement of Shariah Act, 1991
Evidence Act, 1872

Indian Penal Code, 1860
Muslim Family Laws Ordinance, 1961
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The Criminal Law (Amendment) Ordinance 1990
The Federal Council (*Majlis-i-Shoora*) Order, 1981
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The Homicide Act, 1957
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- Justice Khan, Ibadat Yar, former Judge of The Sind High Court and The Federal Shariat Court of Pakistan
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INDEX

- Absconder 198
- Abu Hanifa *see also* Imam 26, 70–71, 89 n. 120, 90 n. 121, 91 n. 125, 159
- Abu Daud 71, 73, 79 n. 90
- Adult 118, 131, 148 n. 19, 176, 190, 192, 196, 206, 229, 232–234, 300, 304, 306, 308, 311, 317, 320–321, 330, 334
- Advisory Council 111
- afw* 21, 87, 182–183, 187, 199, 201, 203, 210, 223, 306
- Ahmed, J. Salahuddin 77
- Aisha, Hazrat 37
- Ajmal, Mian Muhammed 82
- Ali ibn Abi Talib 57
- Ali, Abdullah, Yousaf 11 n. 43, 61 n. 12, 67
- al-Jassas, Ahmad ibn Ali 24 n. 34
- al-Mawaradi 27–28
- Amd* 68, 132 n. 118
- an-Naim, Abdullah Ahmed 48
- Aqila* 38, 72, 132, 136–137, 148–149, 161, 230, 301, 305, 309–311
- Arab 1, 12–14, 25 n. 38, 40, 61–63, 66, 79, 85, 93, 155
- Asad, Muhammad 29–30, 61 n. 13, 66–68, 90, 92
- Assembly 6, 7 n. 29, 38, 57, 70, 106 n. 36, 111, 112 n. 52, 113, 134 n. 124, 147, 149 n. 25, 153, 157–163, 166, 169–170, 172–173, 284, 295, 297–298, 316
- Attorney General 82, 165, 167, 169, 172, 174, 237
- badl-i-sulh* 20, 137, 176–177, 182–183, 185, 194, 196, 200, 206, 208, 221, 223, 228–229, 285, 334–335, 347
- Bakhtiar, Yahya 169–170, 174
- Bar Association 160, 196 n. 141, 217 n. 211
- Bassiouni, Cherif 23 n. 27, 25, 34, 43–44, 97
- Batalvi, Barrister Ejaz 53, 131, 183, 200, 227
- Bhutto, Benazir 82, 94 n. 136, 96, 99 n. 1, 143–144, 158, 166–168, 170, 173–174, 180, 215, 284, 296, 298
- Bhutto, Zulfiqar Ali 76, 94 nn. 135–136
- Blood-money *see also* compensation 13, 21, 37, 89 n. 119
- Bredi, Daniela 49–50
- Brohi, A.K. 116
- Chaudhary, Justice Iftikhar 203
- Cheema, Justice Afzal 100, 103–104, 112–116, 116 n. 70, 117, 131–132, 289–290, 292–293, 299
- Chief Martial Law Administrator 77, 100, 102, 110, 115, 289
- Colonial Law 101, 138–139
- Compensation 12, 15, 19–21, 34, 41, 60 n. 11, 64–65, 67, 75, 82, 84 n. 108, 91 n. 125, 127 n. 101, 152, 154, 176, 182–183, 187, 196, 200, 203–204, 218, 229, 255, 279, 281, 288, 300–301, 306–307, 317, 320–321, 330, 334–335, 351
- Composition 59, 123 n. 85, 140, 146 n. 11, 160, 166, 173, 182, 184, 186, 193, 195, 198, 208, 211, 216, 221, 223–224, 226–227, 255, 267, 277–279, 322, 333, 336
- Compromise 5, 8, 15, 20–21, 35, 47, 50, 55–56, 72, 82–83, 87, 91–92, 160, 162, 168, 176, 177 n. 70, 182–185, 188, 193–198, 202–212, 216, 218–225, 227, 229, 238, 247, 250–251, 253–255, 261–269, 272–273, 276–282, 285–288, 365–375, 378
- Constitution of 1956 7, 111
- Constitution of the Islamic Republic, 1973 7 n. 32, 316
- Coulson, Noel J. 46
- Council of Islamic Ideology 100, 104, 111–112, 123 n. 84, 130 n. 111, 169 n. 20, 245, 289–290, 292–295, 299, 327, 353
- Crime data *see also* data 250–251
- Data 19, 47, 53–55, 154, 162, 240, 250–251, 253–254, 257–268, 270, 280
- Dehlavi, Shah Abdul Qadir 28, 61
- Dehlavi, Shah Wali Allah 28

