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Does a Compromise Blot out Both Guilt and Punishment? Analyzing *Qiṣāṣ* and *Diyat* Provisions of Criminal Law in Pakistan under the Injunctions of Islam

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Abstract

The proposition of whether pardoning a convicted person with or without blood-money would obliterate both his sentence and conviction or obliterate his sentence only without affecting the conviction has divided opinions of the Honourable judges of the Supreme Court of Pakistan. This work attempts to evaluate the interpretation and reasoning of the Honourable judges as per the cases decided so far by the Supreme Court on this issue. It explores the arguments that are missing in judicial interpretations rendered by the Honourable Supreme Court in addition to the views of Muslim jurists on this tricky issue and other issues akin thereto that might arise before the august court in the future. Its main finding is that under Islamic law pardoning a convict with or without compensation would only obliterate his sentence and not his conviction, as he will be permanently debarred from his share in inheritance from the deceased if he is one of his legal heirs.

Keywords

Islamic law, *qiṣāṣ* and *diyat* provisions, criminal law, Islamic injunctions.

Introduction

The famous Qisas and Diyat Ordinance or Criminal Law (Second Amendment) Ordinance was promulgated in 1990 as a result of the decision of the Shariat Appellate Bench of the Supreme Court of Pakistan reported as the *Federation of Pakistan v. Gul Hasan Khan*.[1] The various

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[1] PLD 1989 SC 633.

ordinances that followed were in turn repealed by the Criminal Law (Amendment) Act, 1997 (Act No. II of 1997), which received the assent of the President on April, 10, 1997 to bring the Pakistan Penal Code (PPC), 1860 and the Code of Criminal Procedure (Cr.P.C.), 1898 "in conformity with the Injunctions of Islam as laid down in the Holy Quran and [the] *Sunnah*."[2] Sections 299–338 H of the PPC are the product of those changes from 1990 to 1997. The superior courts have resolved many complicated issues pertaining to these sections, but there are many legal issues that need the attention of serious academic scholarship. The most contentious points on which there is no unanimity within the Supreme Court at present is whether a compromise blots out both the guilt and the punishment. In other words, does a compromise erase, obliterate or wash away the guilt in addition to the sentence? Would pardoning one of the accused by the legal heirs amount to pardoning all the accused even if they were never intended? What is the legal effect of withdrawal of pardon with compensation by the legal heirs of the victim? And what about the situation when the compromise is reached before or during the trial? The Supreme Court has paid much attention to each of these questions through interpreting the law as it is provided in the PPC, the Cr.P.C., its own interpretation in precedent cases, cases from foreign jurisdictions, and other secondary sources. However, the case law so far has not delved into the *sunnah* of the Prophet Muḥammad (peace be on him) and the opinions of jurists derived from the Qur'ān and the *sunnah* on this issue. That is why, this work analyzes crucial case law by the Supreme Court with a focus on the issues that have divided the opinions of the honourable judges enriched by guidance from the *sunnah* and the opinions of jurists. These issues and issues "ancillary or akin thereto" are thoroughly evaluated as per the legal interpretation and guidance available in the decided cases by the Supreme Court as well as per the "Injunctions of Islam as laid down in the Holy Quran and *Sunnah*" of the Prophet Muḥammad (peace be on him), as provided in section 338-F of the PPC.

Blotting out the Sentence or both the Guilt and the Sentence: Interpretations of the Supreme Court of Pakistan

One of the main questions that is the subject of controversy in the Honourable Supreme Court in the recent past is whether compounding an offence by the legal heirs of the deceased amounts to erasing or

[2] See the *Gazette of Pakistan*, April 11, 1997 (Islamabad: Printing Corporation of Pakistan, 1997).

obliterating both the guilt and the sentence of the murderer or is confined to blotting out his sentence only and the guilt remains. The answer should have been given very clearly by the apex court. However, the Honourable judges have two divergent opinions on this issue. In the recent past, the issue was highlighted in a case in which an accused named Waheed Ahmad had allegedly murdered Tariq Husain on June 5, 2007 in Jhelum. He was convicted by the Additional Sessions Judge, Jhelum under section 302(b), PPC to death as *ta'zīr* and was ordered to pay rupees one hundred thousand to the legal heirs of the deceased as compensation under section 544-A of the Code of Criminal Procedure (Cr.P.C.), or in default of payment thereof he had to undergo six months of simple imprisonment. The conviction and punishment were endorsed by a Divisional Bench of the Lahore High Court, Rawalpindi Bench, which dismissed the appeal by the said Waheed Ahmad vide judgment dated May 22, 2012.[3] The said Waheed Ahmad subsequently filed Criminal Petition for Leave to Appeal No. 216 of 2012 before the Supreme Court, which was granted on July 6, 2012. As a result, Mr. Waheed brought Criminal Appeal No. 328 of 2012 before the Honourable Supreme Court. It was during the pendency of this appeal that a Criminal Miscellaneous Application No. 185 of 2017 was filed seeking acquittal of the appellant on the basis of a compromise with the legal heirs of the deceased, which was referred to the District and Sessions Judge Jhelum for verification who confirmed that the compromise was genuine and voluntary and that the heirs of the deceased had waived their right of *qiṣāṣ* and had not claimed any *diyat* for the same.

A Full Bench of the Supreme Court had unanimously accepted the compromise between the parties on March 21, 2017. However, their Lordship differed on the effect of that compromise. Sardar Tariq Masood, J., wrote the majority judgement and Justice Amir Hani Muslim concurred with him. He observed,

> According to subsection (6) of Section 345 of the Code of Criminal Procedure, 1898, the composition of an offence shall have the effect of an acquittal, hence Criminal Appeal No. 328 of 2012 is allowed, the sentence of Waheed Ahmad (appellant) recorded and upheld by the courts below is set aside and he is acquitted of the charges on the basis of the compromise.[4]

Qazi Faez Isa, J., wrote a dissenting note and observed,

> Whilst I agree with my learned brother that the application under section

[3] Criminal Appeal No. 75 of 2009 and Murder Reference No. 20/RWP of 2009.
[4] Crl. M. A. No. 185 of 2017 in Crl. A. No. 328 of 2012, para., 2.

