

**POLICY BRIEF, SEPTEMBER 2023**

# **CRITICAL ANALYSIS: PROVISIONS RELATING TO MURDER IN PAKISTAN PENAL CODE**

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## Executive Summary

In the constitutional history of Pakistan, the objective resolution is considered as a guiding document which enshrined that no law shall be enacted which is repugnant to the Holy Quran and Sunnah. In accordance with this constitutional requirement, the Shariat Appellate Bench in *Gul Hassan Case* declared most of the clauses of Pakistan Penal Code relating to murder as inconsistent with Holy Quran and Sunnah. However, it is essential to divulge into the spirits and operations of Quranic injunctions on *Qatl* to decipher the scale of inconsistencies which were presumably present in the originally enacted sections of PPC. Moreover, a comparison between the currently and originally enacted sections of PPC in the light of Islamic teachings is necessary to identify the legal problems which are currently present in PPC. This identification results in prescription of a clear solution to these problems which are following:

- 1) Section 304-A of PPC (old) should be reenacted with the provision of *diyat* and the addition of word 'mistake'
- 2) Distinction of *Tazir* and *Qisas* in the punishment of proven murder needs to end.
- 3) The section relating to self-defence must include the wisdom of evolved jurisprudence.

## **About the Author**

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## Introduction

The intention of penalizing the offense of murder in Islam rests on three spirits. These are expounded as retaliation, forgiveness, and equality. The intention behind the legalization of *Qisas* in Islam is that whenever a murder is committed, a spirit of anguish is usually ignited in the heirs of the victim. They want retaliation to pacify their grief. The wider purpose for the state in retaliation is to suppress the anguish so that another 'wrong' is not committed. Arabic English Lexicon<sup>1</sup> articulates: *"The word Qisas means retaliation. Another word, to qisas, is retribution which means a punishment inflicted in return for a wrong."* This is also clearly expressed by Holy Quran as:

*"And We enjoined for them therein: life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, wound for wound.... "(5:45)<sup>2</sup>*

However, Quran also neutralizes the concept of retribution by allowing forgiveness of *Qatl* by the heirs of the victim. The primary aim is to extinguish the suffocation derived from an inherent rigidity of Criminal Law. Therefore, the Quran allows forgiveness of a murderer to express the feelings of 'goodwill' in society. The Holy Quran beautifully expresses this as:

*"Then for whom there has been some remission from his brother, [the remission] should be followed according to the Ma'ruf and Diah should be paid with goodness."<sup>3</sup> "(2:178).*

The Holy Quran expresses a supreme benevolence. It endows that for the promulgation of compassion in society, both parties should act in such a way that the feeling of 'rehabilitation' prevails in society. Therefore, the intention of the Quran is to counter the feeling of 'animosity' with 'compassion'. Moreover, the Quran also expresses a very practical solution in the stipulation of the concept of *Diyat*. The primary purpose is monetary rehabilitation of the heirs of the victim. However, this process shall be done in a 'brotherly' manner and the offender should behave in such a manner which express full 'recognition' of the crime so that the message of 'justice'

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<sup>1</sup> Edward William Lane, *American English Lexicon*, (First Published 1863) 733.

<sup>2</sup> Al Quran, (5:45).

<sup>3</sup> Al Quran, (2:178).

is sent in society. The heirs should also act in a reasonable manner which does not give the impression of selling of 'blood'. Therefore, Quran stipulates '*Maruf*' which is interpreted as the amount which is according to customs and social conditions.

Quran states:

*"... if the murderer is a free-man, then this free-man should be killed in his place ...."*  
(2: 178)

Another aim of Islam in relation to *Qatl* is illustrated by the Holy Quran as 'equality'. It is important to note that in the pre-Islamic era, the concept of retaliation was so barbaric that the murder of an influential person could result in the killing of hundreds of men of opposite tribe. Therefore, the Holy Quran built on the concept of retribution and expounded equality in the case of *Qisas* to sanctify 'human life' and prescribed that only the murderer shall be punished. The spirit is rightly encapsulated by the Supreme Court in the appeal of *Zahid Rehman v. State*<sup>4</sup> as:

*"In order to meet the strict claims of justice, equality is prescribed, with a strong recommendation for mercy and forgiveness."*

### **Reflection of the Intentions of Islam in Old and New PPC Provisions**

These aforementioned intentions of Holy Quran are reflected in the Pakistan Penal Code in sections relating to the offense of *Qatl*. Section 300 of PPC defines *Qatl-e-Amd* with the use of word "*whoever*"<sup>5</sup> and thus eliminate any difference between gender and social status. Moreover, section 302(a) of PPC encapsulate the idea of retaliation which is reflected in the penalty of death. The spirit of 'forgiveness' and 'rehabilitation' is recognized in section 309 and section 310 of PPC which allows forgiveness or compounding of *Qatl*. However, most of the concerns of Islam were also reflected in the originally enacted PPC provisions in which the section 299 of PPC (old) neutralized the identity of wrong-doer and section 302 of PPC (old) penalized the offender with death. However, the originally enacted PPC provisions did not encapsulate the concept of *diyat*. They also excluded the possibility of forgiving an

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<sup>4</sup>. *Zahid Rehman v. The State* (SC, 15<sup>th</sup> October, 2014)

<sup>5</sup> Pakistan Penal Code 1860, s 300

individual for Qatl as the Anglo-Saxon Law recognize the offence of *Qatl* as against the state.

### **Analysis of the Operations of Punishment relating to Qatl**

The Holy Quran states<sup>6</sup>:

*“O ye who believe! decreed for you is the Qisas of those among you who are killed ....  
“(2:178)*

The aim of the equality in this *Ayat* is ‘operated’ through the punishment of *Qisas*. It is important to note that this Quranic injunction expresses the ‘will of God’ in which no alterations could be tolerated. Therefore, subject to exceptions, only the punishment of ‘death’ shall be imposed, and the murderer shall be killed with no option of any other punishment. Thus, section 302(a) of PPC conforms this desire of Quran when it stipulates the punishment of death as *Qisas*. The modification of this specific crime was necessary as originally enacted section 302 of PPC did not acknowledge the importance of ‘solely’ subscribing death. The section 302(b) of PPC (new) prescribe *Tazir* as death or life imprisonment in those cases in which *Qisas* is not proved due to the absence of indisputable proof prescribed for **Qisas**. However, these standards of proof which are required by section 304 of PPC for *Qisas* attracts some criticisms. As per Ghamidi:<sup>7</sup>

*“Except for fornication, crimes whose punishment is prescribed by the Shariah are proven through all means that are universally accepted by legal ethics.”*

Moreover, the Holy Quran prescribes the standard of evidence as only truthfulness and uprightness as manifested in:

*“And cover not truth with falsehood, nor conceal The Truth when ye know.”<sup>8</sup>(2:42)*

Thus, the distinction between *Tazir* and *Qisas* in section 302 of PPC is unreasonable as Islam only prescribes death for *Qisas* (in addition to compounding or waiver) which should apply when murder is proved with *any* undisputable standard of proof. Moreover, life imprisonment could also be given under 302(b) of PPC which does not

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<sup>6</sup> Al Quran, (2:178).

<sup>7</sup> Javed Ghamidi, ‘Islamic Punishment’ (*Al-Mawrid*, 1<sup>st</sup> January 2017) < <http://www.al-mawrid.org/index.php/articles/view/islamic-punishments1> > accessed 19th September 2023

<sup>8</sup> Al Quran, (2:42),

capture the intention of Islam. Therefore, section 302(b) PPC is essentially a replication of section 302(old) PPC which was considered un-Islamic for want of *diyat* and presence of imprisonment as a punishment *to proven murder*.

### **Effect of the Distinction in Section 302 of PPC**

The simultaneous presence of 302(a) and 302(b) of PPC led to considerable injustice in Pakistan. An archetype was manifested in *Muhammad Ilyas*<sup>9</sup> where the section 302(b) of PPC was considered in relation to the exceptions of section 306 & 307 of PPC. It resulted in a situation which 'potentially gives a license to *Wali* and minors to murder with no chance of death penalty' as they were considered exempt from death in either case of *Qisas* and *Tazir* due to the want of proof only for *Qisas*. However, the matter was resolved after decades in an appeal of *Zahid Rehman*<sup>10</sup> to the Supreme Court. It stated that any concession in punishments contemplated by the provisions of sections 306, 307 and 308 of PPC extended to certain special categories of offenders in cases of *Qisas* mentioned in these provisions. Therefore, they should not be mistaken as turning those cases into cases of *Tazir*.