- Dera Ghazi Khan 54, 249
 Deterrent 10–11, 47, 116, 287–288
 Diyat 1, 8, 10–22, 34, 38–39, 45–50, 52–53, 55, 57–61, 64–65, 71–72, 78–80, 82, 86–88, 89 n. 119, 90–93, 96, 99–102, 106, 109–110, 112–113, 116–117, 122–123, 125–128, 130, 132, 136–139, 141–142, 144, 145 n. 8, 146, 148–152, 154, 158–159, 161, 165–169, 171–174, 177–185, 187–197, 199–200, 203, 206–207, 210–213, 215, 224, 227–245, 247, 251, 272, 282–285, 287–288, 292–293, 295–297, 299–300, 302, 305–307, 309–311, 315–317, 320–326, 328–331, 333–338, 340, 342–343, 348–350, 352
 Durrani, J. Karimullah Khan 80

Egyptian Penal Code, 1983 47
 Ehtesab Courts 269
 El-Awa, Mohammad Salim 47, 72, 89 n. 121
 Evidence 14, 32, 34, 41, 44, 45 n. 153, 74, 87, 94, 103, 105, 108, 110 n. 47, 122, 125–127, 134–135, 148–149, 151–156, 167, 175, 176 n. 61, 189–190, 192–193, 195, 197, 213, 219–220, 233, 237, 240, 243–247, 253 n. 57, 254–256, 268, 273, 277, 283, 285, 289, 304, 313, 319, 332, 385
 Evidence Act, 1872 139, 141, 240, 244–245, 304

Fatawa-i-Alamgiri 52, 156
Fatwa 97, 163
 Federal Law Secretary 113
 Federal Shariat Court 4, 53, 55, 57, 76–77, 81, 85, 88, 92–93, 106 n. 32, 124, 167 n. 11, 168, 190, 233–234, 237, 240, 251, 255, 273, 291–293
Fiqh 22 n. 24, 71 n. 58, 74, 79, 140
Fisad-Fil-Arz 224
 Fisch, Von Jörg 25, 244

 Gillani, Riazul Hassan 82, 237

 Haider, Afzal 104, 107, 113, 130
 Hallaq, Wael B. 38
 Hanafi 26, 47, 49–50, 71, 90 n. 122, 132
 Hanafi School of Thought 68, 132

 Hanbal 26, 89 n. 120
Haraba 33
Harbi 50
 Hassan, Gul 57–59, 76, 80–81, 124, 165, 167–169, 172, 237, 277, 292, 296
 Hedaya 52, 90 n. 123
 High Court, Karachi 94, 189, 192 n. 129, 248–249, 256
 Homicide 12–13, 15, 17–20, 22, 34, 36, 39, 41–42, 49–50, 52, 57–58, 61–65, 67–69, 72, 76, 78–80, 83 n. 103, 88, 91, 99, 101–102, 106–108, 118–122, 124, 130, 132–134, 136, 138–141, 143–144, 146, 156, 158–159, 165–166, 173–174, 178, 180, 181 n. 84, 186, 189 n. 119, 225, 235–236, 239–240, 241–243, 245–247, 251, 253, 267, 279, 282–288, 293
Hudud 4, 33–35, 37, 40, 45, 55, 73, 86 n. 114, 91, 101, 105–106, 113, 116, 130–131, 138, 140–141, 189 n. 118, 191, 244 n. 17, 255–256, 273, 283, 292
 Hussain, Faqir 101
 Hussain, Justice Sheikh Aftab 77

