FEDERAL SHARIAT COURT OF PAKISTAN

(ORIGINAL JURISDICTION)

PRESENT

Mr. Salahuddin Ahmed, Chairman.
Mr. Justice Agha Ali Hyder, Member
Mr. Justice Aftab Husain, "
Mr. Justice Zakaullah Lodi, "
Mr. Justice Karimullah Durani,

SHARIAT PETITION NO.13 OF 1979 (LAHORE)
(Muhammad Riaz Vs.Federal Government and another).

Petitioner: Nemo.

For Attorney General Pakistan: Mr. Saeed A.Shaikh, Deputy Attorney General for Pakistan
Sh. Riaz Ahmad, Advocate-General, Punjab.

SHARIAT PETITION NO.69 OF 1979 (LAHORE)
(Javaid another Vs. The Federal Government and others). AND

SHARIAT PETITION NO.9 OF 1980(LAHORE)
(Niaz Hussain Petitioner.
Vs.
Federation of Pakistan etc. Respondent.

For the Petitioner: Mian Nazir Akhtar, Advocate.

For Respondent No.1. Mr. Saeed A.Shaikh, Deputy Attorney for Pakistan.

For Respondent No.2. Sh. Riaz Ahmad, Advocate General, Punjab.

Date of hearing. 26th,27th July, 1980 .

AND

SHARIAT PETITION NO.1 OF 1979(KARACHI).
In Re: Mr. Muhammad Muhammadi.

AND

SHARIAT PETITION NO.12 OF 1979(KARACHI).
(Mr. Muhammad Shafi Muhammadi ....Petitioner.

Versus

The Federation of Pakistan and other. ....Respondent.

For the Petitioner: Mr. Mohammad Shafi Muhammadi,Adv.

For Attorney General Pakistan. Mr. Saeed A.Shaikh, Deputy Attorney General for Pakistan.

For Advocate-General, Sind: Mr. M.I.Memon, Add:Advocate-General,Sind.

Date of hearing: 28th & 30th July, 1980.

Contd.....P2

SHARIAT PETITION NO.2 OF 1979 (KARACHI).
(Ghulam Mujtaba Saleem Vs. Federation of Pakistan).

Pettitioner:	In person,
For Attorney General Pakistan:	Mr. Saeed A. Shaikh, Deputy Attorney General for Pakistan.
For Advocate-General,Sind.	Mr. M.I.Memon, Addl:A.G.Sind.

AND

SHARIAT PETTTION NO.20 OF 1979(KARACHI).
(Imdadullah Unar .....Petitioner.
Versus
Federation of Pakistan and others. .....Respondents.

For the Petitioner:	Mr. Allahdino G.Memon, Advocate.
For Attorney General Pak.	Mr. Saeed A.Shaikh, Deputy Attorney General for Pakistan
For Advocate-General, Sind:	Mr. M.I.Memon, Addl:A.G.Sind.
Date of hearing:	2nd August, 1980.

SHARIAT PETITION NO.7 OF 1980(KARACHI)
Ghazi and others. .....Petitioners.
Versus
Federation of Pakistan.....Respondent.

For the Petitioner:	Raja Haq Nawaz Khan, Advocate.
For the Attorney General Pakistan:	Mr. Saeed A.Shaikh, Deputy Attorney General for Pakistan.
For the Advocate-General, Sind:	Mr.M.I.Memon, Addl:A.G.Sind.
Date of hearing:	28th,29th,30th July, 1980.

AND

SHARIAT PETITION NO.4 OF 1980(KARACHI)
Ghulam Mujtaba Saleem. .....Petitioner
Versus
Federation of Pakiatan.....Respondent.

Petitioner:	In person.
For Attorney General Pakistan.	Mr. Saeed A.Shaikh, Deputy Attorney General for Pakistan.
Date of hearing:	3rd & 9th & 10th days of August, 1980.
Amis curial appeared in all cases.	Mr. Khalid Ishaq, Sr. Advocate.
Jurisdonsult: (in all the cases)	Mr. Habibur Rehman Kandhalvi.

Date of hearing 9th & 10th August, 1980

Salahuddin Ahmed, Chairman.

I have carefully perused the erudite judgment proposed to be delivered by my learned brother, Aftab Hussain, Judge. I substantially agree with him and his conclusions. I should, however, like to make some observations.

Keeping in mind the Injunctions of Islam which permits the heirs of the deceased to pardon ' Qisas ' on payment of 'Deeyat', I am of the opinion that Section 345(7) Cr. P.C. affects their right in as much as the right is denied. The Section, therefore, to this extent, is not merely procedural in character, and I am inclined to agree with the decision of the case of Gul Hassan reported in PLD 1980 Peshawar on this question.Left to itself, however, Section 345(7) may be procedural.

This is, however, not much material for our present purpose. We are required to examine the provisions of Section 302 etc. PPC to see whether they are repugnant to the Injunctions of Islam, and if so, to what extent. There is no inhibition in considering this question.

As to how and in what manner the decision of the Court will be implemented is for the law maker to determine. The views expressed by the Court excluding of course the decision of the Court are meant for the consideration and assistance of the law maker.

As regards the nature of pardon permissible in the case of murder I am of the opinion that pardon of 'Qisas ' on payment of 'Deeyat ' only is permissible. This is evident from S.II verse 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 "Deeyat ". These Ahadis are nearest to the

Contd.....P2

said verse of the Holy Quran, which is the pertinent Injunction on the question of ' قتل عمد '.

In providing for punishment in respect of serious hurt when the court finds that, 'Qisas ' cannot be ordered, whipping should be prescribed. I say so because infliction of physical pain will not only give some satisfaction to the aggrieved party, but is apt to act as a deterrent, which is the object and purpose of 'Qisas ' in Islamic Injunctions.

While considering the question of punishment we should not be forgetful of the reality that we have a society consisting of muslims and non-muslims. It is, therefore, desirable that some punishments by way of 'Taazir ' should also be retained or incorporated as punishments.

'Deeyat ' is a matter primarily between the aggrieved party and the offender. The court steps in to help them to finally arrive at a reasonable settlement. The Court must, therefore, be free to use its discretion in the light of the relevant circumstances prevailing at the time and the capacity of the offender to pay. The Court is obviously the trial court, and finally the appellate court.

As regards Petitions 1 and 20 of 1979 Karachi as I have not had the benefit of hearing the parties concerned and the questions raised are of impportance I refrain from expressing any opinion at this stage. These two petitions are accordingly disposed of.

I join with the learned Members of the Court, and express my appreciation of the invaluable assistance rendered to the Court by Mr. Khalid M.Ishaq, an eminent advocate of Pakistan. At the request of the Court Mr. Ishaq readily agreed

Contd.....P2

to act as amicus curie. We are also thankful to Mr. Habib-ur-Rahman Siddiqui Kandhalvi for his assistance to the Court . He not only took pains to submit his written opinion but also appeared before the Court and addressed us. Our thanks are also due to the Islamic Research Council, Islamabad, for furnishing us with their opinion on questions referred to them. The opinion is on record. We have also been ably assisted by the learned advocates appearing on behalf of the various petitions. It has been a pleasant surprise for me to find that the learned advocates have started familiarising themselves with the Islamic Injunctions, and considering the short time in which they have done so they have acquitted themselves admirably. It is equally creditable for them to accept with grace the change in their role, namely transition from the adversary to the role of a friend of the Court.

(Salahuddin Ahmed)
Chairman

JUDGEMENT

AGHA ALI HYDER, MEMBER:- There are 9 Shariat Petitions; 7 of them call in question, the sentence prescribed for an offence under Section 302 of the Pakistan Penal Code, being repugnant to the Injunctions of Islam, as laid down in the Holy Quran and Sunnah. There is further a challenge to the provisions of Sections 109 & 111 PPC and Sections 345, 381, 401 to 402-B and 544-A Cr.P.C. ~~In~~ Sections 337 to 339 Cr.P.C. and 114-B & 133 of Evidence Act have been challenged in the next petition and the provisions of Sections 325, 326, 329, 331, 333, 335 & 338 of the Penal Code in the last one. The same will be disposed of by this composite judgement.

2. A preliminary objection was raised, about the competency of this Court to adjudicate on the provisions of Section 302 PPC, and Sections 345(7), 401 to 402(B) of the Code of Criminal Procedure, afresh, in view of the decision of the Shariat Bench of the Peshawar High Court in Shariat Petition No.7 of 1979 as reported in PLD 1980 P.I I am of the opinion that the contention must prevail.

3. The Federal Shariat Court was constituted by the Constitution (Admendment) Order, 1980, being President's Order No.1 of 1980, which was promulgated on the 27th of May 1980. The powers, jurisdiction and functions of this Court are to be found in Article 203-B thereof, which reads as under:

"203-D. Powers, jurisdiction and functions of the Court.-(1) The Court may, 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 the Sunnah of the Holy Prophet, hereinafter referred to as the Injunctions of Islam.

....p/2

(2) If the Court decides that any law or provision of law is repugnant to the Injunctions of Islam, it shall set out in its decision —

(a) the reasons for its holding that opinion; and

(b) the extent to which such law or provision is so repugnant; and specify the day on which the decision shall take effect.

(3) If any law or provision of law is held by the Court to be repugnant to the Injunctions of Islam —

(a) the President in the case of a law with respect to a matter in the Federal Legislative List or the Concurrent Legislative List, or the Governor in the case of a law with respect to a matter not enumerated in either of those Lists, shall take steps to amend the law so as to bring such law or provision into conformity with the Injunctions of Islam; and

(b) such law or provision shall, to the extent to which it is held to be so repugnant, cease to have effect on the day on which the decision of the Court takes effect.

(4) A decision of the Court shall be expressed in terms of the opinion of the majority of its members and shall be published in the official Gazette".

4. According to Clause (2) of Article 203-H of the said Order, "all proceedings under Clause (1) of Article 203 of the Constitution that may be pending before any High Court, immediately before the commencement of this Chapter shall stand transferred to the Court, and shall be dealt with by the Court from the stage from which they are transferred". It is also to be seen that the appeals from this Court, as from the decision of the Shariat Benches of the High Court are to be ~~prescribed~~ presented before the Appellate Shariat Bench of the Supreme Court.

5. The powers, jurisdiction and functions of the Shariat Benches of the High Court were identical even in terms, to the powers of this Court. The Peshawar Bench had specified a date from which the order was to take effect and we are informed, that the Government of Pakistan had preferred an appeal against the said decision, which

....p/3

is pending before the Supreme Court. No stay has so far been granted and looking to the object and the scheme of the law, it can not be conceived, that an offence of murder in the N.W.F.P., will be dealt with differently from the rest of the provinces. As a successor Court in every sense of the word, though differently constituted, to my mind, we stand debarred from adjudicating the same issues once again.

6. It has been held by the Peshawar Bench, that an offence of murder "can be condoned by pardon, or on payment of 'Diyat', otherwise the convict was to face the penalty of death. The same principle will be attracted in the cases of abettors under Sections 109 & 114 PPC. In support thereof, reliance is placed on two Ahadith as to be found on page 740 Volume II of Mishkat-Al-Masabih, as translated in English, by James Robson.

> "Ibne Umar reported the Prophet as saying, if a man seizes a man and another kills him, the man who killed him is to be killed and the one, who seized him is to be imprisoned. Daraqutni transmitted it".
>
> "Said bin Al-Musayyib told that Umar bin Al-Khattab killed five or seven people for one man whom they had killed treacherously. Umar saying 'If the people of San'a' had conspired against him, I would have killed them all'. Malik transmitted it, and Bukhari transmitted something similar on the authority of Ibne' Umar".

7. The question of any compensation, as envisaged under Section 544-A of the Code of Criminal Procedure, whether the offender meets the Supreme penalty under the Sharia' Law, is pardoned, or pays 'Diyat' does not arise, because it will be in excess of the penalty prescribed.

8. The contentions raised against the provisions of Sections 337 to 339 Cr.P.C. and Sections 133 and

...p/4

134 of the Evidence Act were not pressed. They are otherwise, devoid of merit, as any law relating to the procedure of any Court or Tribunal can not be assailed until the expiration of three years under the Scheme of the President's Order referred to above.

9. As for the intentional bodily hurts as to be found in Sections like 325, 326 PPC, the punishment as prescribed in the Holy Quran is Qisas, (eye for an eye, tooth for a tooth etc) pardon of the offender by the injured person, or the payment of 'Diyat'. There is no ~~Diyat~~ Qisas in unintentional hurts. However, in Sharia, Qisas is limited to cases where the limb is cut from the very joint. The bone can neither be cut or injured therein. As a corollery there is no Qisas, in case of a fracture of a bone, for the cutting of the entire nose, or the tongue or a part of the lip. (The list given by me is not exhaustive). If the injured person, chooses to pardon the offender, or accepts 'Diyat', which is to be satisfactorily proved, there is no further question of any Tazir at all. This, as to be found in the latter part of SII: 178 "is a concession from your Lord. After this whosoever exceeds the limits shall be in grave penalty". The text of the Quran is very clear. There are only three situations envisaged and the Court can not interpose, and say this is not the end of the matter, and some additional punishment by way of a sentence of imprisonment or fine has still to be reckoned with. The quality of mercy is not strained; the payment of 'Diyat' should provide the requisite satisfaction to the victim. After all, why should an accused agree, to appease the victim, if he is still kept guessing about his fate?

....p/5

10. As a result, I will dismiss, S.P.No.20/79-Karachi and S.P.No.1/79-Karachi and allow the remaining petitions. The amendments to be made accordingly, in accordance with the laws of Sharia, as the Court's function is only to construe the law, and not to legislate.

11. Before parting with the Judgement, I would like to express our indebtedness to Mr. Khalid Ishaq, for his very able assistance as an amicus curie, and at such a short notice indeed.

Agha Ali Hyder

JUSTICE AGHA ALI HYDER
Member-I

Islamabad, the
1980.

Per Aftab Hussain, Member

This judgment will dispose of 9 Shariat Petitions bearing the following Nos:-

1. S.P.No.13/79-Lahore
2. S.P.No.69/79-Lahore
3. S.P.No. 9/80-Lahore
4. S.P.No. 2/79-Karachi
5. S.P.No.12/79-Karachi
6. S.P.No. 7/80-Karachi
7. S.P.No. 4/80-Karachi
8. S.P.No. 1/79-Karachi
9. S.P.No.20/79-Karachi

2. The main point in the first 6 petitions is the repugnancy of section 302 PPC and sections 345 and 381 Cr.P.C. with the holy Quran and Sunnah. In addition to this in S.P.No.12/79-Karachi the provisions of sections 109 and 111 PPC which deal with the sentence of an abettor are also challenged as being repugnant to the Shariat. There is also a challenge in S.P.13/79-Karachi to sections 401 to 402-B, 544-A Cr.P.C and 134 Evidence Act.

3. In the last mentioned 2 petitions - S.P.No.1/79-Karachi and S.P.No.20/79-Karachi, the provisions of sections 337, 338 and 339 Cr.P.C are challenged along-with the provisions of sections 114-B and 133 Evidence Act. It is also urged in S.P.No.1/79-Karachi that a judgment of conviction based on the evidence of an approver or an un-reliable witness is no judgment in the eyes of law and in any case where there is difference of opinion regarding the criminality of an accused person between the judges the majority finding against the accused while the minority holding in his favour the accused should be given the benefit of doubt. Lastly it is urged in that petition that if

a person merely abets a murder he cannot be punished with death as the punishment of Qisas can be wreaked from the actual murderer only.

4. Petition No.4/80-Karachi challenges the provisions about sentence in sections 325, 326, 329, 331, 333, 335 and 338, and non-compoundability of some of these offences.

5. The contentions in these petitions, to be more specific, may be summarised as follows:-

1. Section 302 provides for sentence of death or life imprisonment ~~or~~ and fine. The contention is that the sentence of fine and life imprisonment should be substituted by one of blood money (diyat) if the legal heirs of the deceased victim pardon the accused.

2. Alternatively the offence of murder should be made compoundable under section 345 Cr.P.C. read with its Schedule II.

3. The punishment of imprisonment and/or fine for other offences of body viz, sections 325, 326, 329, 331, 333, 335 and 338 should be replaced by the punishment of retaliation (Qasas) or in case of pardon by the accused of compensation (ursh) for the injury caused to the victim and all these offences should be made compoundable in the Second Schedule of the Code of Criminal Procedure read with its section 345 (S.P.No.4/80-Karachi).

4. No person other than the actual killer, despite being an abettor, can be subjected to the punishment of retaliation (Qasas) S.P.No.1/79-Karachi).

5. In case death of one person is caused by several persons all those persons cannot be ordered

to be put to death or executed.

6. The provisions of section 381 Cr.P.C, which renders execution of an accused person obligatory are contrary to shariat since the offence can be compounded by the heirs of the accused or of the deceased or the victim himself on the one hand and the accused on the other even after the pronouncement of final judgment by the Court.

