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The Qisas and Diyat Law in Pakistan: Prosecution of Offence of Murder

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Abstract

The penal laws adopted and practiced by Muslims in the modern period are an appraisal of their adherence to the Qur'ānic principles of justice and contemporary human rights law. In 1990, Pakistan incorporated amendments in Pakistan Penal Code to make the penal laws of the country in consonance with the Qur'ān and the sunnah*—a constitutional obligation. However, Pakistan's existing law of homicide does not completely comply with the Qur'ānic principles of justice and human rights. The paper argues that the Qisas and Diyat Law of Pakistan has further complicated the prosecution of offence of murder on the following grounds: (a) power of legal heirs to waive off or compound the offence of intentional murder (*qatl-i ʻamd*) at any stage of the trial; (b) controversy over the interpretation of some sections of the law related to* qatl-i ʻamd *not liable to* qiṣāṣ*; (c) jurisdiction of the court to award punishment of* taʻzīr *in cases of* fasād fī 'l-arḍ *wherein* qiṣāṣ *is waived or compounded.*

Keywords

Qisas and Diyat Law, Pakistan, prosecution, murder, *qatl-i ʻamd*.

Introduction

This research paper briefly discusses the criminal justice system in the *sharīʻah*. It traces the origins of the Qisas and Diyat Law in both the judiciary and the parliament of Pakistan and elucidates how the right of legal heir to waive and compound offence of murder at any stage provides escape route to the powerful. It also illuminates how the law discriminates against women. Moreover, it evaluates cases of the Supreme Court in which courts awarded punishment without taking into account tangible difference between *qatl-i ʻamd* (intentional murder) liable to *qiṣāṣ* (retaliation) and *qatl-i ʻamd* liable to

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ta'zīr (discretionary punishment). The paper discusses how the courts made conflicting interpretations of the provisions of the law dealing with situations where *qiṣāṣ* for *qatl-i 'amd* is not liable or enforceable. It concludes with enumerating challenges faced by the courts in enforcement of *ta'zīr* after waiver or compounding of the right of *qiṣāṣ* in case of *qatl-i 'amd*.

Crime and Punishment in the *Sharī'ah*

The word crime (*jurm*) has been used in many verses,[1] but the Qur'ān did not give legal definition of crime or the law of procedure to prosecute an offender except in the case of *zinā* (fornication)[2] and *qadhf* (false accusation of fornication).[3] Islamic jurisprudence emerged as a distinguished Islamic science around 150/767, as different Muslim jurists made significant contributions to its evolutionary growth.[4] The various schools of Islamic jurisprudence differed from each other in terms of the interpretations of the Islamic texts (*nuṣūṣ*), customs, social environment, and political allegiance.[5]

The second century of Islamic calendar saw tremendous and rapid development of technical legal thought. Muslim jurists (*fuqahā'*) defined crimes "in terms of punishments."[6] In criminal law of Islam, jurists placed crimes into three different categories: (a) *ḥudūd*[7] (fixed penalties), (b) *qiṣāṣ*[8] (retaliation), and (c) *ta'zīr* (discretionary punishment).[9] Literally, a *ḥadd* means preventing the offender from committing an offence or repeating it. The *ḥudūd* penalties are also classified as rights of Allah. Many jurists including 'Alī b. Muḥammad al-Māwardī (d. 1058 CE) consider all of the *ḥudūd* penalties specially defined punishments.[10] Hence, *qiṣāṣ* was not part of the *ḥudūd*, because it is mostly considered the right of human beings. However, the Shāfi'ī jurists recognise

[1] Qur'ān 77:46; 8:8; 10:82.
[2] Ibid., 24:2.
[3] Ibid., 24:4.
[4] Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Oxford University Press, 1964), 40.
[5] Jamal J. Nasir, *The Islamic Law of Personal Status* (London: Graham & Trotman, 1986), 3.
[6] Mahgoub El-Tigani Mahmoud, *The Sources of Islamic Jurisprudence: Justice and Law in Islam* (Lewiston: Edwin Mellen Press, 2014), 85.
[7] In Arabic language, the word *ḥadd* is used in several meanings, such as edge, border, extremity, terminus, and limit.
[8] It means retaliation, homicide, and personal injury and forms the second type of offence—falling between *ḥudūd* laws and torts.
[9] It means censure or reprimand, but it is discretionary punishment.
[10] Muḥammad Abū Zahrah, *al-Jarīmah wa 'l-'Uqūbah fī 'l-Fiqh al-Islāmī* (Cairo: Dār al-Fikr al-'Arabī, 1988), 25.