 ibn Khuldun, Abdul Rahman ibn Muhammad 36
 Ibn-i-Kathir 63 n. 21
 Ibn-Saad, Mohammad 36
Ijtihad 2, 27, 38, 80, 95
Ikrah-i-tam 175, 317–318, 330–332
 India 4–6, 51–52, 61 n. 13, 72 n. 58, 102, 117 n. 76, 153, 156, 161 n. 76, 239, 241, 249 nn. 43–44
 Investigation 53, 55, 67, 141, 162, 196, 235, 238, 243–244, 246, 250, 252, 258 n. 66, 261, 269, 277, 355 n. 5, 356 n. 10
 Iqbal, Mohammad 6, 21, 25 n. 37, 27, 30–31, 61 n. 13, 65 n. 28, 70, 81 n. 98, 198
 Iran 1, 3, 40, 42, 89 n. 119, 125, 149
 Islamic Criminal Justice System 8, 43–44, 46, 48, 241
 Islamic Criminal Law 1–2, 4 n. 17, 12, 15, 17 n. 2, 18–19, 22, 31–33, 39–44, 46–49, 51–52, 58–59, 94, 99, 106–107, 110, 113, 174, 232, 239, 241, 244–245, 284, 286–287
 Islamic law 4, 6, 8, 11–12, 15, 17–18, 19, 21 n. 21, 22–31, 34–35 n. 99, 36, 38–48, 50–52, 57–60, 70, 76–77, 79,

- 82, 88, 89 n. 121, 95–97, 99–100, 101 n. 11, 107–109, 110 n. 47, 112–113, 115, 117, 123, 128–129, 131, 138–141, 143–144, 146, 148–151, 153–155, 158–159, 161–163, 165, 167, 170–171, 173, 175, 181, 189–190, 192, 214, 218, 220, 227, 229–230, 235–237, 241, 244–247, 251, 283–284, 286, 291–292, 296
- Islamic State 3 n. 13, 4–6, 18 n. 13, 24, 28–29, 34–35, 40, 44, 49, 85, 118, 149
- Islamisation 3–4, 6–8, 15, 17, 52–53, 76, 94, 99–102, 104, 108–109, 113, 117, 127, 146, 154, 171, 283
- Ithna Ashria 26
- Jamat-i-Islami 101, 161
- Jinnah, *see also* Quaid-i-Azam 4–6, 65 n. 28, 154
- Judiciary 17, 28, 58, 99–100, 105, 113, 138, 165, 167–168, 173, 182, 185, 191, 198–199, 228, 236–237, 256, 289, 291
- Jurisdiction 19, 41, 54, 59, 70, 76, 79, 106, 113–114, 192–193, 214, 235, 249, 256, 284, 291
- Jurisprudence 22, 30, 43, 46, 50, 70, 95 n. 142, 96, 125, 129, 132, 140, 153, 230, 232, 239–240, 278
- Jurists 18, 23–26, 31–32, 38, 45, 48, 50–52, 58, 60, 68–69, 89–92, 95–97, 129, 136, 143, 150, 156, 159, 163, 165 n. 2, 187, 241
- Kamali, Mohammad Hashim Khan 35