7. Section 544-A which provides for compulsory imposition of fine which may in its turn be payable to the victim or his legal heirs is bad for the reasons that the amount of compensation is not in conformity with the gravity of the offence, it should be equal to the standard diyat or arsh.

8. The provision, in the Criminal Procedure Code and the Evidence Act about the admissibility of evidence of an approver and grant of pardon to an accomplice, (in sections 337,338,339 Cr.P.C and sections 114-B and 133 of Evidence Act) cannot stand the test of scrutiny under shariat since such an accomplice in case of confession is liable to be subjected to punishment, and cannot furnish reliable evidence insisted upon by shariat.

9. A judgment based upon the evidence of an approver or an accomplice should be declared to be no judgment in the eyes of law.

10. The provisions of sections 109 and 111 PPC which provide for the same punishment to an abettor as provided for the actual culprit cannot be sustained in regard to qisas since according to shariat only the actual killer can be executed.

11. Any difference of opinion among the Judges in regard to the culpability of an accused person entitles him to benefit of doubt and as such to acquittal, notwithstanding the majority opinion being against the accused.

6. A preliminary objection was raised by Mr. Khalid Ishaq that since the matter under discussion has already been the subject matter of decision in case Gul Hassan Khan vs. Government of Pakistan /PLD 1980 Peshawar 1 (Shariat Bench)7, which has become effective, the petitions challenging those matters which have been dealt with by the Peshawar High Court are, therefore, ineffective. Other learned counsel argued in favour of the above judgment being binding on this Court.

7. The Peshawar High Court held in the above case that sections 54-55 of the Pakistan Penal Code and sections 401, 402, 402A and 402B of the Criminal Procedure Code are repugnant to the Injunctions of Islam. It was further held that section 345(7) and relevant parts of the Second Schedule ofCrPC in as far as offences concerning human body (vide Chapter XVI) of the Pakistan Penal Code)are concerned, are repugnant to the Holy Quran and Sunnah. The Court, however, declared that the penalty prescribed in Chapter XVI of the Pakistan Penal Code with respect to offences against human body particularly section 302 can be made to conform to the Injunctions of Islam by addition of provisions for pardon or penalty of diyat.

8. Article 203-D of the Constitution provides that if the Federal Shariat Court finds that any provision of law is repugnant to the Injunctions of Islam it shall state the extent to which such law or any of its provision is so repugnant. It further provides that if any law or provision of law is found by the Court to be so repugnant the President with respect to a matter in the Federal or Concurrent Legislative List, or the Provincial Government in the case of law with respect to a matter not enumerated in any of these lists shall take steps to amend the law so as to bring it in conformity with the provision of Islam and such law or its provisions as are held to be repugnant shall cease to have effect on the day on which the judgment of the Court takes effect. Similar were the powers of the Shariat Benches of the High Courts.

9. The above Constitutional provision contemplates that when a law can be rendered ineffective without leaving a vacum it shall cease to have effect after the expiry of the time fixed by the Court. But in case the law requires amendment, the judgment can become effective only after the amendment as ordered by the Court is made by the relevant legislature.

10. Now in the present case the High Court of Peshawar did strike down the provision of section 401 to 402-B but the same cannot be said about section 302 PPC and section 345 and II Schedule of the Code of Criminal Procedure. Sections 345 and the said Schedule do not provide for compoundability of an offence of murder and some other bodily injuries.

It would, therefore, require amendment. Similarly 302 would require amendment by addition of provisions about pardon or payment of compensation. In these circumstance the argument that these laws have ceased to exist has not impressed me. They are still on the statute books and no amendment can be read into them unless they are amended in the manner directed by the High Court.

11. I am also not in agreement with the submission made at the Bar that this Court being in all respects a successor Court of the Peshawar Shariat Bench, is bound by that decision. Firstly that decision was by a full Bench of three Judges while the present cases are being heard by a larger Bench of five members of this Court. Even as a successor Court it has jurisdiction to differ from the Shariat Bench of Peshawar. Secondly the jurisdiction of the Peshawar being limited to its own territories its judgment could not bind any other High Court. This flaw of territorial jurisdiction has been removed now by the setting up of this Federal Court which has jurisdiction throughout Pakistan. For these reasons the preliminary objections is repelled.

12. Before proceeding to consider the questions raised in this petition I would like to deal with the extent of jurisdiction of this Court. Article 227 of the Constitution provides that existing laws shall be brought in conformity with the Injunctions as laid down in the holy Quran and Sunnah of the Prophet (peace be upon him) and no law in future shall

(as distinguished from personal law) all the difficulty would have been obviated by replacing the present public law by Fatawa Alamgiri. But clearly this is not the object of the Constitution to which it appears abhorrent to demolish the existing legal structure in order to raise a new structure of public law. The constitutional intent is only to repair the existing structure by eliminating from it what is repugnant to the divine law comprised in the holy Quran and the Sunnah of the Prophet (peace be upon him) and amending the law to make it conform to the said divine law.

15. Interpretations of the divine law is a matter which would require the facility of consulting opinions of all our renowned jurists. The possibility cannot be ruled out that the interpretation on a particular point by a jurist belonging to school of thought different from the one to which I belong may commend itself to me as being more in line with the requirements of the modern Muslim Society in the country. In view of the Compatibility of such view with the requirements of our society it will be logically realistic to adopt it as affording guidence in the task assigned to this Court. Some problems faced by this country may, however, be ~~either~~ absolutely new problems for which no jurisprudence may provide any guidance. It is also possible that while differing on a point our old jurists might have taken into consideration different alternative but might have either ignored some alternative or the requirements of the modern society may produce or generate a new option. It may not be possible in such cases to

to rely upon their view. The elimination from the text of the Constitution of reliance upon a particular sectarian doctrine is not, therefore, without reason.

16. In my view the methodology to remove from our laws any incongruity with the holy Quran and Sunnah should be as follows:

1. To find in the first instance the relevant verse or verses in the holy Quran regarding the question in issue;

2. To find out the relevant Hadis (Tradition of the holy Prophet (peace be upon him);

3. To discover the intent of the Quranic verse from the Traditions of the holy Prophet (peace be upon him);

4. To ascertain the opinions of and views adopted by all jurists of renown on that matter and to examine their reasoning in order to determine their harmony with the present day requirements, or if possible to modulate them to the demand of the modern age; and

5. To discover and apply as a last resort any other option which/should no doubt be in harmony with the holy Quran and Sunnah.

17. It may be worthwhile mentioning that more or less the same principles are adopted by the Council of Islamic Ideology, as would be clear from pages 18 and 19 of 'Majmua Qawaneen-e-Islam, Vol.I, by Dr. Tanzil-ur-Rehman (now Justice). Principles followed by the Council are:-

1. To discover the text of the holy Quran and to refer to it.

2. If the Injunction in the holy Quran is clear and does not require any further elucidation or warrant any difference of opinion, to accept it without any hesitation.

3. If there be any difference of opinion on the interpretation of the Injunction in the holy Quran, to find out the relevant Hadis.

4. If there be different traditions and if it be difficult to harmonise them, to find out the correct Hadis on the principles laid down for discovery of such Hadis.

5. If there be no Injunction either in the holy Quran or in the tradition but there be Ijma among the Caliph or different Imams to adopt the same.

6. In case of difference of opinion between different Imams to find out the version which has so far been preferred and to adopt it only in case it is in accordance with the requirement of the present era.

7. In case it cannot be adjusted to modern conditions, to adopt any of the several views of the jurists.

8. In case there be no guidance in the holy Quran and Sunnah and the opinions of different schools of thoughts also be not acceptable, to resort to Ijtihad.

18. Thus the Council also accepts the principle of choosing from the opinions of our renowned jurists and as a last resort of embarking upon Ijtihad, the object in either case being to reconcile the requirement of the present era with the teaching of the Quran and the Sunnah.

19. Now while venturing upon the function constitutionally assigned to this Court it is necessary to remove a serious misunderstanding and also to reiterate the established principles of interpretation of law of the Quran. The general view which is not based upon any comparative study, is that our statute law and the law of the Quran are poles asunder and the twain shall never meet. The view is obviously fallacious. The shariah has impliedly and sometimes expressly approved the customs and usages of the Arab society save to the

extent of their incongruity to the tenets laid down by the Quran and the Sunnah particularly what is declared as unlawful (ناجائز) or lawful (جائز). In this respect the view of Shah Waliullah has been summed up as follows by Dr. Muhammad Iqbal in his lecture 'The Principle of Movement in the structure of Islam':

> "Shah Waliullah has a very illuminating discussion on the point. I reproduce here the substance of his view. The prophetic method of teaching, according to Shah Waliullah, is 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 shariat. In doing so he accentuates the principles underlying the social life of all mankind, and applies them to concrete cases in the light of the specific hadis of the people immediately before him".

20. Islam thus recognised that not all customs and usages of the Arabs were repugnant to Shariah; and maintained most of them as good law. Our statute laws whether inherited from the British Government or enacted after independence are based upon the principle of common good and justice equity and good conscience which is the same as the principles of public good (Maṣaleh Mursila) of Imam Malik and principle of Istihsan of Imam Abu Hanifa. Afortiori these laws must be more in harmony with Shariah. In some respects the statute law may not fulfil the standard of the law of the Quran and may also be repugnant to it but such instances may not be many.

21. Consequently the first principle to be invoked is to test these laws on the principles of Halal (lawfulness) and Haram (unlawfulness) as laid down in the divine law.

22. The holy Quran has expressly stated what is unlawful and prohibited. The prophet of God has made additions to this category, but it cannot be doubted that the authority to declare something unlawful or prohibited lies with the Almighty or his holy Prophet (peace be upon him) and it is not lawful for any person to render unlawful what is lawful see 66:1.

> "O Prophet Why bannest thou that which Allah hath made lawful for thee".

In 10:60 rebuke is administered for this:

> "Have you considered what provision Allah hath sent down for you, how have you made of it lawful and unlawful".

23. Allama Shabir Ahmad Usmani has repeated and developed this principle in his commentary of the holy Quran at various places see pages 33, 138, 157, 159 and 363. Any silence about lawfulness or prohibitions about any matter makes it pardonable (معاف) which means that it cannot be categorised as unlawful. Elam-ul-Mowaqqieen (اعلام الموقعین) by Hafiz Ibn-e Qayyum Vol.1, pages 215, 225, 226, 229, 322, 325, 358, and 661 (printed by Ahl-e Hadis Academy, Lahore).

24. The second principle is that by the change of customs and usage (عرف و عادت) the doctrinal opinion (فتوی) may also change. (See Elamul Mowaqqieen (اعلام الموقعین) by Hafiz Ibn-e Qayyum Vol.2, pages 822 and 843). This principle highlights the importante not

only of change of custom but also change of era and change in society in the context of evolution and dynamism in the field of law, which is taken care of by the principle of Ijtihad.

25. The third principle is that concessions and rights if misused by the people can be suspended or withdrawn as was done by the second Caliph by treating three divorces uttered at the same time as three and irrevocable, contrary to Sunnah of the Prophet (peace be upon him) which treated any number of simultaneous divorces as one. Hazrat Umar introduced this law when he found that the facility or concession was being generally misused.

26. A fourth principle is that it is better not to ward off a transgression if its stoppage leads to the spread of more malignant vices (Elam-ul-Mowaqqieen Vol.2, page 772).

27. The cases about murder were argued by Mian Nazir Akhtar, Raja Haq Nawaz, Mr. Muhammad Shafi Muhammadi and Mr. Ghulam Mujtaba Saleem, while the case about other sections dealing with body hurt was argued by the last mentioned gentleman. Mr. Khalid Ishaq ably argued the matter on the request of the Court. Maulana Habibur Rahman Kandhlawi gave his opinion in writing and also made oral submissions."

28. The primary question for consideration is the repugnancy to the Quran and the Sunnah of the provisions of the Pakistan Penal Code regarding punishment in cases of bodily hurt or death.

29. There is no contest that in case of culpable homicide amounting to murder (qatal-e-amd) the normal sentence prescribed by the holy Quran is death. Verse 178 of Chapter 2 provides:-

"O ye who believe: Retaliation is

> prescribed for you in the matter of the murdered the freeman for the freeman, and the slave for the slave, and the female for the female. 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. He who transgresseth after this will have a painful doom".

In verse 179 in the same Chapter the benefits of retaliation are recounted:-

> "And there is life for you in retaliation, O men of understanding, that ye may ward off (evil)".

Again in verse 45 Chapter 5 it is ordained as follows:-

> "And we prescribed for them therein the life for the life".

30. These verses leave no doubt that the usual sentence for a person convicted of murder is death, or "life for life". The objection however, as already stated, is to the sentence of imprisonment and/or fine including the obligatory fine as leviable under section 544-A part or the whole of which is compulsorily payable to the heirs of the deceased victim as compensation. It was urged that it is open to the heirs of the deceased to either completely pardon the accused or pardon him subject to payment of blood-money (diyat). For this reliance was placed upon the last portion of verse 178 of Chapter 2 which after referring to the sentence of retaliation in the matter of the murder proceeds to state that:-

> "And for him who is forgiven <u>somewhat</u> by his (injured) brother, prosecution according to usage and payment unto him in kindness. This is an alleviation and a mercy from your Lord".

31. Mr. Nazir Akhtar, Raja Haq Nawaz and Mr. Khalid Ishaq laid particular stress upon the right of the

heirs of the deceased victim to pardon the accused completely in which case he should be liable to acquittal, or partially in which case he should pay the amount agreed upon as blood-money (diyat). They also emphasised that since retaliation (qisas) is the right of the murdered person to which his heirs succeed on his death, the state or its legislature cannot provide even for tazir, which can be provided for only in the unoccupied field. For the same reasons they argued that the provisions in section 401 to section 402-B Cr.P.C. which empower the Central or the Provincial Government to commute or remit sentence of a convict cannot be sustained, such right being vested in the heirs of the deceased only.

32. Mr. Khalid Ishaq went to the extent of urging that the sentence of imprisonment is foreign to Islam.

33. On the other hand Mr. Muhammad Shafi Muhammadi submitted that culpable homicide amounting to murder (qatal-e-amd) may be of two ty-pes; one involving rights of God (haqooq-Allah) and the other involving rights of men (haqooq-ul-ebad). Some disputes resulting in the death directly affect only the accused and the family of the deceased as in the case of a dispute over water or tresspass by the cattle in the field of either party or tribal vengeance. Such matters would entail the rights of man (haqooq-ul-ebad) and permission to compose the difference by grant of pardon to the accused would help in the patching up of differences, in diminishing the sense of vengefulness or vindictiveness and in cultivating amicable harmonious relations between the parties. In such cases diyat will be an apt alternative to retaliation (qisas). But if the murder

directly involves or affects the society as in the case of unjustified murder (qatal-e-nahaq) by a person who on account of the depravity or immorality of his character is prone to take the law in his own hand and thus creates or develops corruption in the society, and composition of the offence would not make him repent his misdeeds, the offence would entail the rights of God (haqooq-Allah). In such a case the State can provide in law for sending the accused to the gallows notwithstanding pardon by the heirs of the deceased or in the alternative can sentence him to imprisonment for life and/or fine. In this connection he referred to the principle of القتل اشد من الفتنة and also verse No.33 of Chapter 5 which is as follows:-

> "The only reward of those who make war upon Allah and His messenger and strive after corruption in the land will be that they will be killed or crucified, or have their hands and feet on alternate sides cut off, or will be expelled out of the land. Such will be their degradation in the world, and in the Hereafter theirs will be an awful doom.".

34. Since the Muslim jurists have confined the applicability of this verse to persons accused of sedition or high-way robbery or utmost robbery within the city, he referred to the commentary of the holy Quran by Allama Shabir Ahmad Usmani. According to the learned Comentator the generality of these provisions (5:33) in the Quran cannot be cut-down and the sentence provided therein can be awarded inter-alia for unjustified murder (qatal-e-nahaq).

35. Mr. Ghulam Mujtaba Saleem, Advocate, submitted that the word 'qasas', in 2:178, itself carries the meaning of compoundability.

36. There are several verses in the holy Quran which prescribe the killing of a person by another person. The language in which these verses are couched throw light on the gravity of the offence of murder. It would be clear from the following verses:-

4:29. "... and kill not one another".

4:92. "It is not for a believer to kill a believer unless (it be) by mistake. He who hath killed a believer by mistake must set free a believing slave and pay the blood-money to the family of the slain, unless they remit it as a charity. If he (the victim) be of a people hostile unto you, and he is a believer, then (the penance) is to set free a believing slave. And if he cometh of a folk between whom and you there is a covenant, then the blood-money must be paid unto his folk and (also) a believing slave must be set free. And whoso hath not the wherewithal must fast two consecutive months. A penance from Allah. Allah is knower, Wise".

4:93. "... Whoso slayeth a believer of set purpose, his reward is Hell for ever. Allah is wroth against him and He had cursed him and prepared for him an awful doom".