the *qiṣāṣ* as a *ḥadd*, which they saw as encompassing both homicide (*qatl*) and bodily harm (*jināyah*).[11]

Edward William Lane (d. 1876) defines the Arabic word *qiṣāṣ* as "retaliation."[12] Muhammad Asad (d. 1992) translates it as "synonymous with *musawah*, i.e., making a thing equal, making the punishment equal to the crime—'just retribution.'"[13] Wael Hallaq opines that the *qiṣāṣ* is not an exclusive act of revenge, but "the considered and measured equalization (supervised in all cases, by the Qadi) of loss of either limb or life."[14] Section 299 (K) Pakistan Penal Code defines the *qiṣāṣ* as, "punishment by causing similar hurt at same part of the body of the convict as he has caused to the victim or by causing his death."[15]

The third category of crimes (i.e., *taʿzīr*) refers to discretionary punishments that Muslims rulers exercised "due to the absence of a Sharia's text to determine the deserved penalty."[16] In the beginning, the *taʿzīr* was discretion of the court, but it never meant that judge had unfettered power to inflict punishments. With the passage of time, the punishments of *taʿzīr* were codified. The word *taʿzir* as defined in section 299(l) of Pakistan Penal Code means "punishment other than *qisas*."

The penalties in Islamic jurisprudence were not legislated for random and arbitrary implementation. In fact, "Muslim jurists exhibited concrete concerns over the authenticity of evidence, the legality of pre-trial investigation, and provision of sufficient space for post-trial revisions and corrections."[17] The *summum bonum* of the Islamic criminal justice system is that it is applied equally on all humans, regardless of their status or class.[18] Muhammad Munir argues that the Islamic criminal justice system was ahead of its time and it recognised all safeguards and guarantees of fair trial fourteen hundred years ago, which were essential elements of criminal justice system of the twenty-

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[11] Wael B. Hallaq, *Sharia: Theory, Practice, Transformation* (New York: Cambridge University Press, 2009), 310–11.
[12] Edward William Lane, *An Arabic-English Lexicon* (London: Williams and Norgate, 1872), 2528, s.v. *q-ṣ-ṣ*.
[13] Muhammad Asad, *The Message of the Quran* (Gibraltar: Dar Al-Andalus, 1980), 71.
[14] Hallaq, *Sharia*, 310.
[15] Pakistan Penal Code, sec. 299(K).
[16] Manṣūr Muḥammad Ḥifnawī, *al-Shubuhāt wa Atharuhā fī 'l-'Uqūbah al-Jināy'iyyah fī 'l-Fiqh al-Islāmī Muqāranan bi 'l-Qānūn* (Cairo: Maṭbaʿat al-Amānah, 1986), 37.
[17] Mahgoub El-Tigani Mahmoud, *Criminology and Penology in Islamic Jurisprudence* (Lewiston: Edwin Mellen Press, 2015), 165–66.
[18] Ibid., 140.

first century.[19] Islamic laws are based on equitable principles, "ensuring to individuals perfect equality of rights."[20]

Development of Qisas and Diyat Law in Pakistan

During the process of Islamisation, the Federal Shariat Court (FSC) was established to review the repugnancy of existing laws of Pakistan to Islam.[21] By invoking constitutional jurisdiction, the FSC directed the federal government in its three judgments[22] to review penal laws of the country in conformity with the Qur'ān and the *sunnah*. From 1980 to 1989, both the judiciary and the parliament had intensive discussion on repercussions and implications of the draft legislation. In 1990, in compliance with judgments of the court, the sections of Pakistan Penal Code dealing with murder and bodily hurt were amended in line with Islamic jurisprudence. Subsequently, the law was enacted by the parliament in 1997. In this process, the court played a leading role. That is why, Martin Lau rightly observes that "the Islamisation of laws in Pakistan has been primarily a judge-led process."[23]