### **The validity of *Tazir* in PPC:**

*The Holy Quran states:*

*“And as for the two who are guilty of an indecency from among you, give them both a punishment....” (4:16)*<sup>11</sup>

Jurists have described the idea mentioned in Quran as *Tazir* in which judge can choose according to the circumstances of the criminal, his prior conduct, and his psychological condition. Thus, the spirit of section 311 of PPC relates to the concept of *Fisad fil Arz* which is an expression of that interest of the state which desires peace in society. Therefore, in order to preserve the spirit of Islamic punishments, the judge could prescribe *Tazir* in those cases in which the person is a recidivist or the court could fill the loophole in which *Qisas* is waived due to political or economic pressure (provided *Wali* did not waive) although the murderer did deserve it. Thus, death punishment could be sentenced as *Tazir* which is in accordance with Islamic

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<sup>9</sup> *Muhammad Ilyas v. The State* [2008] SC, [2008] 1 SCMR 396

<sup>10</sup> *Zahid Rehman v. The State* (SC, 15<sup>th</sup> October, 2014)

<sup>11</sup> Al-Quran, (4:16).



principles. However, life imprisonment or imprisonment up to 14 years as *Tazir* in section 311 of PPC raises an important question. Some Islamic jurists argue against incarceration as the Quran only prescribed *Diyat*, *Qisas*, and waiver as a remedy in the case of *Qatl*. Javid Ghamidi, an eminent Islamic jurist states: “Islamic Penal Code though understandably contains a provision for house arresting a criminal or exiling him with his family if needed, it does not sanction in any way the confining of a criminal in a prison.”<sup>12</sup> However, an alternative perspective is that *Tazir* is “flexible” and on the “legislative and jurist” intent. Moreover, Ibn Farhun<sup>13</sup> describes punishment of imprisonment could last until the criminal repents, or until his death if the person is a dangerous criminal. Therefore, it could be deduced that the concept of *Tazir* could prescribe death or imprisonment even after waiver where the aim is the correction of conduct. Therefore, section 311 is in accordance with Islamic intentions. However, this line of view also validates section 302 of PPC (old) if related *only to pursue public policy*.

### **Analysis of Exceptions in the liability of Qatl**

The critical analysis of section 300 of PPC (old) in relation to Islam requires an elaboration of an important confusion which is created in the currently enacted provisions of PPC. It relates to section 302(c) of PPC. This section expounds a condition in which neither *diyat* nor *qisas* are applicable. However, an imprisonment is subscribed. Interestingly, the PPC expressly stipulate no condition on which this punishment shall apply. Justice Fazal Karim in *Ali Muhammad v. Ali Muhammad*<sup>14</sup> provided an intelligent solution. He relied on the observation in *Gul Hassan Case* stating: the offenses within the old section of 304 of PPC are held to be generally falling within the category of *Qatl-e-Khata*. He built on this by combing the ratio of *Muhammad Hanif*<sup>15</sup> which relates to the right of self-defence to defend the honour of wife and *Abdul Haq*<sup>16</sup> case which recognized that grave and sudden provocation is a factor in consideration of determining the punishment. He concluded that Islam excludes *Qisas* in certain situations of *Qatl-i-Amd* which were covered in the

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<sup>12</sup> Javed Ghamidi, 'The Jail Punishment' (*Javed Ahmad Ghamidi*) <[http://www.javedahmadghamidi.com/books/view/the\\_jail\\_punishment](http://www.javedahmadghamidi.com/books/view/the_jail_punishment)> accessed 19<sup>th</sup> September 2023.

<sup>13</sup> Ibn Farhun, *Tabsirat al-Hukkam* (1301 A.H),

<sup>14</sup> *Ali Muhammad v. Ali Muhammad* [1996] SC, [1996] 1 PLD 274

<sup>15</sup> *State v. Muhammad Hanif* [1992] SC, [1992] 1 SCMR 2047.