It is not for a believer to kill a believer unless "it be" by mistake.

5:32. "For that cause We decreed for the Children of Israel that whosoever killeth a human being for other than man-slaughter or corruption in the earth, it shall be as if he had killed all mankind, and whoso saveth the life of one, it shall be as if he had saved the life of all mankind.".

6:152. "... And that ye slay not the life which Allah hath made sacred, save in the course of justice. This he hath commanded you, in order that ye may discern".

17:33 "And slay not the life which Allah hath forbidden save with right. Whoso is slain wrongfully, we have given power unto his heir, but let him not commit excess in slaying Lo! he will be helped".

2:205. "And when he turneth away (from thee) his effort in the land is to make mischief therein and to destroy the crops and the cattle; and Allah loveth not mischief.".

37. These verses clarify the distinction between a justified culpable homicide i.e., a homicide with right i.e., slaying with right, "in the course of justice", "man-slaughter or corruption in the earth" and culpable homicide amounting to murder which is one of the worst sins "gunah-e-kabira". The gravity of the offence is brought out by such warning that unlawful killing of a man is tantamount to killing of all mankind and that his reward is hell for ever. Allah's displeasure over an unjustified slaying is repeated several times. According to Ibn-e-Kather (see commentary on 17:33) it is in tradition that the destruction of the entire world is easier in the eye of Allah than an unjustified murder of a believer (momin). Shah Walliullah writes in Hujjat-ul Lah ul Baligha Vol.II, translated by Molana Abu Muhammad Abdul Haq Haqani at page 431 "the worst of the tyranny is murder and it is the biggest sin". "There is a consensus on this point and the reason is that to murder is to obey the call of indignation (خواہش غضب) and it is the worst manner to spread corruption (فساد) among people."

38. At page 432 he writes that since premeditated murder (قتل عمد) is a cause of corruption and impulsive actions it became necessary to prescribe for a severe sentence in order to stop its recurrence. Dealing with the verse about the reward of a murderer being "hell for ever" (4:93), he writes that it appears from this

verse that a murderer shall not be pardoned by God and this is the opinion of Ibn-e-Abbas though the majority are of the view that even such a person shall be pardoned though at a much later stage than a person committing other sins.

39. Keeping in view the enormity of the offence the holy Quran has prescribed the most severe punishment of death in retaliation.

> 5:45 "... The life for the life, and the eye for the eye, and the nose for the nose, and the ear for the ear, and the tooth for the tooth, and for wounds retaliation. But whoso forgoeth it (in the way of charity) it shall be expiation for him. Whose judgeth not by that which Allah hath revealed: such are wrong-doers".

(See 2:178)

40. The holy Quran further stresses in 2:179 "there is life in retaliation ... that ye may ward off (evil)".

41. Now on the one hand the holy Quran deals with the gravity of the offence and gives warning of eternal demnation to its perpetrators and provides for them punishment of extreme severity, on the other hand in order to maintain balance in the society which is its primary aim, it describes the virtues of clemency and forgiveness. It provides:-

> 2:263. "A kind word with forgiveness is better than almsgiving followed by injury. Allah is Absolute, Clement".
>
> 2:134. "Those who spend (of that which Allah hath given them) in ease and in adversity, those who control their wrath and are forgiving toward mankind: Allah loveth the good".
>
> 4:17 "Forgiveness is only incumbent on Allah toward those who do evil in ignorance (and) then turn quickly (in repentance) to Allah. These are they toward whom Allah relenteth. Allah is ever knower, wise".

24:22 "And let not those who possess dignity and ease among you swear not to give to the near of kind and to the needy and to fugitives for the cause of Allah. Let them forgive and show indulgence. Yearn ye not that Allah may forgive you? Allah is Forgiving, Merciful".

42:43 "And verily whoso is patient and forgiveth—lo! that, verily, is (of) the steadfast heart of things".

45:14 "Tell those who believe to forgive those who hope not for the days of Allah; In order that he may requite folk what they used to earn".

7:199 "Keep to forgiveness (O Muhammad), and enjoin kindness, and turn away from the ignorant".

This urge to forgive is on the principle of 'to err is human and to forgive divine'.

42. It is in this context that the prescribed punishment of retaliation is allowed to be substituted by pardon on payment of blood-money.

2:178 "... And for him who is forgiven somewhat by his (injured) brother, prosecution according to usage and payment unto him in kindness".

43. Thus while providing for the satisfaction of the desire for righteous vengeance for the worst possible wrong perpetrated on the murdered and his family the holy Quran takes into account that though retaliation is life yet in some cases the saving of even such ignominious life as that of a murderer may cut at the root of unrighteous and unjustified vengeance and may be helpful in creating good will between the families of murderer and the murdered, since in some cases to forget a wrong may be the best revenge. Alexander Pope says:

"An enemy overcome by force is only half overcome".

In a moment of despair of the enemy when all hope of survival is lost to him, a kind gesture of saving his

life by the victim's heirs may overcome him completely and may awaken the sense of good fellowship in him and members of his family. This in some cases may be a better guarantee for maintenance of law and order in the locality.

44. There is therefore, no doubt that contrary to the offences of Hadood which in their entirety deal with violation of right of God (haqooq Allah), the offence of murder and, as will be seen later, of offence of injuries to the bodies generally violate the right of man. It is for this reason that in 17:33 the power over a killer is given to the heir of the slain, no doubt subject to an admonition that he should not commit excess in wreaking retaliation. In 2:178 the heirs have also been given the power "to forgive somewhat and to prescribe according to usage and payment unto him in kindness". It means that if the heirs and successors of the deceased feel inclined that the murderer may not be sentenced to death but he may be awarded some lighter punishment, they may agree to give up only some portion of the blood money.... The heirs of the deceased or the claimants for retaliation should have the right either to get the culprit to undergo full sentence through the State or if they are so disposed, to relinquish their right of exacting the extreme punishment, they may obtain compensation in money.

45. Maulana Maqbool Ahmad a commentator belonging to the Jafria sect states as follows:-

> "When one (murderer) is pardoned somewhat (i.e. qasas) from his brother (momin), person granting pardon should be gentle in his demand (of diyat)".

46. In Sahih Bukhari Vol.III, Hadis 1775, it is related from Hazrat Ibn-e-Abbas that pardon means that even in premeditated murder blood money may be accepted. He also stated that اتباع بالمعروف means that they demand (blood money) should be according to custom and should be paid in a good way.

47. The alternative of qisas and diyat is stated in a number of ahadis for example hadis 1774 in Sahih Bukhari Vol.III, Balugh-ul Maram by Allama Ibn-e Hajar-As-Kalani, hadis No.1204, Mishkat Vol.II, page 171, Sunan Abu Daood, Vol.III, page 413, hadis 1091, Sunan Ibn-e Maja, Vol.II, hadis No.399, 400 and 401.

48. There are some ahadis in which the 3 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. In Balugh-ul Maram, hadis No.1204, is from Abu Shuraih Khazai that hence forward if some body is guilty it will be for the members of his family either to accept diyat or kill him by way of retaliation.

49. It, therefore, requires to be considered whether the holy Quran provides for three alternatives of retaliation (qisas), pardon or blood-money; or it provides for the dual alternatives of retaliation and blood money. The arguments of the learned counsel for the petitioners were in favour of the three alternatives but they read traditions in favour of both the propositions.

50. Verse 2:178 as stated above provides "And for him who is forgiven somewhat ... the treatment according

to usage and payment in kindness". The word somewhat which is underlined by me is significant. It points out that the prescribed forgiveness is not total and the culprit is still bound to pay to the heirs of the deceased the compensation in terms of money for the unjustifiable homicide. This interpretation finds support from the word takhfif (reduction).

51. The word takhfif (تخفیف) means lightening or reduction of the 'weight', 'extenuation' or 'alleviation' and takhfif-ul Aquban (تخفیف العقوبہ) means commutation of sentence which means 'to exchange for punishment less severe'. It does not have the sense of absolute pardon. A bare reading of verse 178 (2:178) proves that the word takhfif (reduction) is relatable to reduction in the sentence (عقوبہ) of retaliation. Its interpretation in the sense of commutation of sentence is amply justified.

52. According to Ibn-e Kather blood-money (diyat) is nothing but fine.

53. In the context of what is stated in this verse retaliation being the extreme penalty its reduction would be the liability to pay blood money. Total pardon cannot mean reduction of sentence since it will amount to its obliteration. It is for this reason that in Tafhim-ul Quran by Maulana Maudoodi is of the opinion that pardon should be on payment of blood money.

54. Maulana Muhammad Ali Jallundari has stated the same principle when he said while commenting on this verse "there may be circumstances which alleviate the guilt. In that case the murderer may be made to pay a

fine to the relatives of the murdered person. Such money is called diyat or blood wit."

55. The English translation of what Maulana Abdul Majid Dariyabadi says in his comments on this verse is;"the word " شَيْءٌ "(i.e, somewhat) is significant which means that only a portion of the sentence prescribed be abandoned not that the whole of it may be pardoned." However in Abu Daud, Sunan-e-Darmi and Ibn-e Maja the three alternatives of retaliation, pardon or diyat are attributed to Abu Shuraih Khazaii to whom is attributed the statement of the two alternatives in Balughul Maram (hadis 1204). These two different statements from the same companion cannot be reconciled.

56. The tradition ascribed to Anas that when a matter punishable with retaliation came before the holy Prophet (peace be upon him) he would direct him to be pardoned, does not mean that the pardon would be total pardon and not a pardon in terms of reduction of the sentence which would amount to takhfif as stated in verse (2: 178). The meaning of this statement would be clear if it is read in the context of the explanation given by Hazrat Abbas that pardon means payment of diyat.

57. Similarly nothing turns upon the arguments of Mr. Khalid Ishaq which he addressed on the basis of Al Jami-al Ahkam-ul Quran by Qurtabi Vol.II, page 253, that the word شَيْءٌ (somewhat) denotes blood. The pardon is no doubt of blood or retaliation only and not of what follows this provision in 2:178 regarding payment according to usage which may be considered to be a reduction. It would, therefore,

necessarily mean payment of diyat as a consideration for forgiveness. I am, therefore, clearly of the view that the Quranic text provides for two alternatives viz., punishment of retaliation and in case life of the killer is pardoned punishment of payment of diyat by him, portion of which also may be pardoned by the heirs or successor of the deceased as stated by Maulana Abdul Majid Dariyabadi.

58. Mr. Khalid Ishaq relied in favour of concept of complete pardon on that portion of 5:32 in which it is stated that saving life of one is like saving the life of all mankind. He argued that pardoning the culprits in completely by an heir and thus saving his life would amount to saving the life of mankind.

59. The reliance on this verse would render nugatory 2:179 which ordains-

"And there is life for you in retaliation".

If there is life in qasas or retaliation, saving the life of a person committing culpable homicide amounting to murder cannot amount to saving the life of mankind.

60. In the view of Maulana Abdul Majid Dariyabadi (see his commentary on the Quran) "saving a life is praiseworthy and requitable if it is saved from an unjustified murder/attack. If the words of the verse are interpreted in their generality and literal sense (an anamoly arises); To save a person from qasas or from justified homicide would itself amount to sin and an assistance in what is prohibited." In view of this I cannot subscribe to the argument of Mr. Khalid Ishaq.

61. It was urged that verse 33 of Chapter 17: "whosoever is slain wrongfully We have given power unto his heir", confers not only the authority of retaliation on the heirs of the deceased victim but also vests him with even an unrestricted right to pardon the culprit.

62. This is the view of Ibn-e Katheer as also of Maulana Maudoodi vide Tafhimul Quran Vol.II, page 614, note 35. But in the commentary of Quran by Maulana Ashraf Ali a different view is taken since the verse is explained as saying that "We authorised his heir to obtain retaliation".

63. Maulana Shabir Ahmad Usmani is of the view that the verse confers upon the heirs of the slain a right to seek from the Government retaliation by killing. But they should not exceed the limits and arrange for the punishment of an innocent person instead of the murderer or of innocent persons in addition to the murderer or disfigure the murderer by cutting his ears, nose etc.

64. This later view is thus preferable. The words 'but let him not commit excess in slaying' immediately following the words 'whoso is slain wrongfully We have given power unto his heirs' clarify the divine intent of conferment of only the authority of retaliation by this verse on the heirs of the slain.

65. In view of this discussion the utmost that can be said for amendment of the Pakistan Penal Code is that the alternatives sentence of payment of blood money should be added to section 302.

66. Even if it is assumed for the sake of reasoning that complete pardon is also contemplated in 2:178 that cannot help the petitioners since that provision cannot be included in the Penal Code which deals with punishment only (see sec.2) and not with compoundability. As is clear from section 2 of the Penal Code it deals with the acts or omissions contrary to the provision of the Code and the liability of the person guilty of those omissions to punishment under this Code. The petitioners' purpose can be served by the amendment of section 345 Cr.P.C. but as would be seen later, in my view it is a section dealing with the procedure of the Courts and as such it is not within the jurisdiction of the Federal Shariat Court to give a declaration or direction for amendment of that section.

67. It was at one stage argued, though half heartedly, that verse 33 of Chapter 17 confers the rights of killing on the heir only. I cannot subscribe to this wide proposition. The last portion of this verse 'Lo! he will be helped' gives a right to the society or the State to arrange for execution of the death penalty. Muhammad Ali in his commentary says that these words probably indicate "that as the Government is bound to aid him by bringing the murderer within reach of the law, the heir should not take the law in his own hands". This also appears to be the opinion of Maulana Shabbir Ahmad Usmani, since he also insists upon the State aid in bringing the offender to book. Maulana Abdul Majid Dariyabadi comes to the same conclusion the view of the opening words of 2:178. He explains retaliation (qisas) in the following manner:-

> "Qisas is not a synonym of naked vengeance that every individual may take himself from another individual. On the other hand it is the name of an organised, civilised and systematised 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. Words يا ايها الذين آمنوا are used to address the Muslims collectively and not in their individual capacity".

68. There is thus nothing in the Quran and the Sunnah against the State being responsible for execution of the culprit. While carrying out the execution it shall be treated as to be acting on behalf of the heirs of the deceased.

69. The next point is whether the sentence of life imprisonment and fine is repugnant to Islam. I have already dealt with the question of right of the heirs of the deceased to retaliation (17:33) and pardon on payment of blood-money or diyat (2:178). But murder is an offence which cannot be said to involve only rights of the heirs of the deceased. It also involves the rights of Allah, though in certain cases the rights of the heirs may be given preponderance in the interest of maintenance of peace in the locality by creating good will and amity if possible between the heirs of the deceased and the accused or his family.

70. Quran describes, as stated above, this sin to be the worst of sin and treats the wrongful, killing of one person as the murder of the entire mankind. For this reason the normal sentence for the offence of murder is of death. According to the tradition of the holy Prophet (peace be upon him) من قتل قتلناه (We shall kill a person who kills) or كتب الله القصاص (Retaliation is Allah's command). The Quran emphasises الفتنة اكبر من القتل

(insurrection is much graver than murder). It, therefore, points out as stated by Imam Ibn-e-Taimia in Siyasat-e-Sharia, page 239, that to murder any person is to involve oneself in mischief, corruption and moral depravity (فساد وشر). It cannot be doubted that mischief, corruption and depravity affect the society as much as an individual. For this reason the punishment of a mischief monger (موذی) who habitually causes injuries to the members of the society is death (see Islami Faujdari Qanoon by Salamat Ali Khan, page 163) or detention in prison till he repents. It is for this reasons that it is stated at page 5 of the above book which is an Urdu translation of Kitab-ul-Ikhtiyar, on the authority of Fathul-Taqdir:-

> "Two rights are blended in retaliation; one is the right of God since it frees the world of corruption (فساد) and secondly the right of man, in so far as it is a source of satisfaction to the heirs of the slain".

It is further stated on the same page on the authority of Itabia:-

> "The preponderant right, however, is that of man because you have already seen that retaliation comprises of two rights in which the right of the man is preponderant. But it does not mean that there is no right of God".

While commenting on 5:45 (which in his commentary is marked as verse No.48) Allama Yousuf Ali writes:-

> "Even where the injured one forgives, the State or Ruler is competent to take such action as is necessary for the preservation of law and order in society".

71. Maulana Abdul Majid Dariyabadi is also of the same view in his commentary on 2:178. He states that the offence of culpable homicide amounting to murder

is not only an attack on the State or the society as a whole but also on the individual, meaning thereby that the offence has a public character as well as private.

72. In Kitabul Fiqh by Abdur Rehman Al-Jajaziri, Vol.V, (Urdu translation) page 489, has been discussed the authority of the State (Sultan) in connection with the offence of murder. He writes:-

> "It will not be correct to say that if those who have a right of retaliation pardon the accused law and order situation may arise; because, as, has already been stated the person entitled to retaliation will generally insist upon the punishment of death. Assuming that he pardons the accused the judge can still punish him if he is of the view that peace in the locality shall be disturbed and it is necessary to keep him under detention ... till he is convinced that he has reformed himself".