- Karachi High Court 94
- Kasuri, Nawab Mohammad Ahmad 102, 112, 289
- Khadduri, Majid 25
- Khamr* 33
- Khan, General Ayub Khan 111, 113
- Khan, Justice Abdul Hakim 71
- Khan, Justice Munir 204, 214–215
- Khan, Justice Yaqoob Ali 103
- Khan, Sir Syed Ahmed 6, 90
- Khanewal 54, 217 n. 111, 249
- Khata 68, 82, 345
- Killing of brothers 216
- Killing of close relatives 217
- Killing of daughters 217
- Killing of wives 212
- Lahore High Court 19, 53–55, 77, 94, 103–105, 114, 179, 184, 186, 194, 200, 203, 209, 214, 223, 226, 240, 249, 251, 254, 257, 270 n. 86, 271, 277, 279, 289–290, 292
- Law Secretariat 118
- Layish, Ahron 23
- Layyah 54, 249, 251
- Legal heir 8, 13, 14 n. 56, 15, 19–21, 37–38, 45 n. 151, 55, 127 n. 100, 168, 171, 175, 182–185, 193–198, 200–202, 205–212, 216, 222, 226, 228–229, 232, 241–242, 247, 255, 268, 278–279, 281, 286–287, 300, 378
- Libya 1 n. 2, 3, 40, 42, 149
- Lodhi, Zakaullah 34, 75, 79, 93
- Lodhran 54, 249, 251
- Majlis-i-Shoora* 53, 99, 101, 106 n. 36, 111, 128, 131, 137, 145 n. 3, 260, 294–295, 386
- Malaysia 40
- Malik, Imam 21 n. 21, 26, 63, 89 n. 120
- Masoom-ud-dam* 118, 132, 300–301, 309–310
- Maududi, Abul Ala 3, 29, 61 n. 12
- Mayer, Ann Elizabeth 44
- Ministry 53, 61 n. 13, 116, 118, 124–126, 129, 141, 171, 251, 293–295
- Minor 8, 14 n. 56, 59–60, 72–74, 125, 127, 130–131, 135–136, 175–176, 196–197, 199, 203–209, 212, 215, 229, 232–234, 237, 305–306, 308, 311–312, 317, 319–322, 330, 332–334, 336, 346–347
- Mishkat* 72
- Muhammadi, Shafi 81 n. 98, 94, 130 n. 114
- Mujtahid* 95
- Multan 54–55, 249, 258 n. 62, 271
- Multan Bench of Lahore High Court 53–55, 240, 249, 251, 254, 257, 270 n. 86, 271–272, 279
- Mustamin* 49, 118, 300
- Muzzafar Garh 54
- Nadwi, Hakim Abdul Hamid 27 n. 54
- Nasir, Jamal J. 25 n. 39
- Naskh*, Theory of, *see also* abrogation 96
- Nawaz, Justice Mian Allah 400
- Nissai* 71