> 345(6) of the Code of Criminal Procedure ("the Code") be accepted, I most respectfully cannot bring myself to agree that the convict/appellant be "acquitted of the charges on the basis of the compromise."[5] Subsection (6) of section 345 of the Code does not envisage an acquittal, as it provides: "(6) The composition of an offence under this section shall have the effect of an acquittal of the accused with whom the offence has been compounded.[6]

In the view of his Lordship, "the effect of an acquittal is different from an acquittal."[7] He argued that the judgment in a criminal case had two components: conviction, which meant that he was found guilty and the sentence, which was the punishment given to him. In his view, the legal heirs of the deceased pardon the accused or "compound the offence it does not mean that the appellant/convict was not guilty of the murder for which he was convicted, which would be the case if, as a consequence of allowing the composition, he is "acquitted."[8] In his Lordship's formulation, the statement "composition of an offence . . . shall have the effect of an acquittal" in section 345(6), means that the punishment (sentence) part of the judgment is brought to an end; neither this subsection states, nor it could, that the convict is "acquitted of the charges." Thus, an acquittal by the Trial Court or the High Court or the Supreme Court of an accused is different from when he is found guilty by the Court and is pardoned by the legal heirs of the deceased upon his request. His Lordship has given a number of chapters and verses of the Qur'ān without their translation and interpretation and concluded, "A person can only be forgiven if he is guilty. The cited verses neither state nor imply that the finding of guilt is effaced."[9]

Qazi Faez Isa, J., did not cite any *ḥadīth* or the opinion of any jurist on the issue and, therefore, requested the Chief Justice to take notice of this matter, because section 345(6), Cr.P.C. has not been examined and interpreted from the above perspective and because it is a question of public importance under Article 184(3) of the Constitution. The then Chief Justice had, therefore, put the matter before a Full Bench headed by Asif Saeed Khan Khosa, J., as he then was who decided the matter. The Full Bench did not include Mr. Justice Qazi Faez Isa though.

Mr. Justice, Khosa in the Suo Moto Case No. 03 of 2017 (SMC) sought support from Anglo-Saxon jurisprudence and not from the "Injunctions

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[5] Ibid., dissenting note of Qazi Faez Isa, J., para., 1.
[6] Sec. 345(6), PPC.
[7] Crl. M. A. No. 185 of 2017 in Crl. A. No. 328 of 2012, para., 4.
[8] Ibid.
[9] Ibid., para., 6.

of Islam," which was the requirement for the interpretation of these provisions. Citing a few paragraphs from *Dr. Muhammad Islam v. Government of N.W.F.P.*,[10] to prove his point of view, he reproduced this interpretation:

> An ultimate acquittal in a criminal case exonerates the accused person completely for all future purposes vis-à-vis the criminal charge against him as is evident from the concept of autrefois acquit embodied in section 403 Cr.P.C. and the protection guaranteed by Article 13(a) of the Constitution of the Islamic Republic of Pakistan, 1973 and, according to our humble understanding of the Islamic jurisprudence, *Afw* (waiver) or *Sulh* (compounding) in respect of an offence has the effect of purging the offender of the crime. In this backdrop we have found it difficult as well as imprudent to lay it down as a general rule that compounding of an offence invariably amounts to admission of guilt on the part of the accused person.[11]

He opines that "without burdening this judgment with copious references in that regard it may suffice to state for the present purposes that the Islamic scholars around the globe agree that *Afw* (forgiveness) means to hide an act, to obliterate, remove and pardon it and to erase and efface it from the record as if it had never been committed and, likewise, *Sulh* (reconciliation) means that the act or offence is forgiven and forgotten as if it had never happened."[12] His Lordship further stated,

> A compounding is in respect of the offence regarding which a person has been accused or convicted and it has no direct relevance to his guilt or punishment or even to his conviction or sentence and this is more so because a compounding can take place even before any finding of guilt or conviction is recorded. Through compounding the offence itself is compounded and resultantly the accused person or convict ipso facto stands absolved of the allegation levelled or the charge framed against him regarding commission of that offence and that is why there is no need for recording his acquittal in that connection because through the act of compounding the offence itself has disappeared or vanished.[13]

It would be interesting to analyze under Islamic law "whether a compounding can take place even before any finding of guilt or conviction is recorded" as stated above.

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[10] 1998 SCMR 1993.
[11] See the Suo Moto Case (SMC) No. 03 of 2017, PLD 208 SC 703, at para. 6.
[12] See ibid., para. 7.
[13] See ibid., para. 10.

For his Lordship, the distinction between "the effect of an acquittal" and the word "acquittal" and "guilt" and "punishment" in the context of Sec. 345 (6) of the Cr.P.C. is "quite unnecessary because for all practical purposes an acquittal or any other dispensation having the effect of an acquittal may not make any difference to the parties to the case or the system of administration of justice in the larger context."[14] He argues that perhaps the legislature used the words, "effect of an acquittal" and not the word "acquittal" in Sec. 345 (6) "because an acquittal can be ordered in connection with an existing allegation or charge but where the allegation or the charge itself has disappeared, evaporated or vanished or it stands erased or effaced on account of composition of the offence itself there is hardly any occasion for recording an acquittal."[15] He also mentioned that the legislature wanted to extend all the benefits of an acquittal to such a person, which is why, the words "effects of an acquittal" are used. He argues that if the guilt was to remain intact, the same should have been mentioned in the section.[16] He asserts that law does "not envisage or contemplate removal of punishment while impliedly maintaining a person's guilt."[17] He mentions that such an approach may be debated in theological or sociological terms, but the same should not be imported into criminal jurisprudence. Responding to the concerns of Mr. Justice Isa in *Mureed Sultan v. the State*[18] that a pardoned person could take up a noble job in the government, his Lordship stated,

> It is for the legislature to amend the relevant laws, etc. to keep such a person out of the public life, if it so desires and decides. Without introducing appropriate amendments in the criminal law in vogue in the country there is little scope for canvasing such collateral or incidental punishments for a person and as long as the law of the land stands as it is all the fruits and effects of acquittal have to be extended to such person on the basis of a complete and lawful compounding of the offence with him.[19]