73. At page 490 are given the opinions of different schools of thought. The opinion of Malikis and Hanafis is that withstanding pardon by the heirs of the deceased the State is entitled to award a punishment of one hundred whips or of a year to the murderer and the same view is attributed to the second Caliph and Medinites. The view of persons belonging to the Shafie and the Hanbli schools is that this is not permissible except when the murderer is notorious for his corruption, moral depravity and mischief mongering. In that contigency he can be imprisoned or whipped or deported.

74. This is supported by Anwar Ahmad Qadri in Islamic Jurisprudence in the Modern World (printed by Sh. Muhammad Ashraf), Lahore, page 299 in which he states that tazir can be given with blood-money (diyat).

75. This is also laid down in 5:33 which provides the following sentences for waging war against Allah and raising corruption or mischief in the land.

> 5:33 "The only reward of those who make war upon Allah and His Messenger and strive after corruption in the land will be that they will be killed or crucified, or have their hand and feet on alternate sides cut off, or will be expelled out of the land, Such will be their degradation in the world, and in the Hereafter theirs will be an awful doom".

76. The sentences are,- (1) death, (2) crucifixion (3) cutting of hands and feet from the opposite side and (4) expulsion out of the land which has been interpreted by some as imprisonment. The commentators have confined the applicability of this verse to sedition, dacoity or high-way robbery. But there is no justification for thus limiting its scope and extent. The words of the verse are applicable inter-alia to situation where the actions of individual or a group amount to creating corruption in the land (فساد فی الارض). In fact according to one sense spreading corruption in the land itself amounts to waging war against Allah who has ordained the retention of a balanced society full of virtues and free of vices. It is for this reason that Allama Shabbir Ahmad Usmani is of the view (see his comentary on 5:33) that there is no justification for curtailing the generality of the words used in this verse to specific offences of sedition, robbery or dacoity. The language of the verse should be considered in its wider sense. To be at war with Allah and His Prophet (peace be upon him)

or to create corruptions or disorder in the land would cover all such matters as,- (1) offensive by the non-Muslims (2), the mischief of apostasy (3) highway robbery, (4) dacoity, (5) unjustified murder,(6) plunder, looting or pillage,(7) criminal conspiracy and (8) seditious propaganda. Each of these offences are such for which an offender would be liable to atleast one of the sentences referred to therein.

77. The reference to qatal-e nahaq or unjustified murder clarifies the opinion of the worthy commentator. In fact creation of disorder in society which one wishes to be an ordered society would itself amount to creating corruption or mischief (فساد). Thus a person who is a goonda (arch criminal) takes pride in his being called a goonda. It is his hobby as well as policy to create terror in the minds of members of his locality who would like to put an end to his criminal activities. He earns his living by sale of liquor and other intoxicants, prostitution, gambling, black mail and making people pay protection money. He master minds the criminal activities of others and thus assembles round him other criminals hardened cold blooded as well as potential. In the advancement of any or all of these activities he commits or abets murder. Is he not one who creates corruption (فساد) in the land?

78. Similarly a rasageer who abets the commission of theft of cattle and in the attainment of that objective is so unscrupulous that he does not hesitate in the abetment or commission of offences of murder

ought to be considered a terror to the society or as a person creating corruption in the land. Murder committed by such person would, therefore, fall within the verse. In fact this is a verse which if acted upon would eradicate the menace of such arch criminals from the society. The verse provides the best protection against organised goondaism, terrorism, blackmail, maintenance of dens of vices which attract members who otherwise would have been virtuous and good members of the society. According to Islami Faujdari Qanoon by Salamat Ali Khan, page 163, mischief mongers can be punished with death or by detention in prison till they are truly repentant.

79. It is interesting to note that Shah Waliullah in Vol.II of Hujjat-ul Lah-ul Baligha page 431 has held the offence of murder to be the worst form of creating corruption (فساد) among the people. He says:-

> (It is the biggest cause of corruption).

80. Imam Ibn-e Taimia has referred to the opinions of various jurists about categories of corruption punishable with death in his book Siyasat-e-Sharia, page 225 (Translation by Muhammad Ismail Godarvi).

> 1. Sentence for espoinage according to Imam Malik and some belonging to the Hambli school of thought is death.
>
> 2. According to Imam Shafi and Imam Ahmad and some followers of Imam Ahmad and Imam Malik if a person introduces in the land anything new which is contrary to the holy Quran and Sunnah he should be put to death.
>
> 3. In the view of Imam Malik persons belonging to Qudriya sect should be put to death not because they were apostates but because it was the worst corruption (فساد) in the land.

4. In the opinion of Hazrat Umar and Hazrat Usman, Hazrat Hafsa and Hazrat Abdullah-bin-Umar the sentence of a person practising magic is death by sword. According to some, such a person is an apostate but some jurists say that he is liable to be killed for creating corruption (فساد) in the land.

5. According to Imam Abu-Hanifa a person repeating the commission of an offence punishable by death is liable to be slain by way of tazir.

6. According to Imam Abu Hanifa a person who habitually makes other, part with their property by cheating and fraud should be put to death.

7. If it is proved about a person that the society cannot rid itself of him unless he is killed, he should be put to death. In support of it is cited from Sahih Muslim a tradition related by Arfaja-al-Ashjai who heard the holy prophet say that if you are unanimous about a particular person and somebody comes to you to create dis-unity amongst you or to disrupt your society you should put him to death.

8. About a person habitually taking liquor it is said that if despite punishment he repeats his offence of taking liquor he should be put to death on repetition of the offence a fourth time since he spreads corruption (فساد).

9. Hazrat Umar heard a woman reciting some couplets out of which one couplet expressed a desire to meet Nasar son of Hajaj. Hazrat Umar called Nasar and confirmed that he was an extremely handsome person. He got his head shaved. This added to his beauty and grace. He, therefore, turned him out of the city and deported him to Basra so that the women folk of Madina might not be involved in scandal (فتنہ).

10. If a person acting as a son to a deceased victim accepts diyat but despite this kills the culprit the holy Prophet is stated to have said on the authority of Jabar bin Abdullah that such a man should be killed.

81. According to Raja Haq Nawaz this would still be a case covered by verse 2:178 in which the heirs of the murdered culprit have a right to pardon or obtain blood-money. It is true that notwithstanding the authenticity of this tradition the view of Imam Malik and Shafai is that this should be treated as a new murder. But Akrama and Kataba are clear that such a person should be put to death and in the opinion of Hasan it is discretionary with the Imam to put him to death or to allow the heirs to obtain blood money.

82. Precedents are, therefore, not lacking to show that where there is element of corruption the matter is governed by the principle of right of God and it is open to the Court to sentence a culprit by way of tazir to death or imprisonment. This is further borne out by the fact that verse 5:33 about corruption or waging of war against Allah and His Prophet (peace be upon him), immediately follows verse 5:32 in which a warning given to the children of Isreal (Bani-Isreal) was repeated that the unjustified murder of one human being is as if the entire mankind has been killed. This context proves that wherever the killing is the result of or with a view to creating corruption (فساد) it should be

dealt with in the manner provided by verse 5:33 and the sentence in a case of unjustified murder from among the four sentences enumerated therein would be the sentence of death or imprisonment.

83. Faced with the principle of verse 33 of Chapter 5 some learned counsel submitted that another section could take care of the circumstances in which that verse would be applicable. In this connection reference was made to sections 396, 397 PPC. But this objection is without force. The policy of law is to make the legislation as comprehensive as possible, so as to make it applicable to different circumstances. It is for this reason that the Pakistan Penal Code in its section 302 has described two alternative sentences leaving it to the Judge to award the appropriate sentence keeping in view the facts of each case before him. Section 396 and 397 deal with cases of robbery and dacoity. Similarly Chapter 6 deals with offences against the State including sedition. The section in which provisions for unjustified murder should be properly made would be the section relating to murder. It is for this reason that section 302 is the only section in which sentence for murder contemplated by verse 33 of Chapter 5 should be introduced. And this would not be something strange. We have already seen that in the Ordinance relating to punishment of Hadd, provision for tazir has also be made. As an illustration I may refer to section 10 of the offence of Zina (Enforcement of Hadood) Ordinance (VII of 1979), which provides that "subject to the provisions of section 7, whoever

commits Zina or Zina-bil Jabr which is not liable to Hadd, or for which proof in either of the forms mentioned in section 8 is not available and the punishment of qazf liable to Hadd has not been awarded to the complainant, or for which Hadd may not be enforced under this Ordinance, shall be liable to tazir". Provision for sentence to tazir is made in sub-section (2) of section 10.

84. On the same analogy tazir must necessarily be provided in section 302 for cases in which the right of Allah is considered preponderant over right of man. The standard of evidence for qasas or retaliation is higher than the standard of evidence followed by the Courts. On the analogy of Hadood Ordinance where evidence is insufficient from the standard of Islamic Sharia and a person may still be convicted for tazir, it is necessary to maintain the sentence of imprisonment and fine.

85. It was, however argued by Mr. Khalid Ishaq that there is no concept of punishment of imprisonment in the holy Quran and Sunnah. The reference to such punishment is found in the case of Hazrat Yousuf who was put in prison by the then Government of Egypt but it does not have the seal of approval of the holy Quran.

86. This argument has not impressed me in view of the words ينفوا من الارض in verse 33 of Chapter 5. It is true that these words have been interpreted by some commentators as meaning deportation but according to the Hanafi view it means imprisonment. (See commentary by Maulana Abdul Majid Dariyabadi). A reference to this view has also been made by Muhammad Ali in his commentary.

He says: "ينفوا من الارض" literally means that they should be banished from the earth, but according to Abu Hanifa the meaning is here imprisonment (Al-Habs) and most lexicologists accept this. L.A also accept this interpretation that they should be kept in the prison. The reason is apparent. No one can be banished from the whole of the earth unless he is kept in prison ...".

87. A tradition reported from Ibn-e Umar is reproduced (tradition No.1202) in Balgh-ul Maram, by Allama Ibn-e Hajar Askalani at page 242, that the holy Prophet(peace be upon him) said that if a person seizes another person and a third person kills the person so seized the actual killer will have to be put to death while the man who seizes him would be imprisoned. According to Darqutni this tradition is maosool (موصول). According to Ibn-e Qathan it is sahih (صحیح) since the relators are men of piety but Baihaqi has preferred this tradition as falling in the category of Mursal (مرسل). Hazrat Ali decided an analogous case in the same manner and imprisoned the person who had seized the victim at the time of murder. (See p.566 of Vol.V of Kitab-ul-Fiqh by Abdul Rahman Aljaziri). It is possible that in the above cases the person seizing did not have the intention that the person seized be killed since the view of Imam Malik however is, as stated in Mowatta at page 672, that if the man has seized the victim with the objective that he should be put to death he would also be subject to retaliation.

88. Yet another instance is of the sentence of a person violently killing his slave. According to Ibrahim the killer will be handed over to the heirs of the deceased slave. Imam Muhammad is opposed to this

view since according to him there was no retaliation inter owner and slave. On the other hand the owner should be saved from retaliation and should be imprisoned. This is stated to be the view of Imam Abu Hanifa also (for reference see Kitab-ul Asar by Imam Muhammad page 265).

89. Muavia Bin Abu Sufian on a reference from Murwan bin Hakim directed that an insane person should not be killed in retaliation but should be imprisoned.

90. These instances negative the assertion of Mr. Khalid Ishaq that Islam does not recognize imprisonment as punishment or for detention. It is, therefore, clear that the sentence of imprisonment and fine in section 302 being sentences leviable by way of tazir are not repugnant to the holy Quran and Sunnah. The section, however, requires to be amended in order to include in it by way of provisos, the provision firstly about persons who will not be executed by way of retaliation, secondly about the manner in which an offence can be compounded by the heirs of the deceased unless the culprit is liable to be punished for tazir; and thirdly the forum which should have the authority to determine the question of genuineness of the compromise.

91. This last mentioned provision is necessary in view of the circumstances prevailing in the country in which an accused person uses all tactics including force and black-mail, to tamper with investigation of the offence including the evidence. Some times the heirs of the deceased person, who will otherwise be interested

in seeking retaliation may be terrorised into submission to agree to compounding the offences. I respectfully agree with the suggestion in the case of Gul Hassan given by the Peshawar Shariat Bench that the question of deciding upon the genuineness of a compromise and permitting composition in a case of retaliation should be vested in the High Court whether the agreement of composition is filed during the trial or during appeal or is filed after the judgment of conviction and sentence of death has attained finality but before execution of the said sentence.

92. In view of what has been stated above it is not necessary to deal with the arguments about section 345 Cr.P.C. The Peshawar High Court in the case of Gul Hassan, (PLD 1980, Peshawar 1), has however taken the view that section 345 Cr.P.C. is repugnant to the Injunctions of the holy Quran and Sunnah and has disagreed with the arguments that being a matter of procedure of the Court, it is not within the jurisdiction of the Shariat Court to make such a declaration. Similar embargo on the jurisdiction of the Court has been continued in relation to this Court vide Article 203-B and 203D of the Constitution.

93. The view of the Peshawar Bench is that section 345 Cr.P.C is in the nature of a substantive provision of law and not a mere matter of procedure. The learned Chief Justice relied in his leading judgment on Nabi Ahmad and another vs. Home Secretary, Government of West Pakistan, Lahore and 4 others (PLD 1969 S.C.599), as also on a quotation from jurisprudence by Salmond

Tenth Edition, page 475. I have the highest respect for the erudition and knowledge of law of the learned Chief Justice but I regret that I cannot subscribe to the finding that the Shariat Benches under the provisions then in force or for the matter of that this Court has any jurisdiction to make a declaration about section 345 Cr.P.C or the Second Schedule of the said Code.

94. Under Article 203-D of the Constitution the Court has the jurisdiction to examine or decide 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 (peace be upon him). 'Law' has been defined in Art.203B(a) as not including inter-alia 'any law relating to the procedure'. There can be no dispute on the question that the Code of Criminal Procedure is a law relating to the procedure of the Court. It provides in its section 5(1) that all offences under the Pakistan Penal Code shall be investigated, enquired into, tried and otherwise dealt with according to the provisions hereinafter contained. It is not necessary to consider the import of investigation and inquiry since, the relevant procedure is that of trial which is undoubtedly governed by the provisions of the Cr.P.C. Now a trial under the ordinary parlance will not only deal with the forum but also with the way in which it is to start in continue and to come to an end in a Court of law. For the trial to start it is necessary that complete facts constituting the offence be presented in Court or a report in writing of such fact be made by

any Police Officer or the Court may upon an information received from any person other than Police Officer or upon his own knowledge or suspicion that such offence has been committed may proceed to take cognizance of the matter. In a case triable exclusively by a court of Sessions the case is to be sent by the Magistrate for trial to that Court. A trial envisages framing of charge, taking of evidence and ultimately passing a final order of discharge, acquittal or conviction. All these proceedings including the procedure how a trial would come to an end are matters of procedure.

95. Section 345 Cr.P.C provides for compounding of offences under the Pakistan Penal Code, with or without permission of the Court because certain offences are compoundable with the permission of the Court only. Sub-section (6) of section 345 deals with the effect of composition of offences including offences compounded with the permission of the Court, it provides that the effect of composition would be the acquittal of the accused. Composition is, therefore, a manner in which the trial is to culminate. It is, a provision of law dealing with the procedure of Court and not subject to any declaration by this Court about its repugnancy to the holy Quran and Sunnah of the holy Prophet (peace be upon him).

96. I am also of the view that the distinction between a substantive law and procedural law is not of any relevance in this context since that distinction has been treated to be relevant on the question inter alia of

retrospectivity of a law. A law may provide for a substantive right and yet may be procedural in character. Even a right of appeal though a substantive right is a provision relating to procedure in some sense at least. This matter is thus beyond the jurisdiction of this Court.

97. The next question is about the provisions of sections 55, 56 of the Penal Code and sections 401 to 402-B of the Cr.P.C., which vest jurisdiction, in the Central or the Provincial Government to suspend, remit or commute the sentence passed by a Court of law. I respectfully agree with the findings of the Peshawar High Court in the above case that the provision of section 401, 402-A and 402-B not being provision about the procedure of the Court are not saved and are subject to the authority of this Court. I am also in respectful agreement with the findings that where the heirs of the deceased may be in a position to dictate terms to the Court in respect of sentence, the Central or the Provincial Government cannot press into service the jurisdiction conferred by the above sections to commute or remit the sentence of the convict. But this does not conclude the matter in view of the conclusion arrived at by me that the Court can award tazir in certain cases where the right of Allah is held to have preponderance. It would follow that in such cases the Imam or the State would have the authority to suspend, remit or commute the sentence already passed.

98. This view of mine is supported by the statement of law in Islami Faujdari Qanoon by Salamat Ali Khan, page 157, that'tazir is the right of God and Imam can pardon it'.