- Non-Muslim 15, 47, 49, 89 n. 121,
93, 96, 118–119, 126, 132, 148 n. 22,
150–153, 155–156, 179, 192, 300, 304,
307, 314
- Nyazee, Imran Ahsan Khan 34
- Objectives Resolution 6–7, 112 n. 52,
114, 170
- Ordinance 8, 17, 32, 53–54, 99 n. 1,
100–101, 106–107, 117–119, 122–125,
127, 130–134, 136–141, 144, 145
n. 8, 146, 148, 150, 158–159, 161–162,
165–166, 171–174, 176–188, 190,
194–195, 224, 228, 232, 245, 272,
283–284, 291, 293, 295–297, 299–301,
311, 313–316, 327, 353
- Oudah, Abdul Qadir 23 n. 28, 34,
44–45
- Pakistan Law and Justice
Commission 101
- Pakistan Penal Code, 1860 8, 17,
19–20, 49–52, 82, 162, 240–242,
246, 301, 313, 316, 328, 386
- Pakistani law of murder 52, 57, 59,
235, 282
- Pakpattan 249, 251
- Pardon 8, 10, 21, 34–37, 45 n. 151,
47, 57, 60, 64, 72, 75, 78, 79 n. 90,
80, 83, 86–88, 92, 95, 102 n. 14, 139,
154–155, 160, 168, 182–184, 194, 196,
200–202, 204, 206–209, 211–212, 216,
218–220, 223, 225–226, 231, 247, 255,
277–278
- Parliament 8, 38–39, 57, 70, 97,
99–100, 111, 123 n. 85, 131, 144–146,
149, 158, 162, 165, 169, 180, 285, 295,
297, 328
- Pervaiz, Ghulam Ahmad 61, 65–67,
90
- Peshawar High Court 8, 53, 57–60,
75–77, 79–81, 96, 168, 172, 198, 292,
294, 296
- Peters, Rudolph 2, 41–42
- President 59 n. 9, 81 n. 101, 99 n. 1,
100, 107–111, 113, 117–118, 125–126,
130, 145–146, 150, 157–158, 161, 166,
168, 170, 173, 215, 281, 291–294,
296–299, 315–316, 328
- Presidential Order 107, 170
- Provincial Assembly 111
- Provisional Constitutional Order 145,
289, 294
- Provocation 67, 80, 121–122, 178
n. 73, 204, 285
- Qanun-i-Shahadat* 189–190, 240
- Qassama* 38, 148
- Qatl* 82–83, 131–132, 139, 148 n. 20,
175–176, 187–188, 204, 241, 300, 302,
310–311, 313, 317–319, 323, 325, 329,
330–332, 338–339, 350
- Qatl-bis-sabab* 231, 324–326, 338–339
- Qazaf* 118
- Qisas* 8, 10–22, 25 n. 38, 33–34,
36–39, 45–50, 52–53, 55, 57–61,
63–67, 71–75, 78 n. 85, 79–80, 82,
86–91, 94–96, 99–102, 104, 106–107,
109–110, 112–113, 116–117, 119,
122–130, 135–139, 141–142, 144,
146–150, 152–156, 158–159, 161,
165–169, 171–177, 179–185, 187–194,
196–197, 199–202, 204, 206–207,
210–216, 219–227, 229, 231–240, 242,
244–245, 247, 251, 272, 278, 282–286,
288, 292–293, 295–297, 299–302,
304–308, 311–313, 315, 317–323, 325,
327–329, 331–337, 341–342, 345–348,
352, 379
- Qisas and Diyat* 8, 10–12, 14–19, 20
n. 18, 21–22, 38–39, 45–50, 52–53,
55, 57–59, 61, 79, 82, 91, 96, 99–102,
106–107, 109–110, 112–113, 116–117,
122–123, 126, 128, 130, 136, 138–139,
141–142, 144, 146–147, 149–150, 154,
158–159, 161, 165–169, 171–174,
179–181, 184–185, 187, 190–191, 193,
196, 199–200, 207, 210–213, 215, 224,
227, 229, 231–233, 235–240, 244–245,
247, 251, 272, 282–285, 292–293,
295–297, 299, 315, 328
- Quaid-i-Azam 53, 154
- Quetta High Court 203, 205, 218,
223
- Quran 4, 6 n. 28, 7–8, 11–14, 20,
23–25, 27–28, 32, 33 n. 84, 34, 36,
44, 50–52, 58–65, 67–72, 75, 77–79,
82–93, 95–96, 104, 111–114, 124–125,
140, 143, 150, 152, 154, 159, 168, 174,
179, 187–190, 228, 230, 237, 245, 284,
286–288, 296, 299, 316, 325, 327–328,
338, 353
- Rajanpur 249
- Ramday, Justice Khalilur Rehman 188,
222–223, 226–227