Finally, the unavoidable conclusion of the discussion is penned down by his Lordship by saying that in the case of a successful compounding of a compoundable offence "an accused person or convict is to be acquitted by the relevant court which acquittal shall erase, efface, obliterate and wash away his alleged or already adjudged guilt in

[14] Ibid., para. 11.
[15] Ibid.
[16] Ibid., para. 12.
[17] Ibid.
[18] 2018 SCMR 756.
[19] See SMC judgment, para. 12.

the matter apart from leading to setting aside of his sentence or punishment, if any" and such acquittal shall "include all the benefits and fruits of a lawful acquittal."[20]

It is pertinent to note that his Lordship did not discuss those sections of the PPC and the Cr.P.C. that mention that past or previous convictions should be considered in sentencing. His Lordship also did not mention the names of Muslim scholars who have formulated the view that "'*afw*" or waiver of an offence means that it must be erased from the records as if it had never been committed. His Lordship also did not go into in-depth analysis of the issue as laid down in the Qur'ān and the *sunnah*.

Interpretation by Mr. Justice Qazi Faez Isa

In *Mureed Sultan v. the State*,[21] Qazi Faez Isa, J., once again expressed his point of view and stated that what difference would the acquittal of a person under S. 345(6) of the Cr.P.C. make. He observed,

> There are grave consequences. A man who has committed murder but is "acquitted" merely because the legal heirs of the murdered person compound the offence, would enable the murderer, for instance, to honestly declare on a job application that he is not and has never been a convict; he could thus be eligible to apply for government employment, be employed as a teacher, be inducted into the Armed Forces, enter the judicial service or even be appointed as a judge of the superior courts. There is then the religious aspect to the discussion. The person who has committed the sin of murder if he professes his guilt or is convicted in this world and serves out his sentence or is released as a consequence of the legal heirs forgiving him, may be spared the agony of punishment in the Hereafter.[22]

The above issue once again resurfaced in *Shafqat v. the State*,[23] another Full Bench's decision.[24] In this case, the petitioner, Shafqat was convicted and sentenced to death by the District and Sessions Judge, Rawalpindi vide judgement dated March 28, 2013 under S. 302(b) of the PPC as *ta'zīr* for the murder of Zahir Mehmood. The Lahore High Court upheld the conviction, but reduced the sentence of death to

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[20] See ibid., para. 17.
[21] 2018 SCMR 756.
[22] Ibid., para. 7.
[23] PLD 2019 SC 43.
[24] The three members Bench comprised of Justice Gulzar Ahmed, Justice Qazi Faez Isa, Justice and Yahya Afridi.

imprisonment for life while maintaining the compensation of rupees 100,000 to the heirs of the deceased.

Meanwhile a CMA No. 693 of 2018 was submitted by the petitioner that a compromise has been reached and that the legal heirs of the deceased have forgiven him (i.e., the petitioner). The same was confirmed by the learned Sessions Judge, Rawalpindi. The Supreme Court accepted the compromise between the parties. Upon acceptance of the compromise, the Honourable Supreme Court had to determine whether to set aside his sentence alone or whether his conviction should also be set aside. In other words, did the pardon obliterate both the guilt and the punishment or did it end only the sentence or the punishment without affecting the guilt or the conviction. Qazi Faez Isa, J., got the opportunity once again to write his point of view in more detail about the meaning and implications of Sec. 345 (6) of the Cr.P.C.

His Lordship perused the *Waheed Ahmad* case discussed above, the difference of opinions by the Members of the Full Bench, the SMC, the exclusion of his Lordship from the SMC's Bench, and the opinion of the Bench which had concluded that in case of a successful compounding under Sec. 345 (6) Cr.P.C., an accused or convict is to be acquitted by the "court which acquittal shall erase, efface, obliterate and wash away his alleged or already adjudged guilt in the matter apart from leading to setting aside of his sentence or punishment, if any," and that "the effect of an acquittal" under Sec. 345 (6) "shall include all the benefits and fruits of a lawful acquittal." The majority judgment of Qazi Faez Isa, J., has distinguished the case of *Chairman Agricultural Development Bank v. Mumtaz Khan*,[25] which was relied upon by the Full Bench in the SMC case. In this case, the main question was whether an employee (Mr. Mumtaz Khan)—who had been terminated from service by the Bank because he has been convicted for murder—should be reinstated because he has compromised with the heirs of the deceased. The Federal Service Tribunal, with a split decision of two to one, held that he was entitled to be "reinstated in service with all the back benefits."[26] Thus, he was to be paid salary for the period he was imprisoned and had not been able to work for the Bank. A Divisional Bench of the Honourable Supreme Court dismissed the Bank's appeal and held that "his conviction in the case of murder was the only ground on which he has been removed from service and the said ground has subsequently disappeared through his acquittal, making him re-emerge as a fit and proper person entitled to continue

[25] PLD 2010 SC 695.
[26] Ibid.

with his service."[27] This conclusion was arrived at by the august court because of the understanding of the court of Islamic Jurisprudence, "'*Afw* (waiver) or *Sulh* (compounding) in respect of an offence has the effect of purging the offender of the crime."[28]

Qazi Faez Isa, J., however, opined that before arriving at this conclusion, assistance was not sought from the Attorney General, Advocate Generals, or the government. The honourable court had sought the opinions of law officers of the Federal and the provinces, who opined that "any confusion created by the words 'effect of an acquittal' used in section 345 (6), Cr.P.C. now stands removed by the word 'acquit' used in the subsequently introduced first provision to section 338-E(1), P.P.C. and its interpretation by this Court in the case of *Chairman Agricultural Development Bank and another v. Mumtaz Khan*."[29] His Lordship concluded, "It becomes apparent that proper assistance may not have been rendered in the hearing of the SMC because the relevant law was not cited and the applicable Islamic provisions not referred to. Therefore, in our opinion this issue needs a thorough re-examination." Citing Abdullah Yusuf Ali's English translation of three Qur'ānic verses, 2:178, 5:45, and 42:40, his Lordship concluded, "These verses address the heirs of a murdered person and those who are injured. Forgiveness earns the Reward and Mercy of Almighty Allah. We have not been able to discover a single verse of the Holy Quran which states that if a person is forgiven/pardoned his/her crime is *erased, effaced, obliterated or washed away*."[30] His Lordship has also reproduced the meaning of Arabic word, '*Afw* (waiver), mentioned in section 309 PPC, and argued that the word occurs in thirty different forms in the Qur'ān "but in none of the verses where it is used it means the erasure of the crime even though it has been forgiven."[31] His Lordship has given the English translation of the Qur'ānic verse 42:25, that is, "And He [Allah] is the One that accepts repentance (*tawbah*) from His slaves and forgives"[32] and opined,