99. The learned counsel for the petitioner did not appear in S.P. No.20/79- Karachi in which provisions of section 337Qr.P.C, and section 114 and 130 of the Evidence Act has been challenged. Mr. Muhammad Shafi Muhammadi is a petitioner in a similar case S.P.No.1 of 1979-Karachi, but he did not argue that case. However, I am clear in my mind that these provisions of the Criminal Procedure Code and the Evidence Act relate to the procedure of the Courts and are immune from the jurisdiction of this Court. These petitions are, therefore, liable to be dismissed. But before doing this I would like to meet an objection taken in S.P.No.1/79-Karachi by Mr. Mohammad Shafi Muhammadi that in case where several persons have joined to kill one person, all of them cannot be subjected to retaliation and in any case the person abetting the offence cannot be made liable to the same sentence as the actual killer. Nothing is far from the truth. It is a well known fact that on a child being killed Hazrat Umar sentenced five or seven persons to death and stated that even if the entire city of Sanna had been a party to the death he would have executed all the inhabitants of that city.Balughul Maram by Allama Ibn-e Hajar Askalani, tradition No.1203. The Hanbali view is contrary to this. But Shafies and Hanafis agree that all participants in the murder of one person shall be put to death irrespective of their number (See page 544 of Vol.V of Kitab-ul-Fiqh by Abdul Rehman Aljaziri).

100. As regards the objection about the sentence of the abettor it will be sufficient to quote from Minhaj-ul Talibian page 397: "premiditated homicide, committed under coercion by violence renders liable under the law of talion not only the person who exercised the coercion but also the person who allowed himself to be intimidated for the law regards them as accomplices".

101. There is a concensus of jurists on the sentence of the person who exercises coercion. The difference of opinion is only about the sentence of actual killer, only Hanafis from amongst the four schools being of the opinion that the latter cannot be executed in retaliation.(See pages 537 to 544 of Vol.V of Kitab-ul Fiqh by Abdul Rahman Aljaziri). This view will hold good about an ordinary abettor also. In fact it would be highly unreasonable to hold that a person coerced to kill should be subjected to retaliation while a person who has actually coerced another person to kill should escape the penalty or the extreme penalty.

102. Before finishing the subject of murder I would deal with the provisions of section 304 PPC also which deals with culpable homicide not amounting to murder. According to Fiqh Hanafi murder is of 5 kinds:-

1) Qatle Amd or premeditated murder.

2) Qatle Shibeh Amd is murder when a person dies as a result of injury from something which is neither a weapon nor like a weapon e.g., a whip or a small stone. According to

Imam Abu Yousuf and Imam Mohammad it is Shibeh Amd when death is caused as a result of hurt by something from which death is not usually caused i.e., when from the nature of the object from which death is caused, an intention to cause death cannot be inferred.

3) Qatle Khata (homicide by error) is a result of error for example a hunter fires on something considering it to be an animal but which happens to be a human being and is thereby killed.

4) Qatle Misle Khata or homicide by quasi error is when a person while sleeping falls on another person who is thereby killed or a person falls from a roof on another person who is thereby killed or some brick or piece of wood falling from the hand of a person by mistake drops on another person who is killed or a person riding on an animal trampled and thus killed the deceased.

5) The illustration of qatle bissabab is of a person losing his life by falling into a well excavated by the accused on another person's land.

103. According to another view the last two categories are included in qatle khata or homicide by error. The distinction however between the different categories is that intentional or pre-meditated murder is punishable by death or retaliation, while the other categories are punishable by payment of blood money and of offering (کفارہ) for expiation of the sin. Offering for expiation is not however, enforceable by Courts.

104. Section 304 and 304-A PPC correspond to qatle shiba amad and qatle khata. As in shariah offences under sections 304 and 304-A are not punishable with death. They are punishable with imprisonment and/or fine. These sentence can be maintained on the principle of tazir with the result that the sentence already provided would not be considered to be contrary to the holy Quran. The repugnancy with Quran and Sunnah can be removed by adding the provision for payment of blood money to the heirs of the deceased.

105. The next point is whether the provision of sections 324, 325, 326, 328 and 329 etc require to be changed. The principle of tazir would equally apply to these provisions but the provision of retaliation in some cases and of ursh in others requires to be introduced in some sections in view of the principle laid down in verse 5:45.

106. Before giving my views on the amendments in the various sections of the Pakistan Penal Code concerning bodily injuries I would like to make certain comments. It is not necessary to change the whole structure of the Code in this respect since the Code is a valuable document prepared with utmost care and attention and almost every word of it has been interpreted by Courts of law during more than a century. Any fundamental change in the structure of the Code might render all those valuable precedents of no use. This will be an irreparable loss in the field of criminal law. It would also create problems for the Courts and the Members of the Bar. The Constitutional requirements will be fulfilled by such amendments in law which may remove its inconsis-

tencies if any with the Quran and the Sunnah. It is with this end in view that I proceed to test the various provisions of Chapter XVI.

107. Now homicide may be justifiable and culpable. This difference is recognized by shariah which states that there is no culpability inter-alia in putting a person to death in execution of legal punishment for any offence committed by him. The holy Quran itself recognises it in 5:32 and 6:152, 17:33. In 5:32 the proposition to kill a human being is subject to the exception: "for other than manslaughter and corruption in the earth". In 6:152 such exception is 'save in the course of justice'. In 17:33 the prohibition is 'save with right'. It is further emphasised that it should be wrongful slaying in which the heirs of the deceased would have a right of retaliation. It is this wrongful slaying which is 'culpable homicide'.

108. Section 299 defines culpable homicide which in the parlance of Islamic Jurisprudence or fiqh comprises of premeditated murder (قتل عمد) unpremeditated homicide (قتل شبہ عمد) and homicide caused by negligence whether rash or simple (قتل خطا). This last category includes (قتل مثل خطا) homicide caused by quasi-error and (قتل بسبب) homicide which is the indirect result of error.

109. Culpable homicide which amounts to murder is the same as premeditated murder (قتل عمد) while that which does not amount to murder and which is not punishable with death under the Code is other than premeditated murder for which under Quranic Injunctions also there is no retaliation (See 4:92).

4:92. "It is not for a believer to kill a believer unless (it be) by mistake. He who hath killed a believer by mistake must set free a believing slave, and pay the blood money to the family of the slain, unless they remit it by charity ...".

110. This verse deals with 'murder by error' (قتل خطا) but the same principle has been extended by a tradition of the Prophet (peace be upon him) to an unpremeditated murder (قتل شبہ عمد).

111. Intention to cause death is the main ingredient of premeditated murder so is that of murder in the Code. The intention may be gathered under shariat from the weapon used by the accused. So it can be gathered under the Codes vide secondly, thirdly and fourthly to section 300.

112. It is reported by Ibn-e Abbas that the Prophet (peace be upon him) said that if a person kills another by throwing stone, by a whip, or by a staff it's blood money will be that of homicide by error (قتل خطا). Imam Malik was of the view that if the staff is heavy and sufficient to cause death the assailant will be guilty of premeditated murder. This view finds support from the tradition reported in all well known books of traditions, where a Jew was killed in retaliation by two stones under order of the Prophet (peace be upon him) for having similarly caused the death of an innocent girl.

113. The tradition from Ibn-e Abbas is, therefore, confined to the causing of death by such stone, whip or staff which would not be ordinarily sufficient to cause death and as such from the use of which as a weapon of offence no conclusion of premeditation can be drawn.

114. This tradition which deals with (قتل شبہ عمد) unpremeditated murder names only those weapons from which intention to kill cannot be gathered. Where such intention cannot be gathered, the Code also treats the offence as culpable homicide not amounting to murder.

115. This is borne out by para 513 (P.178) Islami Faujdari Qanoon by Salamat Ali Khan, which is a translation of Kitab-ul Ikhtiyar):

> "The commission of the act causing death may be either with the intention to cause death or without such intention. An act done with the intention to cause death would involve the use of weapon or something like a weapon. It would then be a premeditated murder (قتل عمد). If weapon or something like it is not used it is not premeditated murder but an unpremeditated one (شبہ عمد), since the intention is not to kill".

116. Although the reference to the use of weapons is merely illustrative but it has been taken by some jurists in a literal sense. They are, therefore of the view that death caused by drowning, by strangulation, by throwing the victim to snakes or carnivorous animals is not premeditated murder (قتل عمد) and as such is not liable to qisas. Such opinions may be found in Fatawa Alamgiri and other books on fiqh. But such opinions are not shared by others including Imam Shafie, Imam Abu Yousuf and Imam Muhammad. Death caused by drowning is in their opinion subject to retaliation. Their reliance is upon a tradition from the Prophet (peace be upon him) (p.34) that whoever drowns will be drowned. Fatawa Alamgiri Vol.IV, Kitab-ul Janayat (p.568).

117. Exceptions to section 300 also do not present any difficulty in respect of reconciliation with Quran and Sunnah. The first exception is where death is caused when the offender was deprived of power of self control by grave or sudden provocation or by mistake or accident .

Death caused by accident or mistake is nothing but murder by error (مثل خطا). Provocation when grave and sudden would take the matter out of the category of intended or pre-meditated murder.

118. At page 573 of Ainul Hedaya, Vol.IV, it is stated on the authority of Imam Mohammad that if a person trespasses in a house at night and is found dead in the morning and it is proved that the owner of the house killed him while committing adultery with his wife he cannot be sentenced to qisas. Another instance is related of a person killing a male and one of his (assailant's) female blood relation, when he finds them committing adultery by consent. It was asserted that he cannot be slain in retaliation.

119. These opinions may be compared to tradition 1114 from Abu Daood, Vol.III, page 424, related on the authority of Abu Huraira, Saad bin Ubada enquired from the Prophet(peace be upon him) whether a person who found a stranger with his wife could kill him. The Prophet (peace be upon him) answered in the negative. In another tradition No.1115, Saad bin Ubada is reported to have asked whether in such case he should wait till he collected four witness (to depose against them on charge of adultery). The Prophet (peace be upon him) assented to this.

120. The opinion in Ainul Hedaya and these traditions can be safely reconciled. If a person causes death on seeing his wife or other near female relation in a compromising position with a stranger he should be taken to have lost self control and acted under the influence of sudden and grave provocation. But if before this even

occures a person makes up his mind to kill if he ever saw the two committing adultery it will be a case of premeditation. Moreover the traditions of the Prophet (peace be upon him) prove the incorrectness of the opinion of some jurists that it is permissible to kill persons found committing adultery.

121. Exception 2 is about exceeding in good faith right of self defence. The Quran recognises the right of self defence in verse 2:191 when it declares lawful killing in exercise of such right even in Haram-e-Kaaba where shedding of blood is otherwise prohibited. Imam Mohammad has related from Ibrahim Nakhai that if a person enters another person's house during night and is found dead in the morning, the claim of the owner of the house that he had fought with him would be put to test and similarly if it is found that he had entered the house with the intention of committing theft there will be no retaliation-only blood-money will be payable.

122. At page 328 of Durrul Mukhtar Vol.IV, is recorded a hadis from the holy Prophet that on being questioned about the course to be adopted if a person approached the questioner and snatched away his property from him and it was not possible for him to take recourse to any officer of the Government the Prophet (peace be upon him) said that he should fight with him till he himself either saved his property or was killed and thus attained martydrom. He further said that if the thief was slain his place would be in Hell. But it is clarified in the above book as a juristic opinion, that the right to kill would accrue only if his property could not be recovered otherwise. It is

further stated there that if notwithstanding the knowledge that if challenged the thief would decamp leaving the stolen property there, Anyone killed the thief it would be a case of unjustifiable murder.

123. It is thus clear that exceeding the right of self defence if in good faith would not amount to murder but if it is exercised despite knowledge that no case of self defence is made out it would amount to murder. The Penal Code and Sunnah are, therefore, unanimous on this point.

124. Exception 3 is about a public servant causing death by exceeding his powers in good faith and believing his action to be lawful and necessary for due discharge of his duty.

125. I have not been able to discover any Quranic verse or any tradition of the Prophet (peace be upon him) to the contrary. It is, however, clear that the very fact that there is no intention to carry on unjustified killing would remove his act from the ambit of premeditated murder (قتل عمد).

126. Exception 4 is about the causing of death 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.

127. Such an exception is available in the Sunnah of the Prophet (peace be upon him). Two women of Huzail tribe fought with one another. One of them hit the other with a stone which caused the death of that woman as well as the child in her womb. The Prophet (peace be uon him) awarded diyat for the death of the woman and directed giving of a slave or slave girl for the death of the child.

128. Several principles can be deduced from this tradition.

1) When in a sudden fight between two unarmed women one of them in the heat of passion picks up a stone and throws it on the other, thus causing her death it is not premeditated murder (عمد).

2) The stone not being a weapon as such knowledge could not be brought home to the offender that it must in all probability cause death or such bodily injury as is likely to cause death (see s.300). The offence could not, therefore, be of premeditated murder.

3) The causing of the death of a child in the mother's womb is not homicide. If it had been so full diyat would have been awarded for its death also. This is the same principles as laid down in Explanation 3 to section 299.

129. There are other traditions also about i.e., giving of a slave, or slave girl, horse, mule or 500 Dirhams for death of the child in the womb. It, therefore, appears that in that case it was a fine for the injury caused to the woman.

130. There are however two traditions in which the pregnant woman was killed. One is the tradition related above and the other is of killing by a staff with the result that the child in the womb was killed.

131. In that case the Prophet (peace be upon him) ordered the assailant to be put to death and also to give a slave or a slave girl to the heirs of the deceased.

132. But from these instances it cannot be deduced that killing of a child in the womb amounts to commission of homicide. In Kitabul fiqh by Abdul Rahman Aljazir page 704, is reproduced the opinion of Hanafi jurists that if it is proved that there was a child in the womb it would not add a separate liability since it is a part of the same body (of pregnant woman). It is

for this reason that the fine of a slave is not termed by the jurists as diyat or blood money). Thus the statute law is not different from the law of Shariah.

133. The fifth and the last exception is that 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. The framers of the Code had in mind suttee or duelling (1891) 18 Col. 484 (489) (F.B) per Pigot J leaving the question of age aside since in shariat a person of 15 years of age is presumed to be a major, this provision is in accordance with the opinion of Imam Malik.

134. Section 301 deals with culpable homicide by causing death of a person other than the person whose death was intended. It declares such offence also as murder. There is no tradition about this but it is clear that if intention was to commit murder of a human being and during that attempt some other human being died the offence having been committed in execution of intention and premeditation to kill must amount to premeditated murder. It cannot be equated with quasi murder (قتل شبہ عمد) or homicide by error (قتل خطا) because in the first the intention to kill cannot be presumed from the weapon used and in the other there is never an intention to kill any human being. The want of intention to kill a human being takes these two categories of cases out of the ambit of premeditated murder. Any opinion to the contrary would be repugnant to analogical reasoning or qiyas.

135. The only provisions requiring consideration in matters of homicide are sections 303 and last portion of 307 headed 'attempts by life convicts. Section 303 provides for punishment of death for life - convicts while the last portion of section 307 provides, for the same sentence, for life convicts guilty of an offence of attempt to murder. Provisions for death sentence in either case has obviously been made for administrative reasons and for maintenance of discipline in prisons. The view of Muslim jurists also is that death sentence will be awarded to the accused for recurrence of the offence of murder or repetition for the fourth time of the offence of taking liquor and this can be done for administrative reasons.

136. The only fault one can find is in sections 302, 304, 304A and provisions about hurts and that only to the extent that they do not provide for diyat or blood money or compoundability. For this only necessary amendment is required.

137. The amendment in section 302 PPC will be three-fold. The first amendment will be the addition of a paragraph to the effect that in case the Wali of the deceased pardons the accused somewhat and the Court competent to confirm the judgment of conviction and sentence of death if awarded, considers it a fit case for permitting the offence to be compounded and finds that there has been a genuine composition may substitute the sentence of death

by the sentence of payment of diyat quantum of which shall be laid down in the Schedule to be attached to the Code and for payment of which time shall be fixed by the Court.

138. It should be clarified that in case of default of the accused convict to make the required payment by deposit in Court the sentence of death shall be executed. In case of payment the blood money shall be distributed according to personal law of the deceased amongst his heirs.

139. This shall be followed by a proviso enumerating the persons who cannot be subjected to qisas. These are:-

(1) A person if less than 15 years of age;

(2) A person who is insane at the time of execution of the sentence; and

(3) A person killing his son.