<sup>16</sup> *The State v. Abdul Waheed* [1992] SAC, [1992] PCR.LJ 1596

exceptions of section 300 PPC (old), and that under such circumstances, if this right given is exceeded, then section 302(c) would penalize these conditions. Moreover, all the other ingredients of *Qatl-i-Amd* such as intention to cause death or grievous injury which is likely to cause death also formed the definition of section 300 of originally enacted PPC. Thus, it could be deduced that exceptions in section 300 of PPC (old) were not un-Islamic. Moreover, the interpretation incidentally also covered the punishment of exceeding the right of self-defence mentioned in section 102 of PPC. It also provided a further interpretation of section 100 of PPC in which the right of self-defence extended to the right of husband to kill the man in provocation *regardless of the consent* of the wife.

### **Qatl by Mistake in Islam**

The Holy Quran enshrines:

*And never is it for a believer to kill a believer except by mistake. And whoever kills a believer by mistake - ----compensation payment presented to the deceased's family [is required] unless they give [up their right as] charity. (4:92) <sup>17</sup>*

The Holy Quran prescribes a simple test of “no intention” in *Qatl-e-Khata*. Moreover, this injunction also reflects the prescription of *diyat* for this mistake. However, no *Qisas* is prescribed as the spirit of ‘reverence for human life in society’ is not intentionally infiltrated by the killer. Therefore, this provision expresses that Anglo-Saxon requirement of *mens rea* for an offence is coherent with Quranic principles. Thus, section 80 of PPC reflects Allah`s command when it excludes liability for any offence which is done lawfully. Moreover, section 318 of PPC also excludes liability for *Qatl-e-Khata* and prescribes only *diyat* in section 319 of PPC.

Prophet Muhammad P.B.U.H stated:

*“If a person kills another by throwing a stone, by a whip or by a staff its diyat will be one hundred camels.”<sup>18</sup>*

This Hadith of Holy Prophet express three implications. First, the act should itself be rough and illegal. Second, the *diyat*, in this case, shall be higher as the act was

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<sup>17</sup> Al-Quran (4:92)

<sup>18</sup> *Jam` at-Tirmidhi* (9<sup>th</sup> Century C.E) Vol 7 Hadith 1391

unreasonable.<sup>19</sup> Thirdly, there shall be no *Qisas* as there was no intention. Therefore, *Qatl-Shibh-i-Amd* and *Qatl-bis-Sabab* which is the causing of death by an injury not known to cause death and causing of death by an unlawful act respectively encapsulate the standard expressed by Prophet (P.B.U.H). These acts are prescribed with *diyat* as punishment in section 316 and 322 of PPC but no reference to a 'higher' *diyat* is reflected as desired by Holy Prophet's Hadith.

The section 304-A of PPC (old) also asserted the conditions of the harsh acts which excluded the liability of murder and section 299 of PPC (old) included the constituent of intention while defining culpable homicide. Thus, old PPC under its expansive language, if considered in the 'ordinary meaning', covered all these acts prescribed by Prophet (P.B.U.H). However, it prescribed no *diyat* which is mandatory as discussed above for *Qatl* in section 304-A of PPC (old) which made that part of 304-A contrary to Islamic provisions.

### **Analysis of Qatl by Mistake in relation to PPC:**

A priority of the law-maker in drafting legal provisions is the simplicity and clarity of law. Therefore, as described above, section 80 of originally and currently enacted provisions excluded any act from the punishment which is committed by mistake. Therefore, section 80 already covered the intention of currently enacted section 318 of PPC relating to *Qatl-e-Khata*. This caused redundancy in PPC. Moreover, the repugnancy with Islam relating to *Qatl-e-Khata* could be easily removed through the addition of *diyat* or waiver in section 304-A of PPC (old) while including the word of "mistake" in its clause. The punishments of imprisonment in addition to *diyat* in section 304-A could be maintained as a matter of *Tazir* as it is also maintained in the offence of *Qatl-Shibh-e-Amd*. The argument in *Gul Hassan* that section 2 of PPC shall be violated if there is the addition of *diyat* in originally enacted provisions could be countered by the argument that when the Islamic punishments of *diyat* are incorporated by a way of legislation, then section 2 of PPC shall also 'cover' those amended provisions. It is manifested in section 54 of PPC when it includes *diyat* as a punishment which then covers all section prescribing *diyat* punishment. Moreover, the intention of Islam was only to differentiate between the death caused by intention and