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[27] Ibid.
[28] Ibid.
[29] Ibid.
[30] PLD 2019 SC 43, para. 11. The words in Italics are cited by his Lordship Asif Saeed Khan Khosa, J., as he then was, in his SMC judgement.
[31] Ibid.
[32] The translation, however, has few additions or changes although it is almost identical to the one by Abdullah Yusuf Ali. Ali's original translation of the verse is: "He is the One that accepts repentance from His Servants and forgives. . . ." See, Yusuf Ali's translation available at http://corpus.quran.com/translation.jsp?chapter=42&verse=25, accessed on April 14, 2019. Thus, Ali has not used parenthesis and has used the word "Servants,"

> *Tawbah* is not sought for something not done. The wrongdoer may seek forgiveness from the person wronged. Forgiveness is not sought by the innocent. Forgiveness is premised on the acknowledgment of the wrong, which in a case of murder means admitting having committed the murder. It is our understanding that forgiveness or pardon does not erase or obliterate the crime, it simply withholds the punishment. The Quran negates the concept of obliteration of the crime, even if it has been forgiven, and its repetition attracts punishment.[33]

His Lordship cited the Qur'ānic verse 5:95 "Allah forgives what is in the past, for repetition Allah will punish"[34] and concluded, "The record therefore remains intact. Sections 309 and 310 of the PPC respectively attend to the matter of *afw* (waiver) and *sulh* (compounding), but neither section states that *afw* or *sulh* results in the erasure of the crime from the record."[35] While commenting on S. 338-E of the PPC read with 345 Cr.P.C., Justice Isa argues that the court is not bound to accept the compromise and could acquit or award punishment to the accused as *ta'zīr* depending on the nature of the case. He stated,

> The law does not state that the court has to acquit the accused-convict simply because the offence has been waived or compounded. We have not been able to discover any provision either in the PPC or the Code (Cr.P.C.) which explicitly, or impliedly, mandates that a convict's conviction shall be set aside when the compromise is accepted. Nor, in our opinion, can this be done by relying on subsection (6) of section 345, which states that the composition, "shall have the effect of an acquittal.

He also mentioned that the law officers did not cite a single verse of the Qur'ān in giving their opinion in the SMC judgment, that the court had to derive the meaning of the word *'afw* and *ṣulḥ* not from the injunctions of Islam but from Thomas Patrick Hughes' *A Dictionary of Islam*,[36] and that the entry in the said dictionary did not state that in case of *'afw* or *ṣulḥ* by the heirs of the deceased "the crime is erased, effaced, obliterated and or washed away."[37] His Lordship has shown his disdain

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but the judgment has used the word, "Slaves," which is used by Mohsin Khan and is available at the same link.

[33] Shafqat v. the State, PLD 2019 SC 43, para. 14.

[34] The source of the translation is not given and it is not that of Yusuf Ali. His translation is: "Allah Forgives what is past: for repetition Allah will punish." See http://corpus.quran.com /translation.jsp?chapter=42&verse=25, accessed on June 10, 2019.

[35] See Shafqat v. the State, PLD 2019 SC 43, end of para. 14.

[36] Thomas Patrick Hughes, *A Dictionary of Islam* (Lahore: Unit Printing Press, 1964).

[37] See Shafqat v. the State, PLD 2019 SC 43, para. 16.

for the use of old Indian cases, books of philosophy, English language, and foreign law dictionaries in the SMC judgment instead of guidance from the injunctions of Islam under 338-F of the PPC. He states that "forgiveness is premised on guilt having been established and or acknowledged. The Holy Qur'an does not state that if a murderer is pardoned/forgiven he stands exonerated or "acquitted" of the crime." He concludes that "neither Islam, nor the law, permits such largesse to be bestowed upon a murderer who has taken a sacred [life]. It is more than a sufficient benefit when the murderer is no longer imprisoned and is set free."[38] He argues that setting aside the conviction of a murderer "means that he/she did not commit the crime, which creates a factual fiction. And, such factual fiction has repercussions. . . . It may be said that thieves and murderers do not serve society. Hiring or retaining a thief or a murderer as a cashier, teacher, policeman or judge would be irresponsible and dangerous."[39]

It is pertinent to note that Justice Isa does not like citing of Indian cases, a work of philosophy and legal Dictionaries for understanding the meaning of legal terms of Islamic law in the SMC judgment. However, he himself has quoted precedents and jurisprudence of the USA on "pardon by the executive" and considers it as relevant to the case in hand.[40]

Perhaps the strongest points in the majority opinion is that if the interpretation of erasing the crime or conviction is true then, it would negate many sections of the PPC and the Cr.P.C., under which the previous conviction and conduct of the offender is taken into account. His Lordship particularly mentioned Sec. 75 of the PPC, which prescribes enhanced punishment for offenders with previous conviction. Similarly, S. 311 requires the court to consider "past conduct of the offender" and whether he has many "previous convictions."[41] In addition, S. 337-N of the PPC mentions that in cases of hurt the court may in addition to payment of *arsh* (compensation) "award *ta'zir* to an offender who is a previous convict habitual or hardened . . . criminal." Sections 221 (7), 265-I, and 511 of the Code (Cr.P.C.) mention "previous conviction" and sections 348, 497, and 565 "previously convicted" offenders.[42] He asserts, "Therefore, if the previous conviction/s are erased these legal provisions become redundant."[43] He points out that "we are of the view that when

[38] See ibid., para. 18.
[39] Ibid., Para. 19.
[40] See ibid., paras. 20–24.
[41] See ibid., para. 25.
[42] Ibid.
[43] Ibid.

the compromise is accepted it brings to an end the punishment of the offence, but it does not simultaneously result in the setting aside of the conviction and the acquittal of the convict."[44] Mindful of "the principle of stare decisis and that if a bench of a Court which comprises of an equal number of judges does not concur with the views of the other bench a larger bench should be constituted to resolve the matter."[45] Consequently, the case was referred to the Honourable Chief Justice for the constitution of a larger bench so that every aspect of the matter is thoroughly examined. The court ordered the release of the petitioner-convict from jail.