The last exception is based upon the tradition لا يقاد للابن من ابيه (father will not be subjected to retaliation for killing his son). To the same effect and bearing the same meanings are traditions لا يقتل الوالد بالولد and لا يقتل بالولد الوالد

The jurists have extended this principle of invalidation of retaliation (qisas) to cases where the murderer is the mother and grand parent, how high so ever, of the

slain. My view is that this is not a fit matter for extension of classes by analogy except in case of a mother. On account of extreme love and affection for the child no parent can be expected to kill his/her child by premeditation except in most unusual circumstances. This might itself be a ground for giving him/her benefit of doubt in relation to the murder being absolutely unjustified. But the doubt, on this ground will disappear with the change in the degree of relationship. In the context in which this exemption was made by the Prophet (peace be upon him) the word الأب can mean father only and cannot include father's father or any higher ascendant.

140. The jurists have also exempted from retaliation a person who becomes the heir of the deceased or of an heir of the deceased. There appears to be no justification for this principle in Quran and Sunnah. In any case such a person cannot be allowed to take advantage of his having become such an heir and to claim the authority to pardon himself since a murderer cannot be allowed to succeed the murdered. This category should not be added to the exemption clause.

141. Sections 304 and 304A PPC will confirm to the holy Quran and Sunnah by the addition of sentence of payment of blood-money or diyat quantum of which as stated above shall be laid down in the Schedule to be added to the Pakistan Penal Code. It should also be provided that after recovery the amount shall be distributed amongst the heirs of the deceased according to his personal law. No doubt time shall be fixed for deposit of the blood money in Court.

142. In this connection, it is worthwhile noting that according to some traditions the payment of diyat would directly be made by the helpers, relatives, sympathisers of the accused or by the group to which he belongs (Aqila). The principle for fixing the liability to pay blood money on persons other than the accused is that those persons being in a position to influence the actions of the accused should be reminded of their duty of keeping the accused as well as other members of their group under control and check their criminal activities. This is a form of collective fine upon the helpers, associates and companions etc of the accused. The list of supporters or helpers is not prescribed. It may very according to circumstances. According to Abdul Rahman Aljaziri (see Kitabul fiqh, Vol.5, page 716), the Aqila of an accused, if he is a government servant, may be the members of the same service in his immediate Department. He relies for this proposition upon the decisions of Hazrat Umar who established government offices and made the members of the respective office liable to pay penalty imposed on an accused for offence committed by him during his tenure of Government service.

143. The adoption of this method could certainly put a check on the criminal tendencies of the members of a homogoneous society where the rule of majority prevails or elders and supporters can command obedience but in the present society where heterogeniety is the rule and it is difficult even for parents to claim obedience from their children, it will be almost impossible to obtain that benefit, except probably in a few

cases. Such exception may be:-

1) Injuries or death caused as a result of rash and negligent driving of a public vehicle in which case the owner of the vehicles can be made liable for payment.

2) Injuries or death caused by a member of a group known for its criminal propensities in which case the leader and other members of that group can be made liable for payment.

144. In such exceptional cases specific provision can be made for payment of diyat by owner of the public vehicle or the member of the criminal group as the case may be. In other cases no specific order for payment by Aqila need be made. They can be made to voluntarily contribute towards the discharge of the liability of the accused by providing for keeping the accused in jail to under go the tazir sentence till the blood money or other compensation is deposited in Court clarifying all the same that such amounts shall be recoverable as arrears of land revenue, even after the accused under goes full sentence of imprisonment. Those who are interested in his early release may then come to his rescue and make contributions for discharging his liability.

145. It has already been seen that verse 45 of Chapter 5 of holy Quran prowides retribution for other injuries also to the human bodies eye for eye, nose for the nose and the ear for the ear and the tooth for the tooth. This principle of retribution will have to be incorporated in the Penal Code.

146. Section 319 defines hurts as meaning causing of bodily pain, disease or infirmity to any person.

Then certain hurts are designated as grievous in section 320 PPC, they are:-

Firstly	..	Emasculation
Secondly	..	Permanent privation of the sight of either eye.
Thirdly	..	Permanent privation of the hearing of either ear.
Fourthly	..	Privation of any member or joint.
Fifthly	..	Destruction or permanent impairing of the powers of any member or joint.
Sixthly	..	Permanent disfiguration of the head or face.
Seventhly	..	Fracture or dislocation of a bone or tooth.
Eighthly	..	Any hurt which endangers life, or which causes the sufferer to be during the space of twenty days in severe bodily pain or unable to follow his ordinary pursuit.

147. The tradition from Anas that the holy Prophet (peace be upon him) would direct or recommend pardon in cases punishable by retaliation (qisas) has already been referred to. The object clearly was to avoid qisas as for as possible. This policy appears to have been followed in cases of grievous hurt too.

148. Qisas or retaliation for death does not pose any problem since whatever might have been the manner in which the accused killed the deceased the manner of his execution was by sword. The aim was firstly to fix one method of execution of all criminals sentenced to death and secondly that the execution should be by a simple method causing the least pain or suffering to the convict.

149. But qisas (retaliation) in 'eye for eye, and the nose for the nose, and the ear for the ear, and the tooth for the tooth' presented difficulties. The term qisas is considered

synonymous with musawa i.e., to make a thing equal to another thing. Qisas, therefore, means making the punishment equal to the crime Sahih Muslim by Abdul Hameed Siddiqi, Vol.III, 895, note 2125. To cause harm to the assailant equal to the harm caused by him to the victim is not possible in many cases. Different principles have therefore been evolved to imitigate the probable inequality the ultimate emphasis in most of the cases being on the alternative sentence of payment of compensation.

150. Thus Imam Muhammad reports on the authority of Imam Abu Hanifa who reported it from Hamad that Ibrahim said that if the accused cuts another person's foot, the foot of the former should also be cut. But if it be not possible to obtain retaliation he should pay compensation (diyat). It, therefore, follows that inability to cause the equal or almost equal injury would entitle the claimant to demand compensation.

151. It is for this reason that retaliation in cutting a limb is limited to cases where the limb is cut from the joint. It is not permissible to cut or injure the bone.

152. There is no qisas:-

1. In fracture of the bone in view of the tradition of the Prophet (peace be upon him) لا قصاص في العظم
2. If full nose is cut since it would require cutting the nasal bones.
3. For the same reason if the cutting of the limb involves cutting of the bone too or cutting of a finger from a place other than the joint.
4. If the eye is gouged.
5. In cutting of only a part of the lip.
6. In cutting of a tongue.

7. If an additional finger of the victim is cut.

8. In the cutting of skin of the head or the body or cutting the flesh of the cheek, belly or back, or in the cutting of hair.

9. In causing a wound going to the brain, stomach wound or dislocation of bone in view of the tradition:

لا قود فی المامومة والجائفة والمنقلة

153. The sentence in the verse related to above-i.e., eye for eye, nose for nose etc-will apply to cases of permanent privation of the sight of eye, cutting of ear, amputation of any limb or organ of the body. Provisions for qisas shall, therefore, be made subject to the rights of the victim to pardon in such cases but keeping in view the principle of equality and that the cutting of the limb ought not to involve cutting of bone. Qisas shall also be provided for Mozaha (موضحہ), a wound caused on the head, forehead or face by a cutting or stabbing instrument or weapon which exposes the bone. It should for these reasons be provided that execution of sentence of qisas should be preceded by medical examination in order to find out whether equality can be maintained without causing an additional injury and to make sure that no bone would be effected during amputation or cutting.

154. Another point which is to be kept in view is that provisions for qisas will have to be made in sections relating to intentional causing of grievous injury. Such sections are sections 326, 329, 331 & 333. Other sections like 335 and 338 are of causing grievous hurt unintentionally for which the only sentence in

Shariah is compensation. In all the sections relating to hurt only the provision for payment of compensation requires to be added.

155. Since the compensation as fixed by the Prophet (peace be upon him) varies with the nature of the injury it would be better if a schedule describing the standard compensation be added in the same manner as it is added to the Workmen's Compensation Act and reference to the Schedule be made in the relevant sections of the Code. The maximum amount of diyat may be fixed and it may be left to the Judge to award such amount as he thinks fit keeping in view the circumstances of each case and the financial position of the accused.

156. The Sunnah of the Prophet (peace be upon him) lays down the following rules about compensation:-

Arabic Name of Injury.	Nature of Injury	Compensation
قتل نفس	Murder whether intentional or un-intentional or consequence of a rash or negligent act.	Full diyat.
	Grievous hurt	
	Destruction or amputation of any member or joint in the body.	Full diyat if the member of joint is single e.g., bone, tongue, sexual organ.
	1. Permanent impairing of the powers of any member or joint.	1/2 diyat if the members are in pairs and permanent damage is caused to one member e.g., eyes, ears, eye brows, hands, feet.
	2. Privation of sight of either eye, hearing of either ear, or of any member or joint.	1/2 diyat if in quadruplicates e.g., eye lashes.

3.	Cutting of one lip	1/2 diyat
4.	Uprooting of the hair of the head, eye brows, eye lashes or any other part of the body.	Full diyat
5.	Privation of complete sight	"
6.	Privation of complete hearing	"
7.	Loss of sexual power	"
8.	Cutting of nose-part or whole - resulting in permanent disfiguring of the face	"
9.	Loss of tooth other than milk tooth	5% diyat
10.	Loss of milk tooth if amounts to permanent loss of tooth	"
11.	Loss of one finger or thumb whether of hand or foot.	"

Injury on head or face other than of destruction, impairment and privation of any member or joint.

Shajjah Khafifa	Hurt on head or face in which bone is not exposed.	Zaman
Shajjah Mozaha	Hurt in which bone is exposed	5% diyat.
Shajjah Hashima	Fracture of the bone without its dislocation.	10% diyat
Shajjah Munaqqila	Dislocation of bone	15% diyat
Shajjah Amma	Fracture of the skull when the would touches membrance of the brain.	1/3 diyat
Shajjah Damigha	Fracture of the skull when the wound ruptures the memberance of the brain.	"

Note:- If the brain injury permanently reduces the intelligence quotient of the victim. Full diyat

WOUNDS OTHER THAN OF HEAD OR FACE.

1.	Jaifa	When the wound enters the body of the trunk.	1/3 diyat

Note:- If the wound pierces through any part of the body the offender shall be guilty of causing Jaifa for each of the wound separately.

2. Ghair Jaifa

a)	Damigha	Rupture of the skin causing bleeding.	Zaman
b)	Bazia	Bone not exposed	"
c)	Mutalahima	Lacerating the flesh.	"
d)	Moziha	Exposing the bone	"
e)	Hashima	Fracture without dislocation of bone.	"
f)	Munaqqila	Fracture and dislocation of bone.	"

157. The compensation know as 'Zaman' is not fixed. It is compensation for hurts for which no diyat or ursh in the form of percentage of diyat is fixed. It should be left to the judge to fix the amount of Zaman compensation keeping in view the nature of the injury. He should also add to it expenses borne by the complainant and any other loss suffered by him which may be provable as liquidated damages. This will obviate the necessity of his filing a civil suit for damages.

158. While amending the sections about hurt principles laid down for amendment of provisions about murder shall be followed with the difference that cases of qisas in matter of hurt shall be compoundable with the permission of the Sessions Judge.

Tazir

Existing provisions about punishments shall be retained as tazir punishment on the principle already discussed and may be pronounced in addition to the sentence of compensation.

159. For the reasons given above I dismiss S.P.No.20/79-Karachi and S.P.No.1/79-Karachi and allow the other petitions and direct that the amendments be made in the different sections of the Pakistan Penal Code as suggested in paras 137, 138, 139, 141, 144, 145, 153 to 158 of this judgment. This decision shall be effective as from the Ist April, 1981.

Before parting with this judgment I would like to place on record my appreciation for the manner in which the members of the Bar have accepted the challenge of Islamisation of Laws in Pakistan. About the assistance that this Court received from the learned Counsel for the petitioners, the least I can say is that it was very satisfactory. My thanks are specially due to Mr. Khalid Ishaq but for whose assistance as amicus-curaie, I would not have felt confident in determing some difficult points.

MEMBER

JUDGMENT

ZAKAULLAH LODI, J:- I had the advantage of going through the judgment proposed to be delivered by my learned brother Mr. Justice Aftab Hussain. I would, however, like to add a few lines of my own.

2. We had before us four sets of petitions in which repugnancy of some provisions of Criminal Procedure Code and Pakistan Penal Code with the Injunctions of Holy Quran and Sunnah of the Holy Prophet (peace be upon him) (hereinafter referred to as the Injunctions of Islam), has been challenged. (i) In Petitions No.13,69,2,12 of 1979 and 9/80 Section 302 PPC read with section 345, 401, 402, 402-A and 402-B of the Criminal Procedure Code (hereinafter described as "the Code") has been challenged. Besides this, some other provisions of the PPC which have relevance with Section 302 PPC, in it, that they deal with the scheme and operation of the PPC, such as Sections 54 etc. and some provisions of the Code of similar nature have also been challenged. (ii) Petition No.4/80 challenges some of the offences against human body covered by Section 325, 326, 329, 331, 333, 338 PPC, (iii) Petition No.12/79 challenges the provisions of Sections 337, 338 and 339 PPC read with Section 224-B and 133 of the Evidence Act. (iv) Petition No.12/79 assails the maximum penalty prescribed by PPC to an abettor of offence under Section 302 PPC. In this petition it has also been challenged that in a case of intentional murder, more than one accused cannot be awarded capital punishment.

3. Dealing with the first set of petitions, suffice it to say that the points involved in these petitions were subject matter of Petition No.7/1979, decided by Shariat Bench of Peshawar High Court, on Ist October 1979 (PLD 1980 Peshawar I). As this Court is only a successor Court, in my humble view, these points cannot be re-examined by us. We have also been informed by the learned Deputy Attorney General that an appeal has since been filed by the Government against the said judgment which is pending decision.

4. Some questions were raised before us with regard to the existing legal position in the relevant field with pointed reference to some lacunas alleged to be appearing in this judgment. In my opinion it would only be relevant to raise such points before the Court now ceased of jurisdiction in the matter. As far as this forum is concerned, it cannot go into them in exercise of parellel jurisdiction. I am also very humbly unable to contribute to the view taken by my learned brother on the point of jurisdiction of Peshawar Bench. I am quite clear in my mind that the jurisdiction of a Shariat Bench has no nexus to the Court's territorial jurisdiction. It rather extends to laws, irrespective of the list in the Constitution on which they find place. I may also add that once a law was struck down by any Shariat Bench of a High Court being repugnant to the Injunctions of Islam, it became extint as from the date fixed by the judgment, and such decision was binding on all Courts. Accordingly the question of any complication, as pointed out by my learned brother, also did not arise. The reference to the number of Judges in the Federal Shariat Court vis-a-vis the Shariat Benches is also insignificant in view of the fact that all these Benches enjoyed identical jurisdiction as the Federal Court now enjoys. Since the jurisdiction of these Benches had relevance to a law examined by it and not to a particular territory, therefore, the possibility of conflicting judgments by different Benches, was also out of question, as discussed by my learned brother.

5. Petition No.4/80 questions the scheme of the penal provisions regarding offences against human body, enumerated supra, in it, that they did not provide for "DIAT" and 'Qasas" in terms of the Injunctions of Islam, as they do not provide for inflicting similar injury to the aggressor i.e. "eye for eye" and "ear for ear" etc. I am in respectful agreement with the main conclusions

arrived at by my learned brother in this context. However I find myself unable to contribute to the observations incorporated in para 153 of the Judgment. These are to the effect that in cases where it was possible to inflict an injury in the same degree or nearest to it upon the person of the aggressor as he had caused to his victim, the principle of retribution should come into play, in its strict sense, subject to the medical opinion. I would venture to deal with this aspect of the subject according to my own understanding of the Injunctions of Islam. I may be permitted to add a few words on this point.

We are required to construe the Injunctions of the Holy Quran and the Sunnah in the light of such conditions as were prevailant at a particular juncture of time in the society in which Islam was practised first in its truest spirit and not to try to apply it by rigidly adhering to the grammatical meanings of a particular verse and by divorcing the impact and bearing of the general scheme and spirit of Quran as well as the goal in view of the Holy Prophet (Peace be upon him). The greatest of exponents of Islamic Laws always adopted this course in their own times and provided a guide line for us. Such other questions, as the examination of the historical background of our people, their temprament and the place and position that they occupy in the present day civilisation are other considerations which shall have to be kept in mind. In the present context it is all the more necessary because the compliance of the doctrine of "eye for eye" etc. was not stressed even in the early days of Islam. The reason was obvious.

The entire scheme of penology in Islam depends upon the interpretation of word 'Qasas' and there are not too opinions about it that it means "equalisation", and such equalisation was always considered feasible by the

doctors of our jurisprudence in other suitable ways. It was, therefore, that they substituted the mode of punishment of "eye for eye" by imprisonment and flogging etc. This diversion was never considered offensive to the dictates and policy of the Holy Quran. Undoubtedly such departure has not been absolute. But the principle that can be deduced for it is that such departure was punctuated by the realisation of social conditions and physical impractibility of "Qaṣāṣ". Before I elaborate the point further I would refer to the Quranic verse which deals with "Qaṣāṣ" in exact terms, so that the gradual development of Quranic laws during the period Holy Quran was revealed, may help us in understanding the methodology of its laws in the field of crimes.