In fact, the Qisas and Diyat Law was enacted without developing any consensus among the members of the parliament. It is noteworthy that the National Assembly of Pakistan debated the draft law of homicide and bodily hurt in 1993,[24] but it could not become legislation. On April 7, 1997, the law was tabled in the National Assembly for its approval.[25] The parliament passed the bill within thirty minutes without observing the procedure prescribed under its statute. In this context, the prior notice was not served to the members of the parliament nor was the bill debated by the Standing Committee or Select Committee before its approval by the National Assembly.[26] Syed Naveed Qamar raised the objection regarding the abrupt introduction of the law as follows: "We are suspending rules so that we can

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[19] Muhammad Munir, "Fundamental Guarantees of the Rights of the Accused in Islamic Criminal Justice System," *Hamdard Islamicus* 40, no. 4 (2017): 45-46.
[20] Syed Amir Ali, *The Spirit of Islam* (London: Chatto & Windus, 1922), 289.
[21] Presidential Order No. 1, 1980, The Constitution of Islamic Republic of Pakistan 1973, article 203 D (1).
[22] Gul Hassan Khan v. the Government of Pakistan, PLD 1980 Peshawar 1; Muhammad Riaz etc. v. the Federal Government of Pakistan, PLD 1980 FSC 1; and The Federation of Pakistan v. Gul Hassan Khan, PLD 1989 SC 633.
[23] Martin Lau, *The Role of Islam in Legal System of Pakistan* (Leiden: Martinus Nijhoff, 2006), 1.
[24] "The National Assembly of Pakistan Debates: Official Report," vol. 2, no. 6 (June 10, 1993), p. 606, http://www.na.gov.pk/uploads/documents/1459320457_248.pdf.
[25] Ibid., vol. 4, no. 7 (April 7, 1997), p. 577, http://www.na.gov.pk/uploads/documents /1459577438 _817.pdf.
[26] Ibid., p. 578.

pass a law without getting anything to Committee."[27] The opposition walked out.[28] The Lahore High Court endorsed the fact in its observations made in *Abid Hussain v. the State* that the law was incorporated into the criminal justice system without any serious arguments or cogitation.[29]

Leading Muslim scholars have consensus that the *ḥudūd* and *qiṣāṣ* penalties are ideally enforced only by an ideal authority in egalitarian Muslim society. Abū 'l-A'lā Maudūdī (d. 1979) rightly observes that an isolated provision of Islamic law cannot do any miracles without addressing the economic, social, and political problems of society.[30] Salim el-Awa[31] and Mohammad Hashim Kamali also endorse Maudūdī's standpoint that the Islamic criminal justice system in an alien environment is not only unrealistic, but most likely produces the opposite results—frustration with the Islamic vision of justice and fair play.[32] The law was grafted onto the penal system of Pakistan without taking into account the social matrix of society. Consequently, the law entailed legal and social complications in its implementation.

The Power of Legal Heir to Pardon off at any Stage of the Trial

The law had profound impact on process of prosecution of the offence of murder. The law shifted the emphasis from homicide as a crime against the state to a private offence against the victim. Evan Gottesman rightly observed, "The law overhauls Pakistan's British-written criminal legal code and marks a profound shift away from the British system of state control over punishment."[33]

Section 309 of PPC empowers a sane adult legal heir to "waive his right of *Qisas*" in murder without compensation at any stage of trial or after conviction.[34] Moreover, section 310 permits the sane legal heir to forgive the offender in lieu of financial compensation.[35] In this regard, *badl-i ṣulḥ* (financial

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[27] Ibid.
[28] Ibid., p. 585.
[29] Abid Hussain v. the State, PLD 2002 Lahore 482.
[30] S. Abul A'la Maudūdī, *Islamic Law and Its Introduction in Pakistan*, trans. Khurshid Ahmad (Lahore: Islamic Publications Limited, 1970), 19–20.
[31] Mohamed S. el-Awa, *Punishment in Islamic Law* (Indianapolis, IN: American Trust Publications, 1982), 136.
[32] Mohammad Hashim Kamali, "Punishment in Islamic Law: A Critique of the Hudud Bill of Kelantan, Malaysia," *Arab Law Quarterly* 13, no. 3 (1998): 229.
[33] Evan Gottesman, "The Re-emergence of Qisas and Diyat in Pakistan," *Columbia Human Rights Law Review* 23, no. 2 (1992): 433.
[34] Pakistan Penal Code, sec. 309.
[35] Ibid., sec. 310.