Gulzar Ahmad, J., wrote his dissenting note citing from the SMC judgement[46] of the Full Bench agreeing with the majority of the Bench that the matter be referred to the Chief Justice for the constitution of a larger Bench for determination of the matter. Since the larger Bench has not been constituted to determine this fundamental issue, there is no unanimity in precedent cases "whether a pardon blots out the guilt in addition to the sentence" or only ends the sentence whereas the guilt remains intact.

An Islamic Perspective of Blotting out the Sentence and the Guilt in Case of Pardoning by the Heirs

So far the discussion of whether both the guilt and the sentence are blotted out or only the sentence is erased in case of compounding of murder under the PPC has seen reproduction of many verses of the Qur'ān, especially by Mr. Justice Qazi Faez Isa in his majority opinion discussed above. However, there has been no mention of any *ḥadīth* or the various principles derived by eminent Muslim jurists and scholars from the Qur'ān and the *sunnah* of the Prophet (peace be on him) regarding this issue and issues akin thereto.

It is pertinent to note that as per Section 338-F of the PPC, "In the interpretation and application of the provisions of this Chapter (that is, XVI of the PPC), and in respect of matter ancillary or akin thereto, the Court shall be guided by the Injunctions of Islam as laid down in the Holy Qur'ān and *Sunnah*."[47] This aspect of these provisions has not yet caught the due attention of the judges and which is why a fresh start is needed.

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[44] Ibid., para. 26.
[45] Ibid.
[46] PLD 2018 SC 703.
[47] Sec. 338-F of the PPC.

According to Muḥammad b. Abī Bakr b. al-Qayyim (d. 1350 CE), three rights are attached to murder: the right of Allah, the Exalted; the right of the victim (the murdered); and the right of the heirs of the victim. If the murderer surrenders to the state and repented thoroughly the right of Allah lapses, however, the right of the heirs lapses either with retribution or compounding (*ṣulḥ*) or waiving (*'afw*). As far as the right of the victim is concerned, Allah will reward him from the convicted person who has repented and will bring in *ṣulḥ* between the two. Thus, neither the right of the victim nor the *tawbah* (repentance) of the accused are wasted.[48] According to some jurists, *'afw* plays the role of expiation (*kaffārah*) for the murderer and once he is pardoned by the victim or his heirs he would not be answerable on the day of Resurrection.[49] They differed on the meaning of who was intended in the Qur'ānic verse, "But whosoever forgoes it by way of charity, it will be for him an expiation."[50] Now who is meant in the pronoun "him" above? For some, the pardoner or heirs of the victim are intended while for others the pardoned is meant here. Ibn Kathīr (d. 1373 CE) has provided minute details of the differences among the early jurists on this issue.[51] Muḥammad b. Abī Shaybah (d. 235 AH) has narrated all the *aḥādīth* regarding the interpretation of the above verse (5:45). In one of the reports, it is mentioned that it is expiation for the victim, but as per the opinion of Mujāhid (d. 722 CE), it is for the accused.[52] There are many reports cited by Ibn Abī Shaybah, but there is no consensus about who exactly is intended in the verse. One report mentions that it amounts to expiation whether the accused is pardoned or paid blood-money or is

[48] See Muḥammad b. Abī Bakr b. Qayyim al-Jawziyyah, *al-Dā' wa 'l-Dawā'*, ed. Muḥammad Ajmal al-Iṣlāḥī (Makkah: Dār 'Ālam al-Fawā'id, 1429 AH), 128.

[49] See Muḥammad b. Aḥmad b. al-Jawzī, *Kitāb al-Tashīl li 'Ulūm al-Tanzīl* (Beirut: Dār al-Kitāb al-'Arabī, 1392 AH), 1:178; Abū 'l-Faḍl b. Ḥasan al-Ṭabrisī, *Majma' al-Bayān fī Tafsīr al-Qur'ān* (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, 1379 AH), 3:200; Muḥammad b. Aḥmad al-Qurṭubī, *al-Jāmi' li Aḥkām al-Qur'ān* (Beirut: Dār Iḥ yā' al-Turāth al-'Arabī, n.d.), 6:208; Muḥammad b. Jarīr al-Ṭabarī, *Jāmi' al-Bayān fī Tafsīr Āy al-Qur'ān*, 3rd ed. (Cairo: Maktabat Muṣṭafā al-Bābī, 1329 AH), 6:261–62.

[50] Qur'ān 5:45. The translation of the Qur'ān in this work is taken from Sayyid Abul A'lā Mawdūdī, *Towards Understanding the Qur'ān: English Version of Tafhīm al-Qur'ān*, trans. and ed. Zafar Ishaq Ansari (Leicester: Islamic Foundation, 2016), also available at http://www.islamicstudies.info /tafheem.php.

[51] See 'Imād al-Dīn Ismā'īl b. Kathīr, *Tafsīr al-Qur'ān al-'Aẓīm*, ed. Muṣṭafā al-Sayyid Muḥammad et el (Al-Jīzah: Mu'assasat Qurṭubah, 2000), 5:239–40.