- Razinama*, see also compromise 193
- Rehman, Chief Justice Hamoodur 112
- Rehman, Tanzilur 100, 116, 126 n. 94, 189, 191, 292–293
- Review 14, 57, 74, 97, 108–109, 112, 114, 165, 169, 184, 215, 217, 237, 244, 253, 281, 283, 292, 296
- Sahiwal 54, 249
- Samdani, Justice K.M.A. 103, 289
- Sariqa* 33
- Saudi Arabia 1, 3, 42, 46, 49, 62 n. 18, 125, 149, 236, 242
- Schacht, Joseph 11, 34, 46, 75, 89 n. 119, 150, 241
- Shafi 61 n. 12, 81 n. 98, 89 n. 120, 90 n. 122, 94, 130 n. 114, 381
- Shah, Justice Pir Karam 81, 83–85, 89, 91, 93, 96
- Shah, Zafar Ali 159, 298
- Shariah 15, 22–23, 25, 28–31, 36, 38, 40, 44–45, 48, 50 n. 175, 63 n. 22, 66, 73, 86, 88, 91–93, 95 n. 143, 104, 114, 140–141, 143, 146, 148, 155–157, 176, 197, 283–284, 288, 291, 307, 321, 335, 385
- Shariat 4, 59, 109, 150–151, 291–292
- Shariat Appellate Bench 57, 80, 81 n. 101, 107, 191, 215, 237, 296
- Sharif, Nawaz 49, 99 n. 1, 100, 143–144, 162, 168–169, 215, 297–298
- Siddiqi, Mohammad Iqbal 46–47
- Sindhi, Ubaidullah 27
- Sources 22, 26, 31, 41, 47, 53, 58, 70, 79, 90 n. 122, 163, 179
- Sudan 1 n. 2, 40, 42, 125
- Sunnah* 4, 7–8, 13, 20, 23–28, 32, 33 n. 84, 44, 50–52, 58–59, 63 n. 22, 68–70, 77, 79, 82–83, 85, 90, 92–93, 95–96, 111–114, 124–125, 140, 143, 154, 159, 168, 174, 179, 187–190, 228, 237, 245, 284, 286–288, 296, 299, 316, 325, 327–328, 338, 353
- Supreme Court 51, 53, 55, 57, 76–77, 80–82, 94 n. 138, 103–110, 112–114, 116 n. 72, 135, 156, 165–173, 185–186, 190–191, 194, 196, 199, 201–202, 204, 206–207, 210, 214–216, 220–221, 225, 227–228, 233–237, 240, 245, 251, 255–257, 274, 276–278, 280–281, 284, 289–290, 292, 294, 296–297
- Tabri, Mohammad Ibn Jarir 36 n. 109, 62 n. 20
- Taqlid* 38
- Tazir* 21 n. 21, 33–34, 45–46, 51, 72–76, 91 n. 124, 96, 123, 132–133, 136, 141, 152, 174, 176–178, 180, 185, 187–188, 192–193, 197, 201–202, 204, 206, 211–213, 215–217, 219–227, 233–234, 236, 238, 242, 244, 273, 300–305, 307, 309, 312, 316–318, 320, 322–324, 327, 329–331, 333–335, 337–337, 341–347, 349, 351–352
- Tazkiyah al-shahud* 190–192, 219, 378
- The Police 16, 21, 54, 102, 160, 197–198, 226, 240, 242–244, 247, 251–253, 255, 258 n. 67, 259–261, 267, 269, 278–280
- The Sessions Court 103, 246, 251, 253–255, 267, 269, 271, 280
- Tradition 8, 13–14, 19–20, 37 n. 113, 39, 41, 48, 50, 63, 69 n. 46, 70–71, 74–75, 78–79, 89 n. 120, 91–92, 96, 152, 159
- Trial 41, 54–56, 67, 76, 94, 102, 105, 107–109, 123, 196, 199, 201, 203, 211–212, 216, 218, 243, 246–247, 252–256, 258 n. 66, 261, 263 n. 75, 267–269, 277, 279–280, 284–285, 288, 292, 326, 339
- Tribal 14, 35, 38 n. 114, 63–64, 79, 85, 92, 208, 236, 248–250, 285
- Ulema* 3, 6, 24, 36, 38, 53, 66, 68, 71 n. 58, 81 n. 101, 129, 136, 139, 141, 143, 148–149, 151–152, 155, 294
- Umar 32, 37, 44, 170
- United Arab Emirates 40
- Usman 37, 44
- Usmani, J. Muhammed Taqi 81
- Vehari 54, 249
- Verse 178, Chapter 2 34, 63–64
- Waiver 15, 123, 136, 180, 182, 183 n. 96, 184–187, 201–203, 211, 216, 222–227, 306–307, 320–322, 327, 333–336, 352
- Wali*, see also legal heir 14 n. 56, 19, 37, 89 n. 119, 123, 127, 136–137, 155, 174–176, 197, 205–206, 210, 212–215, 218–219, 227,

- 278, 287–288, 300–301, 304–308,
312–313, 317, 319–323, 331–337,
347–348
- Witness 32, 34, 45 n. 153, 55, 87, 109,
126, 148 n. 22, 151–153, 156, 160,
189–191, 192 n. 129, 193, 219,
242–243, 245, 268, 277, 280, 304, 378
- Woman's testimony 129, 151
- Women's Division 126–129, 295
- Yilmaz, Ihsan 39
- Zahiri 47, 68
- Zia-ul-Haq 4, 17, 99–107, 109–110,
113, 116, 122, 127, 130, 139, 141, 143,
145 n. 7, 162, 283, 289, 293
- Zina 4 n. 17, 31 n. 72, 32–33, 55, 101,
118, 233, 256, 386
- Zullah, Justice Afzal 100, 103, 166–169