6. Verse 5/45 (also numbered as No.48 in some commentaries) from which the principle of retaliation is generally deduced may be perused first:

٤٥: وَكَتَبْنَا عَلَيْهِمْ فِيهَآ اَنَّ النَّفْسَ بِالنَّفْسِ ۙ وَالْعَيْنَ بِالْعَيْنِ وَالْاَنْفَ بِالْاَنْفِ
وَالْاُذُنَ بِالْاُذُنِ وَالسِّنَّ بِالسِّنِّ ۙ وَالْجُرُوْحَ قِصَاصٌ ۭ فَمَنْ تَصَدَّقَ
بِهٖ فَهُوَ كَفَّارَةٌ لَّهٗ ۭ وَمَنْ لَّمْ يَحْكُمْ بِمَآ اَنْزَلَ اللّٰهُ فَاُولٰۗىِٕكَ هُمُ الظّٰلِمُوْنَ ○

(مفہوم) ہم نے بنی اسرائیل کے لیئے یہ قانون مقرر کر دیا تھا کہ جس شخص نے کسی شخص کو (ناحق) قتل کر دیا اُسکی سزا قتل ہو گی۔ جان کا بدلہ جان، آنکھ کا بدلہ آنکھ، کان کا بدلہ کان ناک کا بدلہ ناک، دانت کا بدلہ دانت۔ یعنی صرف جرم قتل ہی مستوجب سزا نہیں کسی کو زخمی کر دینا بھی ایسا ہی جرم ہے جس کی سزا دی جائے گی اور سزا جرم کے مثل ہو گی۔ لیکن اگر مستغیث مجرم کو معاف کر دے تو یہ چیز مجرم کی سزا کا کفارہ ہو جائے گی۔

Explaining the background of Islamic dictates on the subject of penology, with reference to this verse A. Yusuf Ali, unquestionably an eminent commentator/ translator explains in side note No.554 that "The relation is prescribed in three places in the Pentateuvh, viz., Exond. xxi.23-25; Leviticus xxiv.18-21, and Deut.xix.21. The wording in the three quotations is different, but in

none of them is found the additional rider for mercy, as here. Note that in Matt. v.38 Jesus quotes the Old Law "eye for eye" etc., and modifies it in the direction of forgiveness, but the Quranic Injunctions is more particular". It is obvious that in its earlier part, the verse explains the unflexible law that existed in the days of the Moses and the other part explains the flexibility shown by the Holy Quran. The earlier part of the verse is in the nature of "Khabar", whereas the later is law laying. It would hardly need a mention that a "Khabar" falls much too short of a "Hukm" (direction) and its compliance is also not absolutely binding. It will have a binding effect only if nothing else was to be found in the 'Book' or the "Tradition" relevant to the point. The reasons of rigidity in the earlier times have direct relevance to the conditions then existing and the flexibility later introduced is also directly relevant to the state of things at the time of advent of Islam. God Almighty in his infinite wisdom makes this apparant by the scheme of the verse itself. Gradual process of revelations on the same subject cannot be taken lightly. Hence, the Holy Quran and Hadith shall have to be interpretted in the light of evolution of human society and its demands at a particular stage of time; of course, such process should not defeat the intent and purpose for which Holy Quran stands. Quranic laws were systematically revealed over a period of about 23 years and the purpose behind this process was to gradually introduce the change in the existing mode of things, so that by gradual character building of the people, social conditions could be changed. This process continued till the people were psychologically prepared to receive and follow the ultimate or final laws on a particular subject, and no scope for revulsion and thereby defeating the Islamic system of life was left open. Such is the method of evolution as

Verses 17/33, 4/92 are not relevant for our purposes as they deal with unintentional murders. Apart from these categories of murders another distinct category of laws deals with criminals waging war against an Islamic State and committing highway robbery or decoity coupled with murder. This is all what we find on the subject of murder. These verses are conspicuously silent as to how different kinds of intentional murders would be dealth with. This field is again left open to the future legislators who would utilise it best according to varying times and situations. However the rule in case of intentional murder is death penalty, while compounding the same was merely a concession. Much has been said about the manner and method in which such compounding was to be given effect and also about the state prerogative to punish the offender despite forgiveness in lieu of "DIAT" by the heirs of the deceased, and I need not repeated the same. Even otherwise I have not directly touched that subject. I may only remark here that Islam condemns destroying of life in strongest terms when it says (symbolically) that killing of an individual is killing of the entire humanity. As said above, various shades of intentional murders in the light of their respective background is a matter which differs from circumstances to circumstances, and it should therefore be dealt with keeping in view the social conditions in the state and other relevant considerations. To argue, therefore, that more than one person could not be killed as against one life is too wide a proposition; and not free from difficulty at the same time. But it shall be in the realm of the law makers to give it due consideration. Verse 5/101 and 102 is clear on the State responsibility to enact suitable laws on the subject in the light of the Injunctions on the point found in Quran.

Such legislation is covered by the term "تفاصیل" or "جزئیات" for which the "اولاالامر" is competent. See verses 5/101 and 102.

(مفہوم): اے جماعت مومنین! جن امور کی تفصیل قرآن میں نہیں دی گئی انہیں کرید کرید کر مت پوچھو (کیونکہ اگر ہم نے انکی تفصیل کو بھی متعین کر دیا تو وہ غیر متبدل قرار پا جائیگی اور جب وہ زمانے کے بدلتے ہوئے تقاضوں کا ساتھ نہیں دے سکیں گی تو تمہارے لیے اُن کا بنا فنا مشکل ہو جائے گا) تب نزولِ وحی کا سلسلہ جاری ہے تو تمہارے اوپر اگر انہیں ظاہر کر دیا گیا تو یہی صورت پیدا ہو جائے گی۔

10. The other part of the contention is about the difference of opinion among the Judges and credibility of approver's evidence. No suggestion is to be found in the Holy Quran on these points. In fact in the early period of Islam, which ended with the demise of the worthy Caliph IV, a system of more than one Judge deciding a particular case was not in vogue. Even thereafter in the period of (ملوکیت) any example of this kind is not to be found. However, in the early days of a Islama a principle in the nature of review or appeal had gained ground; though vague and indifinite; as codification of laws was not in practice. Accordingly, apart from the fact that such questions fall beyond the scope of this Court's jurisdiction being matters of procedure, it may be usefully remarked that suitable laws on the point can be formulated, keeping in view the principle of "Adal" which is the edifice of Islamic judicial system. Moreso, because the Quranic Injunctions and the "Hadith" and major part of jurisprudence developed later, only appears to be tackling the cases of direct murder. Since the treatment of this subject is directly and substantially dependent upon the law of evidence in Islam, therefore, a few words may be added here. Alike many other matters, in this field also we find only the basic principles.

Firstly, Quran emphasis on the duty of a Judge (قاضی) to be fair and impartial. It was enjoined

upon Prophet Daud in his capacity of decision making authority, to decide litigation fairly and impartially.

Verse 38/26:

(مفہوم) اے داؤد ہم نے تمہیں ملک میں حکمرانی عطا کی۔ اس سے مراد یہ ہے کہ تم لوگوں کے تنازعہ امور کے فیصلے حق کے ساتھ کرو اور اسمیں اپنے جذبات کو قطعاً دخل نہ دینے دو۔ اگر تم نے ایسا کیا تو یہ بات تمہیں خدا کی راہ سے گمراہ کر دے گی۔

In verse 5/48, the Holy Prophet was directed in these terms:

(مفہوم) ہم نے تمہاری طرف یہ کتاب حق کے ساتھ نازل کی ہے سو تم لوگوں کے فیصلے اس کتاب کے مطابق کیا کرو اور ان کے جذبات اور خواہشوں کے پیچھے مت چلو۔

There are other verses too, on this point, However on the principles of evidence, verses 5/58 and 70/33 may be referred to, as they deal with witnesses. In the matter of evidence verse 17/36, enjoins upon the judge first to make all kinds of inquiries to satisfy himself that all the links in a case before him were perfectly available. After so directing the Qazi, the witnesses are addressed as under:

(مفہوم) اے جماعت مومنین تم عدل کی شہادت دینے کے لئے عدل کو قائم رکھنے کے لئے محکم طور پر کھڑے ہو جاؤ۔ اور کچھ کسی عناد یا اپنے ذاتی مقصد کے لئے نہیں بلکہ محض اللہ کی خاطر کرو۔

In this connection verses 4/135 and 5/8, 2/282-3 may also be referred to. Verses 5/107 and 108 enjoin upon the Qazis (Judges) to summon other set of witnesses in case they did not believe those that were produced before them by anyone of the rival parties. Logical deduction from this would be that if no other witnesses were available and those that had been produced before the Qazi were not worthy of confidence, benefit of doubt would go to the accused. Holy Quran has laid much stress on the point of corroboration of evidence. Verse 5/106

has direct relevance to this principle. There is, however, no direct revelation about the use of circumstantial evidence for corroboration of occular testomony or as independent evidence to base conviction in a criminal case. Same is the case about the worth or weight to be attached to an approver's statement. It is a phenomenon which has attracted the modern system of laws. But in the scheme of things as they stand in the Holy Quran there is also no reason to put a clog on the use of such evidence, provided it was logically and reasonably helpful in the fair decision of cases. Hemce this should also attract law maker's attention.

11. Next comes the contention that an abettor could not be awarded capital punishment. Quranic Injunctions were silent about such criminals; hence the principle of "Ijtehad" should be invoked. The concept of mensrea is of fundamental importance in Islamic legal system. It is evident from the distinction created by the above cited verses which distinguished accidental murder (قتل سہو) from intentional murder (قتل عمد). The rule thus is that the physical punishment is for intention and act both and not for any one of them independent of the other. However, in the light of Quranic Injunctions it is often argued that punishment of crimes in Islam mainly depends upon the direct act alone. I do not hold this view. I am of the opinion that primarily the punishment is for the act; and the intention behind the actual act serves as an aggravating factor or otherwise. In MINHAJ-UL-TALIBIAN (page 397), "premeditated homicide" has been discussed. The view was that in the cases in which murder had been committed under coersion not only the person committing the crime physically but also such other person who had been guilty of exerting coersion on the offender was responsible for the crime being an accomplice. There is,

however, difference of opinion on the point of equal treatment of all of them as to the quantum of punishment. The Hanfi school holds that such person shall not be executed in retaliation (pages 533-537, Vol.V of Kitab-ul-Fiqah by Abdul Rehman Aljaziri). This view appears to be more reasonable. But we also come across cases in which the actual offender was an unwilling party, and the amount of coersion exercised upon him was to such an extent that he had no alternative but to submit to the abettor's will. In such cases rule of prudence should be to judge the nature and extent of coersion. If it was of such a degree that instant death or such instant irreparable loss was feared which could not be repaired at all and there was also no imaginable chance of resorting to law enforcing agencies, then it should not be the actual offender who should receive maximum penalty but the abettor would deserve such punishment. But in the absence of such circumstance, which occurs rarely, there appears no reason why law of the Hanfi school should not be followed. I am thus of the view that an abettor can only be punished with maximum penalty when it was proved beyond any shadow of doubt that the quantum of coersion put upon the assailant placed him in the danger of instant death or something as high as that in terms of losses. Remote and indirect threats and apprehensions cannot be used for lessening the burden of the actual offender. In such a case the abettor shall be dealt with lightly in the light of the facts of each case. The petition is thus dismissed subject to these observations.

JUSTICE ZAKAULLAH LODI
MEMBER-III

Karimullah Durrani, Member: While I am in agreement with my learned brother, Sheikh Aftab Hussain Member, in the conclusion that he has reached and generally with the reasoning by which it is supported, I cannot, with profound respect, agree to the effect of the decision in Gul Hassan's case given by the Shariat Bench of the Peshawar High Court (PLD 1980 Peshawar 1) to which I was a party. My learned brother is of the view that the declaration therein of repugnancy to the injunctions of Islam of Sections 54, 55 and 302 of the Pakistan Penal Code and Sections 345(7), 401, 402 and 402B of the Code of Criminal Procedure with the relevant parts of its schedule cannot have its effect on the state of law beyond the territorial jurisdiction of the said High Court. To my humble opinion this is not the correct appreciation of the constitutional position on the subject. Articles 203A, 203B, 203C, 203D and 203E of the Constitution as incorporated therein by President's Order No.3 of 1979, governed the composition and jurisdiction of the Shariat Benches of the Superior Courts. The position under these articles was that after a Shariat Bench had made a declaration of repugnancy to the injunctions of Islam of a certain law or a provision of law, "such law or provision shall to the extent to which it is held to be so repugnant, cease to have effect on the day the decision of the High Court takes effect" (Clause (b) of sub-Article (4) of Article 203B). I am, therefore, of the view that this cessation of effect is not confined to the territorial limits of the

jurisdiction of a High Court as would be apparent from Clause (a) of the very same Sub-Article of the Constitution which reads as under:-

> "(a) The President in the case of a law with respect to a matter in the Federal Legislative List or the Concurrent Legislative List, or the Governo in the case of a law with respect to a matter not enumerated in either of those Lists, shall take steps to amend the law so as to bring such law or provision into conformity with the Injunctions of Islam".

The cumulative effect of these two clauses would be to remove the so declared law from the Statute Book from the date the relevant decision takes effect. It is for this reason that the President, in case of a federal law and the Governor of the Province in case of laws falling within the Provincial sphere, are enjoined upon to take steps to so amend ~~a~~ law as to bring it in conformity with the decision of the Shariat Bench of a High Court.

Now, this declaration of repugnancy by a Shariat Bench of a law or provision of law to the injunctions of Islam can possibly result in two ways. Either it would leave nothing for the authorities mentioned in clause(a) of the Sub-Article reproduced above to legislate in order to give affect thereto when no lacuna is left in law with the ipso facto removal of the impugned law or provision from the Statute Book, as was the position created by the Decision in Naimatullah Shah Vs. Govt. of Pakistan "(PLD 1979 Peshawar (Shariat Bench) 104)" wherein Clause (d) of Sub Para (3) of Paragraph 25 of Martial Law Regulation No.115 of 1972, conferring first right of Pre-emption on a tenant in land sold by the owner, was declared repugnant to the injunctions of Islam and the decision was ordered to take effect immediately with the pronouncement thereof. Or, on the other hand, it would necessitate alternate or consequential legislation by the authorities concerned where it is so required to be done in order to fill in the lacuna or to avoid chaos resulting from the removal of the

repugnant law. Nevertheless, the decision will take its effect on the existing state of law for the whole of Pakistan notwithstanding the territorial limits of the High Court concerned. In other words such declaration as is under discussion would have extra territorial effectiveness. It would not be a situation unknown in the annals of legal history, as many a federal or provincial law ceases to be effective in the whole of the country once it is held ultra-vires of the legal authority of its legislator. Unless, of course, it is followed by a contradictory decision by another competent Court in which case the applicability of the decisions would remain confined to the extent of the territorial limits of the respective High Courts.

An objection was taken to the effectiveness of the decision of Shariat Bench of the Peshawar High Court on the very same hypothetical reasoning that in case of conflicting declarations by more than one High Court, the declaration of repugnancy by one would not remain capable of implementation outside the territorial limits of its jurisdiction. This objection was very ably countered by the learned Amicus-Curiae, Mr. Khalid M. Ishaq, in that the refusal of the Shariat Bench of a High Court to declare a law repugnant to the tenets of Islam would only be of the effect that law in question would remain uneffected on the Statute Book till such time as it is subsequently declared repugnant by another Shariat Bench in which event that particular law would cease to be a valid one. But position could not be the same when a declaration of repugnancy of a law or a provision of law has already been made by a Shariat Bench of a High Court and thereafter the Shariat Bench of another High Court is asked to make a contradictory declaration to that already made. In this position the latter would not be competent to enter into examination of the particular law, because that law would not be existing and jurisdiction to declare

a law repugnant to Islam vesting in a Shariat Bench is to so declare a law which is a valid law at the time. Be that as it may, this situation does not arise in the case of the decision under reference as no other Shariat Bench, either before or after the date specified therein i.e. 1.12.1979, has made a contra pronouncement in this regard and therefore the only decision in the field, so far, is that of the Gul Hassan Khan's Petitition. I would not like to further indulge in discussion on the competency of the petitions agitating the same question before us as after having had the benefit of the perusal of the Judgment of the learned Chairman and in view of the fact that I myself am mainly in agreement with the essentials of that as well as those of the Judgment of my learned brother Aftab Hussain, M. I am confident that the decision of the Court on the petitions in hand is not going to differ in any material aspect from that which was pronounced in Gul Hassan's case by the Shariat Bench of the Peshawar High Court.