[52] See Muḥammad b. Abī Shaybah, *al-Kitāb al-Muṣannaf fī 'l-Aḥādīth wa 'l-Āthār*, ed. Muḥammad 'Abd al-Salām Shāhīn (Beirut: Dār al-Kutub, 1995), 5:460–61, *ḥadīth* no. 27978.

executed in retribution.[53] A report in *Musnad* of Aḥmad b. Ḥanbal (d. 855 CE) mentions that "Whosoever receives an injury on his body, then pardons (the inflictor of the injury), his sins are atoned for to the measure of his pardoning."[54] Therefore, forgoing one's right of retaliation is atonement of one's sins. In other words, as per this report, the person meant in the verse (5:45) is the victim whose sins are atoned or his legal heirs. As a matter of fact 'Abd Allāh b. 'Abbās, Jābir b. Zayd, and 'Āmir al-Sha'bī argue that the person meant in the verse is the inflictor.[55] However, Jabir b. 'Abd Allāh, Ḥasan al-Baṣrī, Ibrāhīm al-Nakha'ī in one report believe that it is expiation for the victim.[56] As a matter of fact, the accused must completely repent from his grave sin as his pardoning by the legal heirs will drop the punishment in this world only.[57]

It is reported that 'Abd Allāh b. 'Abbās was asked about the fate of a person who killed another Muslim intentionally then repented, became a good Muslim and lived a pious life. He said, "How can he be a righteous person; I have heard your Prophet (peace be on him) saying 'The murderer will be presented before Allah on the Day of Resurrection by the murdered (person) who will be holding his (murderer's) head and will be saying, "O God! Ask him, why did he kill me?"' For God's sake, God has revealed that (Qur'ānic) verse on your Prophet and has never repealed it."[58]

However, what is the legal effect of compounding (*ṣulḥ*) or forgiveness (*'afw*) of the accused under Islamic law? The first legal effect is that his sentence or punishment is removed. However, it is pertinent to note that the crime committed by him remains a crime and his conviction for the crime remains. Only his punishment lapses, but there is no other legal consequence as far as his criminal record of committing a murder is concerned. Under Islamic law, such a convict will be debarred from inheriting from the murdered person if he happens to be his legal heir as well. All the Islamic schools of thought are unanimous

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[53] See ibid., *ḥadīth* no. 27981.
[54] Aḥmad b. Ḥanbal, *Musnad* (Cairo: al-Maṭba'ah al-Maymaniyyah, n.d.) 5:316, 329, 412.
[55] Ibn Kathīr, *Tafsīr al-Qur'ān al-'Aẓīm*, 3:124.
[56] Ibid.
[57] See Zayd b. 'Abd al-Karīm b. Zayd, *al-'Afw 'an al-'Uqūbah fī 'l-Fiqh al-Islāmī* (Riyadh: Dār al-'Āṣimah, 1410 AH), 519.
[58] Muḥammad b. Yazīd b. Mājah, *Sunan*, Kitāb al-diyāt, Bāb hal li qātil Mu'min tawbah, *ḥadīth* no. 2621, also available at http://maktaba.pk/hadith/ibn-e-maja/2621/. With a slight variation of words, this report is available in Muḥammad b. 'Īsā al-Tirmidhī, *Sunan*, Kitāb abwāb al-tafsīr, Bāb wa min Sūrat al-Nisā', *ḥadīth* no. 3029. The Qur'ānic verses referred to above are 20:82 and 4:93.

on this issue although there is some difference among them whether the one who kills intentionally as well as by mistake is permanently debarred or whether it is only about the one who kills with intention. Abū Ḥanīfah endorses the former[59] whereas Mālik adheres to the later view.[60] It is pertinent to note that the Prophet Muḥammad (peace be on him) is reported to have said, "The murderer will not inherit."[61] There are similar reports reported by other narrators of *aḥādīth*. Since a murderer is prevented because of his killing the victim even if he is his closest relative and legal heir, it means that his guilt for the act of killing is very much taken into consideration by the Prophet as well as the Muslim jurists. In other words, forgiveness or compounding does not obliterate, erase or wash away both the guilt and the sentence of the pardoned. Section 307(1) of PPC caters to this issue. It states that "*Qisas* for *qatl-i-amd* shall not be enforced," (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."[62] The right of *qiṣāṣ* devolves on the legal heirs as per the Islamic law of inheritance and their shares in *diyat* or blood-money, if any, are fixed according to their shares in inheritance. Although, the murderer-cum-legal heir avoids one punishment as *qiṣāṣ* is dropped, but he can still be punished under *ta'zīr* or *siyāsah*[63] by the state. Legal heirs may waive their personal right, but they do not have the right to waive or negate the right of the state. Section 311 clearly mentions that the right of the state remains even

[59] There are, however, slight differences among the Ḥanafī Jurists regarding detailed rulings and consequential secondary issues or *furū'*. For further details, see Abū Bakr Muḥammad b. Abī Sahl al-Sarakhsī, *al-Mabsūṭ* (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, 2002), 30:50.

[60] For Mālik and his disciples, only in the case of *qatl al-'amd* (intentional murder), the murderer will not inherit his victim. As for in the case of *qatl al-khaṭa'* (homicide by mistake), he does inherit, except from the *diyah*. See Imran Ahsan Khan Nyazee, trans., *The Distinguished Jurist's Primer: Bidāyat al-Mujtahid* (Reading: Garnet, 1994), 2:436; Wahbah al-Zuḥaylī, *al-Fiqh al-Islāmī wa Adillatuhu* (Damascus: Dār al-Fikr, 1989), 8:260–62. The preferred opinion within the Shāfi'ī school is that in any case of murder, the murderer shall not inherit his victim. See Muḥammad Najīb al-Muṭī'ī, *Takmilat al-Majmū' Sharḥ al-Muhadhdhab li 'l-Nawawī* (Beirut: Dār al-Fikr, n.d.), 17:60–61. For Ḥanbalī jurists, the murder in all these cases will debar the murderer from inheritance of his victim. See 'Abd Allāh b. Aḥmad b. Muḥammad b. Qudāmah, *al-Mughnī* (Beirut: Dār 'Ālam al-Kutub, 1997), 9:152–53.

[61] See al-Tirmidhī, *Sunan*, Abwāb al-farā'iḍ, Bāb mā jā' fī ibṭāl mīrāth al-qātil, *ḥadīth* no. 2109, available at https://sunnah.com/tirmidhi/29.

[62] Sec. 307 (1) (C) PPC, 1860.