compensation) is explained under section 310 as "the mutually agreed compensation according to Shari'ah to be paid or given by the offender to a wali in cash or in kind or in the form of moveable or immovable property."[36] As a safeguard, the section 310-A categorically prohibits exchange of woman as a compensation to waive the right of *qiṣāṣ*. The Supreme Court of Pakistan defines the concepts of *'afw* and *ṣulḥ* as follows: "Waiver-*Afw* (forgiveness without accepting any compensation) and Compounding-*Sulh* (compounding on accepting *badal-i-sulh*/compensation)."[37]

The right of legal heirs to waive or compound *qiṣāṣ* at any stage of the trial entails many social and financial complications. First, the law does not stipulate any explicit guidelines to the courts how to gauge fairness of the compromise. Consequently, the process of compromise results in coercion and corruption in some cases. In this respect, the judgments of the FSC[38] did not rule out the possibility that legal heir could be subjected to social and economic pressure to accept compromise. Against this backdrop, the FSC suggested that the high courts should be only competent court to monitor the "the genuineness of compromise."[39]

The perusal of the National Assembly debate on the law reflects that many members of the assembly showed their concern regarding the viability of the law. In this regard, in 1993, Syed Zafar Ali Shah, a member of opposition, highlighted the issue that legal heirs were more vulnerable to accept compromise under intimidation and compulsion.[40] The Lahore High Court, in *Ghulam Shabir v. Mst. Zanib Bibi*, noted that in numerous cases the indigent legal heirs of a deceased could not sustain the pressure and were forced to resort to compromise to accept *diyat* (blood money).[41]

Second, the right of the *valī* to compound *qiṣāṣ* at any stage of the trial had an impact on the process of investigation and trial. In the recent past, the two most widely reported cases showed how the powerful and the rich exploited the law. On January 27, 2011, Rammond Davis, the American Central Intelligence (CIA) contractor, killed two men in an accident in Lahore. The trial of the accused was under progress in the special court held at

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[36] Ibid.

[37] The Supreme Court of Pakistan, *Suo Motu* Case No. 03 of 2017, regarding the issue as to whether compounding of an offence under section 345, Cr.P.C. amounts to acquittal of the accused person or not, para. 7.

[38] Gul Hassan Khan v. the Government of Pakistan, PLD 1980 FSC 187; Mohammad Riaz v. the Federal Government, PLD 1980, FSC 187.

[39] Muhammad Riaz v. the Federal Government PLD 1980 FSC 30.

[40] "The National Assembly of Pakistan Debates: Official Report," vol. 2, no. 6. (June 10, 1993), p. 614, http://www.na.gov.pk/uploads/documents/1459320457_248.pdf.

[41] Ghulam Shabir v. Mst. Zanib Bibi, 1999 MLD 585.

Central Jail, Lahore. During the trial, on March 16, 2011, the trial court ordered to release Davis on the ground that the legal heirs accepted blood money that was worth 2.4 million. The swift release of Davis left behind many doubts and questions regarding the settlement of the double-murder case. The counsel of the victims' families alleged that the government forced the families to accept the *diyat*.[42]

In another case, the anti-terrorism court sentenced Shahrukh Jatoi and Siraj Talpur, charged with gruesome murder of Shahzeb Khan in June 2013. The case exposed flaws of the trial of murder under prevalent criminal justice system of Pakistan. The condemned prisoner, Shahrukh Jatoi managed to persuade the legal heirs of the slain Khan to forgive the killer under influence of wealth and social pressure. The legal heirs of (the murdered) Khan could not sustain the pressure and influence and eventually submitted an affidavit of forgiveness of their son's murderer.

During the last decade of the eighteenth century, the British also pointed out social and legal complications involved the right of legal hair to pardon the killer. It is pertinent to mention that the Qisas and Diyat Law was applicable to all religious groups equally during the Muslim rule in India during the eighteenth century. This law was acceptable to Brahmin as a class, because the probability of their execution was remote and in practice 'Gentoo' lower class Hindu, could not afford to opt for *qiṣāṣ* in case of Brahmin.[43] On December 3, 1790, Lord Cornwallis observed,

> The evil consequences, and the crimes which hereby escape punishment, are so manifest and frequent, that to take away the discretion of relations seems absolutely requisite to secure an equal administration of justice and will constitute a strong additional check on the commission of murder, and other crimes.[44]

Moreover, the British pointed that the law contemplated offence of murder against an individual not a society or state.[45] To secure equal administration of justice the right of the victim's relatives to forgive a murderer, enforced in India under Islamic law, was amended in 1790 through

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[42] http://www.bbc.co.uk/news/world-south-asia-12757244, accessed on April 20, 2016.