Also I cannot persuade myself to agree with my said learned brothers on the non permissibility of complete pardon by the heirs of a victim of 'QATL-I-AMAD' to the murderer. In my opinion Verse 178 of Chapter II of the Holy Quran cannot be read in isolation of the other Verses of the Holy Book. It has to be read in conjunction with other verses on the topics of 'QISAS' AND 'AFUW' found in different of chapters of the Quran. The various 'AHADITH' of the Holy Prophet (Peace be Upon Him) on these topics are also to be kept in mind while interpreting the Verses under reference in order to see whether total pardon is available to the culprit of the murder mentioned therein.

After a careful study of these Verses and the 'AHADITH', I have come to the conclusion that the heirs of the deceased in 'QATL-I-AMAD' are entitled to grant total pardon to the culprit in the same manner and in the same degree as are those of the murdered in cases of 'QATL-I-

SHUBH-I-AMAD' and 'QATL-I-KHATAA'. 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 forego the right of QISAS. But it has to be noted that in case of complete pardon by the heirs of the Maqtool in 'QATL-I-AMAD', the perpetrator of the offence is not absolved of his liability to Tazeer, as he is not purged of the 'ZULM' which he has committed on the Society by taking life of a Masoom-ud-Dam i.e. a human being whose life was not legally forfieted to the State in punishment of a crime. I am in full agreement with my learned brother Aftab Hussain, M., when he says that in case of this type of murder, the Right of God is merged with those of His creatures (HAQOOQ-UL-IBAD) and that the prescribed punishment in this offence is 'QISAS'. It is only a reduction of sentence on behalf of God Almighty which comes as a blessing from Him to the accused that this punishment gets converted into payment of Diyat to the heirs of the deceased on partial pardon by them and once Diyat is paid both of these amalgameted rights are expiated. Although pardon in toto by the aggrieved party absolves the culprit of the Rights of men, the right of God which had merged into the rights of men on the commission of the offence gets, on a complete pardon, separated therefrom and stands revived. This right of God on account of the element of 'ZULM' in the offence will be exacted in this case by the Court, who will have the discretion after taking into consideration attending circumstances of each case, either to award a suitable Tazeer or to leave the matter to rest with Allah by not awarding any sentence at all. This Tazeer can be to any extent barring the sentence of death as to exact 'QISAS' is the right of the heirs of the deceased (فقد جعلنا لولیه سلطانا ...) and once an option to not to have 'QISAS' is exercised by them either by way of total or partial AFUW (عفو), the sentence of death stands commuted on

behalf of God and the offender becomes the recipient of His Rahma (ذالک تخفیف من ربکم ورحمۃ). This, of course, does not include those murders which are committed in furtherance of 'FASAD' and/or 'FITNA'. The moment an offence of murder is found to contain elements of 'FASAD', 'FITNA' and/or of waging of war against the Society it does not remain a case of (قتل عمد) only but also becomes 'HARABA' or same other offence of the like nature. The case then would not be covered by Verse 178 of Chapter II of the Holy Book alone but would become punishable under Verse 33 of Chapter V as well whereunder neither partial nor total 'AFUW' is available to the culprit. Similar are the cases of a recidivist and of a person who kills the murderer after having received Diyat in lieu of 'QISAS'.

I am fortified in coming to the conclusion that complete 'AFUW' is available in cases of 'QATL-I-AMAD' as it is available in 'KATL-I-KHATTA' and 'QATL-BIL-SHUBAH-I-AMAD' by the commentary of Maulana Shabbir Ahmad Usmani of Verse 178 of Chapter II. The Note appended to the interpretation of the phrase (ذالک تخفیف من ربکم ورحمۃ) in this Verse reads as under:-

"یہ اجازت کہ قتل عمد میں چاہو قصاص لو چاہے دیت لو چاہو معاف کردو اللہ کی طرف سے سہولت اور مہربانی ہے قاتل اور وارثانِ مقتول دونوں پر جو پہلے لوگوں پر نہ ہوئی تھی کہ تعین پر خاص قصاص اور کفارہ پر دیت یا عفو مقرر تھا"

As will be seen from the above quoted note, Maulana Shabir Ahmad Usmani has read provision for total pardon in the Verse under reference in addition to the option to receive Diyat in lieu of 'QISAS' although the word occurring in the Verse in respect of AFUW (عفی) is which means a thing, a parcel or 'somewhat', thus the plain meaning of the phrase, inter alia, would be that whosoever somewhat pardons his brother he shall receive compensation for the lost life. The question of payment of Diyat would only come when the heirs are not prepared to fully pardon the accused as in case of full pardon there would not be

any question of payment of Diyat. As this Verse lays down the provision for payment of compensation the word has been used which connotes partial pardon, but it does not by intendment exclude total pardon.

The above interpretation of the Verse finds further support from Verse No.45 of Chapter V which enjoin 'QISAS' for slaying of a life or for the loss of eye, nose, ear and tooth or against any injury to the human body. An exception has been made to said rule of exaction of 'QISAS' by incorporation of the following proviso therein (فمن تصدق به فهو كفارة له) which was translated by Maulana Mahmoodul Hasan as under:-

"تو یہ بھی اس نے معاف کر دیا تو وہ گناہ سے پاک ہو گیا"

The persuasion to pardon contained in the words reproduced above is not relative to any particular cause for 'QISAS' and is general in its import. Thus it has been laid down that whosoever in stead of exacting 'QISAS' pardons the offender gets his sins expiated.

The earlier part of this Verse is a خبر i.e. a statement of Law of توراۃ but the later part is an amendment brought therein for امت مسلمہ. The whole Verse including the خبر part becomes law of Islam (امر) by reading this Verse in conjunction with Verses, 178, 179 and 194 of Chapter II and Verse No.126 of Chapter XVI. Many a Jurist of Islam has held 'AFUW' as a form of punishment (Alaquba P 136). The great Egyptian Scholar, Abdul Qadir Oada in his التشریع الجنائی الاسلامی has held that 'AFUW' (Pardon) is provided by the Quran, Sunna and Ijma (Urdu translation by مولوی صاحبزادہ الرحمان مانسہروی Vol.II P.157). He is also of the opinion that 'AFUW' is batter than the punishment.

Needless to say that 'AFUW' is one of the greatest virtues in the tenets of Islam and invites blessings of

God on the person who practises the same even in case of his deadly enemies or against a person from whose hands he has received the greatest harm. Verse 134 of Chapter III may conveniently be quoted in this context. This Verse is as follows:-

"الذین ینفقون فی السراء والضراء والکاظمین الغیظ والعافین عن الناس واللہ یحب المحسنین ۝"

It has been rendered in Urdu by Sheikh-ul-Hind Maulana Mahmoodul Hasan in the following manner:-

"جو (ہر ہر بار) خرچ کرتے جاتے ہیں خوشی میں اور تکلیف میں اور دبا لیتے ہیں غصہ اور معاف کرتے ہیں لوگوں کو اور اللہ کا پیارا ہے نیکی کرنے والوں کو۔"

The commentary on this Verse by Maulana Usmani is as under:-

"غصہ کو پی جانا ہی بڑا کمال ہے۔ اس سے بڑھ کر کہ لوگوں کی زیادتی یا غلطیوں کو عملاً معاف کر دیتے ہیں اور نہ صرف معاف کرتے ہیں بلکہ احسان اور نیکی سے پیش آتے ہیں..."

Again:

"وان عاقبتم فعاقبوا بمثل ما عوقبتم بہ ط ولئن صبرتم لھو خیر للصبرین ۝"

It has been translated in Urdu by the above named translator in the following words:-

"اور اگر بدلہ لو تو بدلہ اسی قدر جس قدر تم کو تکلیف پہنچائی جائے اور اگر صبر کرو تو بہتر ہے صبر والوں کو۔"

The same principle has been laid down in Verse 22 of Chapter XIII:-

"والذین صبروا ابتغاء وجہ ربھم واقاموا الصلوٰۃ وانفقوا مما رزقنھم سرا وعلانیۃ ویدرؤن بالحسنۃ السیئۃ اولئک لھم عقبی الدار ۝"

Urdu translation of this Verse is as under:-

"اور وہ لوگ جنہوں نے صبر کیا خوشی کو اپنے رب کی اور قائم رکھی نماز اور خرچ کیا ہمارے دیئے میں سے پوشیدہ اور ظاہر اور کرتے ہیں برائی کے مقابلے میں بھلائی۔ ان لوگوں کیلئے ہے آخرت کا گھر۔"

Maulana Usmani further elaborates the meaning of these words in the following manner:

"یعنی برائی کا جواب بھلائی سے دیتے ہیں سختی کے مقابلے میں نرمی برتتے ہیں۔ کوئی ظلم کرے یہ معاف کر دیتے ہیں (مگر حکمت جہاد میں برائی کے ترقی کرنے کا اندیشہ نہ ہو) بدی سے بچنے نیکی اختیار کرتے ہیں اور اگر کوئی برائی کر جاتا ہے۔ تو اسکے مقابلے میں بھلائی کرتے ہیں"

The Ahadith narrated by ابوشریح الخزاعی and ابوشریح الکعبی (apparently two different 'Rawees', one belonging to بنی خزاعہ and other to بنوکعب) which are included by Darmi, Ibn-i-Maja and Abu Daud in their compilations of the Sunna of the Holy Prophet (Peace be upon him) and which are considered by the consensus of the learned as three out of six authentic compilations (صحاح ستہ), are to the effect that the Holy Prophet stated that in (آل محمد) any out of three courses of 'QISAS', payment of Diyat or pardon by the heirs of the deceased can be adopted and nothing else is to be acted upon. These Ahadith when examined in the light of the above quoted Verses of the Holy Book would not leave any scope of doubt on their authenticity as these do not lay down a rule which is not found in the Holy Book. There are also other narrations on the topics of murder in(صحاح ستہ) by different narators in which the messenger of God has been reported to have said that in case of murder one can either exact 'QISAS' or take 'Diyat'. The mention of the 3rd method of composition by the above named two narators would not render their narration conflicting to the latter Ahadith wherein two methods are mentioned of dealing with a case of murder, as against those which contain an addition as mentioned. As long as an addition in one or more of Ahadith to the Rules laid down in the rest does not come in conflict with the Quranic principles, the addition will be considered as an expansion of the Rule of law and not a contradiction thereto.

These conclusion do find further support from a number of Ahadith narrated through different sources on the topics of 'AFUW'. Sahih Bukhari published by Quran Mahal, Karachi in its Vol. II contains the following

Hadith:

... عن عبد الله بن زبير خذ العفو وامر بالعرف قال ما انزل الله الا في اخلاق الناس
وقال عبد الله بن مراوة ... عن ابن زبير قال امر الله نبيه صلى الله عليه وسلم ان يأخذ العفو
من اخلاق الناس او كما قال

It has been rendered into Urdu in the same publication as under:

یحیٰی وکیع ہشام عروہ عبد اللہ بن زبیر سے روایت کرتے ہیں انہوں نے بیان کیا
کہ اس آیت (یعنی خذ العفو... الخ) اخلاق انسانی کیلئے نازل فرمایا ہے عبد اللہ بن مراوہ
کہتے ہیں .... اور وہ ابن زبیر کے ذریعہ سے کہتے ہیں کہ اللہ تعالیٰ نے اپنے نبی صلعم کو ارشاد فرمایا
کہ درگزر اختیار کیجئے عفو کو اختیار کرنے کا حکم دیا ہے یا کچھ اس قسم کی گفتگو اللہ تعالیٰ نے فرمائی۔

Needless to say that this Hadith is a commentary on this Verse of the Quran:

خذ العفو وامر بالعرف ... الخ

(7:199)

In this respect yet another Hadith from the compilation of ابوداؤد may safely be quoted:-

"حدثنا ..... عن انس بن مالك قال ما رأيت رسول الله صلى الله عليه وسلم
رفع اليه بشيء فيه قصاص الا أمر فيه بالعفو"

Vol.III Hadith No.1084 published by Quran Mahal, Karach) rendered into Urdu it would read as under:-

موسیٰ بن اسمٰعیل عبد اللہ بن بکر عطاء ابن میمونہ حضرت انس ابن مالک سے روایت
کرتے ہیں کہ میں رسول اللہ صلی اللہ علیہ وسلم کو دیکھا جب کوئی مقدمہ آپ کے پاس ایسا
جاتا جس میں قصاص لازم ہو تو آپ عفو کا حکم کرتے (رغبت دلاتے عفو کی)

مشکوٰۃ المصابیح contains the following 'حدیث' from Tirmizi and Ibn-i-Maja: Abu Darda told he heard God's messenger say, "No one will suffer any bodily injury and forgive it without God raising him a degree for it and removing a sin from him".

It was on the basis of the above quoted Verses of the Holy Book and Ahadith besides many others on the topic under discussion that almost all the leaders of different schools of Fiqh in Islam have conceded the right of complete pardon to the heirs of the victim of 'QATL-I-AMAD'. The heirs have, therefore, the option either to exact 'QISAS' through the agency of the Court or the State, or to ask for payment of 'Diyat'. They can also forgo the whole or a part

payment of 'Diyat'. They can also forgo the whole or a part of the amount of the 'Diyat'. The consequences of the pardon in toto on the part of the heirs have been discussed by me in the earlier part of this note.

I am also in complete agreement with the learned Chairman, Salahuddin Ahmad, J, as I was with Abdul Hakim Khan, C.J., as he then was, of the Peshawar High Court, in Gul Hassan Khan Vs. State (PLD 1980 Peshawar 1) that Section 345(7) of the Code of Criminal Procedure is not merely procedural as it denies the right of composition to the effected parties and is therefore to this extent repugnant to injunction of Islam.

With above observations, I would endorsed the order proposed by the learned Member Sheikh Aftab Hussain, of the dismisal of Shariat petitions No.20 of 1979 and 1 of 1979 both from Karachi, and of allowing the other petitions.

Rawalpindi
21-9-1980.

Member -IV.

FEDERAL SHARIAT COURT

Order of the Court.

The Court has by majority arrived at the following decision:

1. That judgement of the Shariat Bench of the Peshawar High Court dated 1-10-1979 in Gul Hassan Khan vs. Government of Pakistan reported as PLD 1980 Peshawar 1, declaring Sections 54, 55 and 302 of the Pakistan Penal Code and Sections 345(7), 401, 402 and 402-B of Code of Criminal Procedure with the relevant parts of the Schedule repugnant to Injunctions of Islam is binding and holds the field.

2. It is held by majority that Section 302 PPC is also repugnant to Injunctions of Islam on the following additional ground:

> No exemption of death sentence has been provided for
>
> (a) an offender who is insane at the time of execution; and
>
> (b) a parent killing his/her son.

3. Sections 304 & 304 A are repugnant because they do not also provide for composition and payment of 'deeyat'.

4. Sections 324, 325, 326, 329, 331 and 333 are repugnant because they do not also provide for Qisas or payment of compensation (Deeyat, Ursh or Daman).

5. Furthermore Sections 326 and 329 are repugnant because they do not also provide for composition.

6. Sections 335 and 338 are repugnant because they do not also provide for payment of 'deeyat'.

7. Other provisions relating to hurt in chapter XVI of PPC are repugnant as they do not provide for absolute compoundability and payment of compensation (deeyat, ursh or Daman).

...p/2

8. In cases in which حق العبد (right of man) is treated to be predominant, the provisions of Sections 401, 402,402 A and 402 B Cr. P.C. shall not apply. These Sections are repugnant to the Holy Quran and the Sunnah of the Holy Prophet (peace be upon him) to this extent.

9. This decision shall take effect from the Ist of April, 1980.

Chairman

M.I

M.II

M.III

M.IV

Rawalpindi, the
23rd September, 1980.

(APPROVED FOR REPORTING)

FEDERAL SHARIAT COURT

In the Court's Order dated 23rd September, 1980 passed in the following cases:-

1)	S.P.No.13/79(L)	- Muhammad Riaz vs Federal Government and another.
2)	S.P.No.69/79(L)	- Javaid & another vs Federal Government and others
3)	S.P.No.1/79(K)	- In-Re Muhammad Shafi Muhammadi
4)	S.P.No.2/79(K)	- Ghulam Mujtaba Saleem vs Federation of Pakistan
5)	S.P.No.12/79(K)	- Mr. Mohammad Shafi vs Federation of Pakistan & another
6)	S.P.No.20/79(K)	- Imdadullah Unar vs Federation of Pakistan & another.
7)	S.P.No.7/80(K)	- Ghazi & Others vs Federation of Pakistan
8)	S.P.No.9/80(L)	- Niaz Hussain vs Federal Government of Pakistan and another.
9)	S.P.No.4/80(K)	- Ghulam Mujtaba Saleem vs Federation of Pakistan

through inadvertance a typographical error as todate has taken place. Instead of "Ist of April 1981" namely, the date on which the Order shall become effective, "Ist of April 1980" has been mentioned.

The correct date is Ist of April, 1981 and the Order shall thus stand corrected and the Court's Order shall become effective from this date.

Chairman

Member I

Member II

Member III

Member IV

Lahore the
Ist October, 1980

11-10-80