[63] For details of the doctrine of *siyāsah*, see Mushtaq Ahmad, "The Doctrine of *Siyāsah* in the Ḥanafī Criminal Law and Its Relevance for the Pakistani Legal System," *Islamic Studies* 52, no. 1 (2013): 29–55.

after compromise or waiver and on that basis the convict can be given a *ta'zīr* punishment. Finally, he is permanently debarred from receiving his share from the assets of the victim under Islamic criminal law. Unfortunately, the Honourable judges have not referred to this issue, which is the most relevant in this discussion. This argument favours the stance and interpretation of his Lordship, Justice Isa.

What one may say about the remarks of his Lordship Chief Justice Khosa that "Through compounding the offence itself is compounded and resultantly the accused person or convict ipso facto stands absolved of the allegation levelled or the charge framed against him regarding commission of that offence and that is why there is no need for recording his acquittal in that connection because through the act of compounding the offence itself has disappeared or vanished"[64] and that compromise or compounding might take place before or during the trial before the guilt is established? It is possible that the accused might be pardoned or a compromise might be reached before or during the trial. In such a case, there is a possibility that the accused might be acquitted by the court and that the compromise denied him the verdict of acquittal. It could be rebutted, however, that if the accused was innocent and was sure of his acquittal why would he be asking for a compromise or get ready to pay for his pardon. The argument that the offence itself has disappeared or vanished by the act of compounding is not appropriate in all cases. In the majority of cases that reached the apex court, the accused was found guilty by the trial court and the same was endorsed by the relevant High Court and compromise was reached during the appeal in the Supreme Court. Thus, at least in the cases beforehand, the argument is not tenable, but it is very relevant if compromise is reached before or during the trial and this gives more weight to the argument of his Lordship, C. J. Khosa discussed above.

According to the Egyptian Muslim jurist 'Abd al-Qādir 'Awdah (d. 1954), "Even if the victim consented to the crime it will still be considered a crime under Islamic law and that only the punishment will be dropped, not because the victim or his legal heirs agreed to the commission of the crime, but because they have the legal right to pardon (the accused)."[65] He reiterates that pardoning (*'afw*) a murderer presupposes murder or that murder is already committed by the accused. If someone is pardoned before the commission of the crime, it has no legal effect, which "means that the right of the victim to pardon

[64] See SMC judgment, para. 10.
[65] 'Abd al-Qādir 'Awdah, *al-Tashrī' al-Jinā'ī Muqaranan bi 'l-Qawānīn al-Waḍ'iyyah* (Beirut: Dār al-Kitāb al-'Arabī, 1401 AH), 1:445.

does not accrue before the crime is committed."[66] Writing about the issue of pardoning the thieves without reporting the crime to the court, Abū Zahrah argues that even if pardoning by the victim leads to dropping the *ḥadd* punishment the accused may be given *ta'zīr* punishment by the court,[67] which may be correspondingly reduced as he is pardoned by the legal heirs of the victim.[68]

Pardoning only Some of the Offenders under Islamic Law

Here is a new proposition that has not yet arisen in our legal system, but might occur one day. If there are two or more offenders and the legal heirs of the victim pardon some of them, what will be the legal effect on the others? According to Ḥanafī jurist Abū Yūsuf Ya'qūb b. Ibrāhīm, *qiṣāṣ* of other offenders will also be dropped in such a case.[69] However, Muḥammad b. al-Ḥasan al-Shaybānī holds that "if the heirs pardon one of the two murderers, they may enforce *qiṣāṣ* against the other if the deceased was killed by both of them. Pardoning one of the offenders does not drop retribution from the rest."[70] Similarly, Abū Bakr Muḥammad b. Abī Sahl al-Sarakhsī views that "'*afw* (pardoning) of one of the murderers does not make *qiṣāṣ* from the other invalid. The same is the case in the instance of a compromise with one of them."[71] Abū Bakr b. Mas'ūd al-Kāsānī supports Shaybānī and Sarakhsī's view and asserts that the other offenders shall remain liable to execution, as only the punishment of the specific person is dropped. He remarks, "If one of them is pardoned, *qiṣāṣ* is dropped from him and he [the heir] may enforce *qiṣāṣ* against the other, because each of them was liable to *qiṣāṣ* and pardoning one of them does not amount to pardoning the other."[72] Thus, pardoning in such a case has no consequences beyond the pardoned murderer in view of Shaybānī, Sarakhsī, and Kāsānī. The majority of Muslim jurists hold the same view.[73]

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[66] Ibid., 1:444.
[67] Muḥammad Abū Zahrah, *al-Jarīmah wa 'l-'Uqūbah fī 'l-Islām* (Cairo: Dār al-Fikr al-'Arabī, 1998), 73.
[68] See Zayd, *al-'Afw 'an al-'Uqūbah*, 520.
[69] See Abū Bakr b. Mas'ūd al-Kāsānī, *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'* (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, 2000), 6:294.
[70] Muḥammad b. al-Ḥasan al-Shaybānī, *al-Aṣl* (Beirut: Dār Ibn Ḥazm, 2012), 6:585.
[71] Sarakhsī, *al-Mabsūṭ*, 26:159.
[72] Kāsānī, *Badā'i'*, 6:293-94.
[73] Ibid., 6:294-95; Mālik b. Anas, *al-Mudawwanah al-Kubrā* (Beirut: Dār Ṣādir, n.d.), 6:435; Muḥammad b. Idrīs al-Shāfi'ī, *al-Umm* (Beirut: Dār al-Ma'rifah, 1393 AH), 6:10; Muḥammad b. Aḥmad b. Ḥamzah al-Ramlī, *Nihāyat al-Muḥtāj ilā Sharḥ al-Minhāj* (Cairo: Maktabah wa Maṭba'at Muṣṭafā 'l-Bābī al-Ḥalabī, 1386 AH), 7:274; 'Abd Allāh b. Aḥmad b.

What is the legal status if one or more legal heirs, but not all of them, pardon the murderer? Sarakhsī holds that "when retribution of [*qatl-i*] '*amd* is shared between two persons and one of them pardons (the murderer), there will be no *qiṣāṣ*."[74] He argues that in this case *qiṣāṣ* is dropped, because "the share of the pardoner is dropped due to pardon, so the share of the other heir is also dropped, because it [*qiṣāṣ*] cannot be split."[75] According to Muḥammad Najīb al-Muṭī'ī of the Shāfi'ī school, "if a group had the right to *qiṣāṣ* and some of them pardoned [the accused], the right of others in *qiṣāṣ* would also be dropped."[76] Therefore, *qiṣāṣ* will be dropped in a case where two or more heirs share the right of *qiṣāṣ* and the murderer is pardoned by some of them.