[43] Charles Grant, *Observations on the State of Society among the Asiatic Subjects of Great-Britain particularly with respect to Morals and on the Means of Improving It* (London: House of Commons, 1813), 35.

[44] Ibid.

[45] Mahabir Prashad Jain, *Outline of Indian Legal History* (Bombay: N. M. Tripathi, 1981), 489.

promulgation of a regulation.[46] The amendment enacted the principle that "the relatives be debarred from pardoning the offender in future instances and that the law be left to take its course."[47] Finally, the Indian Penal Code 1860 and Code of Criminal Procedure 1898, contrary to Islamic penal laws, empowered the state to punish and grant pardon.

Discrimination against Women

The Qisas and Diyat Law implicitly gave legitimacy to the murder committed in the name of honour. Before the enactment of the Qisas and Diyat Law, the Indian Penal Code 1860 did not reckon culpable homicide as murder under the provision of "grave and sudden provocation."[48] In *Gul Hassan Case v. Federation of Pakistan,* the court stated that Islamic jurisprudence does not permit to dilute the intensity of offence of murder under the plea of "sudden and grave provocation."[49] The plea of provocation was argued and accepted in the courts in mitigation even though the provision as such no longer exists in the law.[50] In this regard, the judges invoked section 338(F) that empowered the judiciary to interpret the law in light of the *sharī'ah*.[51] However, unfortunately no comprehensive plan was chalked out for the training of judges to sensitise them to the Islamic laws in order to perform their professional role in accordance with the law.[52]

Against this backdrop, the judiciary made its own interpretation of the *sharī'ah* to apply the law. In *Ghulam Yasin and two others v. the State*, the court exercised the powers under article 338(F) and made distinction of intentional murder (*qatl-i 'amd*) from the murder committed on account of honour.[53] The court noted that the accused who was proved guilty of offence of murder (*qatl*) committed the crime as consequence of honour, hence, merited concession.[54]

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[46] James Norman Dalrymple Anderson and Noel James Coulson, *Islamic Law in Contemporary Cultural Change* (Zurich: Verlag K. Alber, 1967), 42.

[47] James Edward Colebrook, *Supplement to the Digest of the Regulations and Laws Enacted by the Governor General in Council for the Civil Government of the Territories under the Presidency of Bengal* (Calcutta: n.p., 1807), 155. The instruction was further issued in detail in regulation 1793/9, secs. 55, 76 and regulation 1797/4, secs. 3, 4.

[48] Indian Penal Code, 1860, sec. 300.

[49] Gul Hasan Khan v. Government of Pakistan, PLD1980 FSC 187, 674.

[50] Sohail Akbar Warriach, "'Honor Killings' and the Law in Pakistan" in *Honour: Crimes, Paradigms, and Violence against Women*, ed. Lynn Welchman and Sara Hossain (London: Zed Books, 2005), 96.

[51] Pakistan Penal Code, sec. 338(F).

[52] Tahir Wasti, *The Application of Islamic Criminal Law in Pakistan: Sharia in Practice* (Leiden: Brill, 2009), 194.

[53] Ghulam Yasin and two others v. the Sate, PLD 1994 Lah. 392.

[54] Ibid., at 397.