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<sup>19</sup> Dr Masuma Parvin, "Law of Murder under Islamic Criminal Law: An analysis" [2016] 53 Journal of Law, Policy and Globalization, 143, 147

mistake rather than this intense differentiation manifested in PPC. Moreover, the infliction of imprisonment up to 25 Years in *Qatl-Shibh-e-Amd* is a matter of *Tazir*. Therefore, it was not right to declare the section 304-A of PPC (old) entirely repugnant to Islam. This spirit of this argument although in the context of evidentiary law was expressed in the note of Justice Shafi-ur-Rehman in *Gul Hassan Case*<sup>20</sup> as:

*“The Test of repugnancy can’t be applied based on what jurists have evolved over time. In a matter of Tazir, the tests applied could be controlled by law and context.”*

### **The concept of Wali in PPC**

*The Holy Quran states:*

*“We have given his heirs the authority to demand Qisas, or to forgive, or to take Diyat”.*  
(17: 33)<sup>21</sup>

The use of word ‘heirs’ in Quran recognize the concept of *Wali* reflected in section 305 of PPC. Quran confers them a prerogative in deciding the remedy in relation to the murder of their loved one. Thus, these sections reflect the desire of Islam when the right of *Qisas* possessed in heirs is synchronized with the spirit of retaliation present among heirs. However, the contention among jurists is the want in the enforceability of the liability of *Qisas* if the *Wali* is the offender himself. It could be justified by the argument that it is unnatural that spirit of retaliation is reciprocated on oneself. However, the prohibition of *Qisas* on the killing of children/grandchildren or parent/grandparent is more contentious. Islam does not distinguish one victim from another and proposing an alternate in this regard infringes the spirit of equality in Islam<sup>22</sup>. No mention of any distinction in this regard is present in Islam and *Hadith* relating to this concept is considered weak. Therefore, contemporary scholars justly rely on the following *Ayat* of Quran:

*“O! you who have believed! Prescribed for you is legal retribution for those murdered?”* (2:179)<sup>23</sup>

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<sup>20</sup> *Federation of Pakistan v. Gul Hassan Khan* [1989] SC, [2009] 1 PLD 633

<sup>21</sup> Al Quran, (17: 33).

<sup>22</sup> Dr. Masuma Parvin, “Law of Murder under Islamic Criminal Law: An analysis” [2016] 53 Journal of Law, Policy and Globalization, 143, 147

<sup>23</sup> Al Quran, (2:179)

Therefore, the exclusion in PPC section 306(b) and 306(c) do not encapsulate the intention of Islam. However, section 307(c) of PPC conforms the principles of *justice*.

**Recommendations:**

1. In summation, it is recommended that the distinction of *Tazir* and *Qisas* in the punishment of 'proven murder' must be eliminated and only death should be prescribed with the provision of *diyat* or waiver as a remedy to *Qatl-i-Amd*. However, a defined parameter of *Tazir* must be legislated which should limit the punishment of death or imprisonment for *Qatl-i-Amd* after waiver of *Qisas* only to *fisaad-fil-arz* reflected in section 311 of PPC. For this *fisaad fil arz* must be made more expansive in language to consider the power inequalities in society.
2. There should be the re-enacting of general exceptions mentioned in section 300 of PPC (old) which should be linked to the separately created section covering the PPC clause of 302 (c).
3. Section 304-A of PPC (old) should be reenacted with the provision of *diyat* and the addition of word 'mistake'. It shall capture intentions of Islam in a simple and detailed way. Therefore, provisions defining different unintentional *Qatl* and their punishments should be repealed.
4. The section relating to self-defence must also be modified to include the considerations of *Ali Muhammad v. Ali Muhammad*. These reforms shall help to balance the constitutional requirements, Islamic interests, principles of natural justice with the Pakistan Penal Code.