What is the legal status if the legal heirs withdraw their intention to get blood-money to compound the case before the same is accepted by the murderer? Such a withdrawal is not valid according to the Shāfi'ī and the Ḥanbalī schools and one view within the Mālikī school, because compounding the *qiṣāṣ* in return for blood-money is effective without being dependent on the consent of the murderer.[77] Therefore, once the legal heirs chose to compound the *qiṣāṣ* in return for blood-money, the blood-money would be compulsory on the wrongdoer even if he did not accept it and they would not be allowed to return to the *qiṣāṣ*. However, according to the Ḥanafīs and the dominant view of the Mālikī school, such withdrawal is valid, because the intention to get blood-money to compound the case is not effective unless the murderer accepts the same. They argue that acceptance of the condition by the murderer to pay blood-money is mandatory, because it is a kind of *ṣulḥ* (compromise) between the two, which requires the consent of both sides, that is, the legal heir(s) and the murderer.[78] However, according to Abū Ḥanīfah, the *qiṣāṣ* will be dropped just by the legal heirs' demand for blood-money on the basis of the *istiḥsān* due to the doubt (*shubhah*) resulted from the demand of blood-money. For Mālik, the omission of the retaliation is

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Muḥammad b. Qudāmah, *al-Mughnī* (Riyadh: Maktabat al-Riyāḍ, 1401 AH), 7:751; Manṣūr b. Yūnus al-Buhūtī, *Kashshāf al-Qinā' 'an Matn al-Iqnā'* (Beirut: 'Ālam al-Kutub, 1403 AH), 5:515.

[74] Sarakhsī, *al-Mabsūṭ*, 26:160.

[75] Kāsānī, *Badā'i'*, 6:294.

[76] Muṭī'ī, *Takmilah*, 18:476.

[77] See Buhūtī, *Kashshāf al-Qinā'*, 5:544; 'Abd Allāh b. Aḥmad b. Muḥammad b. Qudāmah, *al-Sharḥ al-Kabīr* (Riyadh: Kulliyyat al-Sharī'ah, n.d.), 5:438; Zayd, *al-'Afw an al-'Uqūbah*, 2:90-91; Abū Zahrah, *al-Jarīmah wa 'l-'Uqūbah fī 'l-Islām*, 481; 'Awdah, *al-Tashrī' al-Jinā'ī*, 1:776.

[78] Muḥammad 'Arafah al-Dusūqī, *Ḥāshiyat al-Dusūqī 'alā Sharḥ al-Kabīr* (Beirut: Dār Iḥyā' al-Kutub al-'Arabiyyah, n.d.), 4:240; Zayd, *al-'Afw an al-'Uqūbah*, 289-90.

conditional on the wrongdoer's acceptance to pay blood-money.[79] Zayd b. 'Abd al-Karīm remarks, "'*Afw* for Ḥanafīs and Mālikīs is pardoning the wrongdoer for free; whereas dropping the *qiṣāṣ* in return for blood-money is not considered '*afw* to them. It is *ṣulḥ* and it is effective only if accepted by the wrongdoer."[80]

Conclusions

At the end, the most important formulations of this discussion may be summed up here. Provisions of the PPC and the Cr.P.C. regarding *qiṣāṣ* and *diyat* were originally introduced in 1990 and are now part of the PPC and Cr.P.C. as per the Criminal Law (Amendment) Act, 1997 (Act No. II of 1997), which have brought about far reaching consequences in Pakistani legal system. The most important changes are that an accused found guilty of murder or serious bodily injury may be pardoned with or without compensation or blood-money. One issue that has divided opinions of the Honourable judges within the Supreme Court of Pakistan is whether both the guilt or conviction as well as the sentence or punishment of an accused are obliterated or erased when he is pardoned by the legal heirs of the victim in case of murder or whether only the punishment is obliterated whereas the guilt stands. The Supreme Court has clarified many twisted legal issues. Judges of the Honourable Supreme Court have given their opinions from existing Pakistani case law, cited cases from foreign jurisdictions, or cited secondary sources. Justice Asif Saeed Khan Khosa has preferred the view that both the guilt as well as sentence of a convict are obliterated if pardoned with or without compensation. He clearly articulated his view in the Suo Moto Case No. 03 of 2017 known as the SMC. However, Justice Qazi Faez Isa holds that only the sentence is affected whereas the conviction remains. He has given very convincing arguments in *Shafqat v. the State* case.[81] However, request had to be made for the constitution of a larger bench of the Supreme Court as another Full Bench has given the opposite interpretation. Their Lordships do not go into details or analysis of legal texts of the Qur'ān and the *sunnah* of the Prophet, which is required under section 338-F of the PPC. Their Lordships have given neither *aḥādīth* of the Prophet Muḥammad (peace be on him) nor the opinions of Muslim jurists and scholars in support of their views regarding this issue.

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[79] See Abū Zahrah, *al-Jarīmah wa 'l-'Uqūbah fī 'l-Islām*, 481.
[80] See Zayd, *al-'Afw an al-'Uqūbah*, 43.
[81] PLD 2019 SC 43.

As per the opinions of Muslim jurists pardoning the accused by the legal heirs amounts only to obliterating or erasing the sentence or the punishment and he remains a convict for his crime and may be given a *ta'zīr* punishment if the court considers it suitable. Moreover, such a convict will be debarred from inheriting from the murdered person if he happens to be his legal heir as well. In other words, *'afw* or pardon does not erase, obliterate, wash away or blot out his guilt and only his sentence or punishment is obliterated. Muslim jurists have differed on the interpretation of the Qur'ānic verse 5:45 whether pardoning is an expiation for the accused or the victim. Moreover, in case of two or more accused, according to the majority of Muslim jurists, if one or more of the accused are pardoned by the legal heirs, it will not affect the punishment to be given to the remaining accused. Withdrawal by the legal heirs to pardon the accused with compensation has no legal effect as per the view of the majority of Muslim jurists.

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