In *Ghulam Hussain alias Hussain Bakhsh v. the State and another*, the Supreme Court validated "sudden provocation" as mitigating circumstance to commute the sentence of murder.[55] In *Muhammad Rafique v. the State,* the Lahore High Court granted benefit to the murderer on account of sudden provocation, who killed his wife due to her violation of social norms.[56] In *State v. Abdul Waheed and another*, the Supreme Court observed that the murder of wife committed by husband due to honour should not be awarded the punishment of the *qiṣāṣ*.[57] The Supreme Court endorsed the act of husband who killed the person who was caught red handed in doing sex with his wife on the account of sudden provocation.[58]

On the contrary, the case law shows that judiciary in Pakistan adopted an opposing stance in a series of judgments.[59] In *Muhammad Siddique v. the State*,[60] the Lahore High Court upheld the trial court's punishment of death penalty to a man who killed his daughter, the husband of the daughter, and their child, regardless of the fact that the compromise had been concluded between the parties. In *Ashiq Hussain v. Abdul Hameed*, the court reiterated that murder could not be defended to glorify custom, creed, and tribe.[61] Similarly, the Supreme Court, in *Muhammad Saleem v. the State* categorically denounced the practice of killing a person in the name of honour.[62]

Contradiction in Interpretation of Exceptions to *Qatl-i 'Amad* Liable to *Qiṣāṣ*

Section 299 of PPC prescribes two punishments for intentional murder (*qatl-i 'amd*) as *qiṣāṣ* and *ta'zīr*. Section 304 of PPC contains two requisites for the award of the punishment of *qiṣāṣ*: First, the accused facing the charges of offence of murder makes a candid confession without any coercion and temptation;[63] second, the witnesses meet the threshold of competence (*tazkiyat al-shuhūd*) as enunciated by the law of evidence.[64] If the evidence against the accused offender does not meet the aforesaid standard, the accused will get

[55] Ghulam Hussain alias Hussain Bakhsh v. the State and another, PLD 1994 SC 31.
[56] Muhammad Rafique v. the Sate, PLD 1993 Lahore 848.
[57] The State v. Abdul Waheed and another, 1992 P Cr. LJ 1596.
[58] The State v. Muhammad Hanif, 1992 SCMR 2047.
[59] Warriach, "'Honor Killings' and the Law in Pakistan," 96.
[60] Muhammad Siddique v. the State, PLD 2002 Lahore 444, 454.
[61] Ashiq Hussain v. Abdul Hamed, 2002 P Cr L.J 859.
[62] Muhammad Saleem v. the State, PLD 2002 SC 558.
[63] Pakistan Penal Code, 1860. sec. 304.
[64] The *Qanun-e-Shahadat* Order 1984, article 17.

punishment of *ta'zīr*. It means that the nature of sentence—whether *qiṣāṣ* or *ta'zīr*—is determined by the standard of the proof.[65]

The law enumerates some exceptions wherein the punishment of *qiṣāṣ* in *qatl-i 'amd* is neither "liable" nor "enforceable."[66] It includes cases when the offender is minor or insane, or the offender causes death to his child or grandchild, or any *valī* of the victim is a direct descendent of the offender. In line with the provisions of the law, those cases which fall under the aforesaid exceptions to punishment of *qiṣāṣ*, the offender who is found guilty of *qatl-i 'amd* will get the punishment of *diyat* under section 308. As the statutory provisions clearly show, the exception is for those who are convicted of murder under 302(a).

However, there are series of cases wherein the Supreme Court extended the benefit of exception to the convicts who were punished as *ta'zīr* under 302(b). In this context, the Supreme Court granted benefit to the death row prisoner, Khalil-uz-Zaman, who was charged with killing of his wife and survived one minor child.[67] The aforesaid judgment of the August Supreme Court proved to be pioneering precedent case wherein the Supreme Court provided relief to those who were awarded punishment for the commission of offence of *qatle-i 'amd* and punished under section 302(b) with *ta'zīr*, but they yet qualified to get benefit of exception under section 306 and 307 of PPC.

In 2015, the Supreme Court, in *Zahid Rehman v. the State*[68] attempted to end controversy and ambiguity. The court did the survey of all the reported judgments of the Supreme Court on the subject and concluded that *qiṣāṣ* and *ta'zīr* are two different and "exclusive punishments," which do not "overlap."[69] Moreover, the exceptions where the punishment of *qiṣāṣ* is not liable or cannot be enforced have no relevance to the punishment of *ta'zīr*, hence, applicable cases of *qiṣāṣ* only.[70]

Ta'zīr after Waiver or Compounding of the Right of *Qiṣāṣ* in *Qatl-i 'Amd*

The tension between the empowerment of the victims and needs of the state has always engaged Muslim scholars. It is argued that "the safety of the community requires that the state retain the right to impose *ta'zir* in case of

[65] Pakistan Penal Code, sec. 304.
[66] Ibid., secs. 306-07.
[67] Khalil-uz-Zaman v. Supreme Appellate Court, Lahore and 4 others PLD 1994 SC 885.
[68] Zahid Rehman v. the State PLD 2015 SC 77, 29.
[69] Ibid.
[70] Ibid.

pardon or settlement.'[71] Mahmood Ahmad Ghazi (d. 2010) defends the state's power to punish the murderer in order to protect the right of society.[72] If in a case, *qiṣāṣ* is inapplicable due to waiver, the court may award *ta'zīr* punishment under the principle of *fasād fī 'l-arḍ* (serious disruption in society). However, it has been the general practice that the court does not impose any kind of punishment on the accused of murder in case of compromise between the parties.[73] Consequently, the person who commits an offence of murder is released.

The concept of *fasād fī 'l-arḍ* is still very much subject for debate due to its diverse interpretations. The section 311 of PPC enlists honour killing under *fasād fī 'l-arḍ* and its punishment is not less than ten years imprisonment in case legal heirs forgive the killer under the law.[74] Moreover, this section explains that the court will take account of the previous convictions of the convict, the manner of killing, and the threat that the offender may pose to society. However, it is difficult for the court to determine a murder that created a sense of insecurity and unrest in society. This section also permits the court to determine an act of murder as *fasād fī 'l-arḍ* through sketch of imagination.

Conclusion

The majority of Muslim jurists argue that the Qur'ān and the *sunnah* of the Prophet permit to forgo the *qiṣāṣ* punishment in case of *qatl-i 'amd*. The legal heir(s) may pardon the punishment of *qiṣāṣ* of the convict either against *diyat* or without accepting any compensation. The Qur'ānic verse that contains the command of *qiṣāṣ* gives the option of forgiveness and reconciliation.[75] The underlying principle of this divine rule is to promote justice as well as life.

As a constitutional obligation, in 1990 the government of Pakistan incorporated amendments in the provisions of the chapter sixteen of Pakistan Penal Code in conformity with the Qur'ān and the *sunnah*. However, it is argued that Pakistani Qisas and Diyat Law was enforced without conducting a rigorous research on Islamic criminal justice system and taking into account unequal distribution of wealth and power among different strata of Pakistani society. Consequently, the power of legal heirs to waive or compound the

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[71] Gaafer Mohamed Abd-Elrahim, "The Concept of Punishment in Islamic Law in Relation to Contemporary Legal Trends," *American Journal of Islamic Social Sciences* 7, no. 1 (1990): 124.
[72] Mahmood Ahmad Ghazi, *Musawwadah-i Qānūn-i Qiṣāṣ-o Diyat* (Islamabad: Idāra-i Taḥqīq-i Islāmī, 1986), 64.
[73] Ghulam Hyder Sindhi, *Honour Killing and the Status of Women in Pakistan* (Islamabad: National Institute of Pakistan Studies, 2007), 137.
[74] Criminal Law (Amendment Act, 2016), sec. 311.
[75] Qur'ān 2:178.

right of *qiṣāṣ* from investigation to the time of execution not only mars the process of investigation, but also gives an ample opportunity to the powerful and wealthy to entice the legal heirs to compound the offence.

Moreover, the law implicitly condones honour killings that contradict the tenets of Islam and spirit of the Constitution of Pakistan. Since the promulgation of the law, both the trial and appellate courts put different interpretations on the provisions dealing with exceptions or concession to the application of *qiṣāṣ* and the power of the court to award punishment of *taʿzīr* in cases where *qiṣāṣ* was compounded or waived under the provision of *fasād fi 'l-arḍ*. By overlapping two distinct types of punishment namely *taʿzīr* and *qiṣāṣ*, the courts extended the exceptions to the enforcement of *qiṣāṣ* on intentional murder to the cases liable to *taʿzīr*. Owing to diverse interpretations of *fasād fi 'l-arḍ*, the courts exercised discretion to award *taʿzīr* punishment. However, the law must identify the circumstances wherein the state's intervention is necessary to maintain peace in society without infringing the victim's rights.

Taking into account the socio-economic dynamics of Pakistani society, the paper suggests to reform the Qisas and Diyat Law of Pakistan to eliminate its misuse and dissolve legal complications.