

**COMPOUNDING OF DEATH SENTENCE AWARDED
BY WAY OF QISAS AND TA'ZIR---
LEGAL IMPLICATION**

By

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A question is gaining ground amongst certain quarters and the issue has particularly been raised by Pakistan Bar Council, regarding different treatment being meted out to the convicts who have been punished with death as Qisas and as Ta'zir, in the matter of compounding the offence, The Supreme Court of Pakistan has held in its decisions that death sentence awarded as Qisas can be compounded even by one of the heirs of the victim but in case of death punishment awarded as Tazir all the heirs of the victim must join in compounding the offence.

The honourable members of the Bar are of the view that keeping in view the spirit of the principles enumerated by Sharia, on the subject, both the punishments are required to be treated at par and similar treatment extended thereto for the purpose of compounding.

The proposition needs critical examination of the relevant provisions of P.P.C, Cr.P.C., the case law on the subject, read with the settled principle of Sharia.

The position of law obtaining on this question may be critically examined.

Section 302, P.P.C, provides inter alia that whoever commits Qatl-e-Amd, subject to the provisions of this Chapter (Chi.XVI) be:

- (a) punished with death as Qisas;
- (b) punished with death or imprisonment for life as Ta'zir having regard to the facts and circumstances of the case, if proof specified in section 304 is not available.

Section 309 provides for waiving of right of Qisas by a Wali without compensation. In case a victim has more than one Wali (heir) any one of them may waive his right of Qisas, the Qisas becomes Saqit (not to be enforced) and the heirs who have not waived their right of Qisas are entitled to receive their share of Diyat.

Section 310 provides that in case of Qatl-e-Amd a Wall may compound his right of Qisas by accepting Badal-e-Sulah, which may be any amount mutually agreed upon but it will not be less than the value/amount of Diyat.

The other provisions relevant to the issue are section 345, Cr.P.C. and sections 338-E and 338-F, P.P.C.

Relevant part of section 345, Cr.P.C. is quoted for ready reference:

Section 345, Cr.P.C. ,

Offence	Sections of Pakistan Penal Code	Persons by whom offence may be compounded.
Qatl-i-Amd	302	By the heirs of the victim other than the accused or the convict if the offence has been committed by him in the name or on the pretext of Karo Kari, Siyah Kari or similar other customs or practices

Section 338-E. Waiver or compounding of offences.—(1) Subject to the provisions of this Chapter and section 345 of the Code of Criminal Procedure, 1898, all offences under this Chapter may be waived or compounded and the provisions of sections 309 and 310 shall, mutates mutandis, apply to the waiver or compounding of such offences:

Provided that, where an offence has been waived or compounded, the Court may, in its discretion having regard to the facts and circumstance of the case acquit or award Ta'zir to the offender according to the nature of the offence:

Provided further that where an offence under this Chapter has been committed in the name or on the pretext of honour, such offence may be waived or compounded subject to such conditions as the Court may deem fit to impose with the consent of the parties having regard to the facts and circumstances of the case.

(2) All questions relating to waiver or compounding of an offence or awarding of punishment under section 310, whether before or after the passing of any sentence, shall be determined by trial Court:

Provided that where the sentence of Qisas or any other sentence is waived or compounded during the pendency of an appeal, such questions may be determined by the Appellate Court.

Section 338-F, P.P.C reads as follows:

Interpretation.--In the interpretation and application of the provisions of this Chapter, and in respect of matters ancillary or akin thereto, the Court shall be guided by the injunctions of Islam as laid down in the Holy Qur'an and Sunnah.

The proposition in hand along with above quoted provisions of P.P.C. and Cr.P.C. came to be considered in the case of Muhammad Aslam v. Shaukat Ali 1997 SCMR 1307. The relevant observations at page 1327 read as under:--

"It may further be observed that subsection (2) of section 309, P.P.C. quoted hereinabove and discussed is in line with the above extract from as its proviso lays down that the Wali, who does not waive his right of Qisas, shall be entitled to his share of Diyat. There is no doubt that section 338-E, P.P.C. provides that subject to the provisions of this Chapter and section 345 of Cr.P.C. all offences under this Chapter may be waived or compounded and the provisions of sections 309 and 310 shall mutatis mutandis apply to the waiver or compounding of such offences. The proviso to the same lays down that where offences have been waived or compounded the Court may by its discretion having regard to the facts and circumstances of the case acquit or award Ta'zir to the offender according to the nature of the offence. The above section is to be interpreted in the light of the guideline for interpretation provided in section 338-F, which enjoins that the Court while interpreting and applying the provisions of the Chapter in question of the P.P.C. and in respect of matters ancillary or akin thereto, shall be guided by, the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah. In our view this provision does not nullify the well-settled proposition of law that in case where an accused person has been awarded sentence for murder as Ta'zir and not Qisas, the legal heirs cannot waive or accept Badal-i-Sulh. However, in view of the amendment in section 345(2), Cr.P.C., the sentence awarded for murder as Ta'zir can be compounded by all the legal heirs of the deceased with the permission of the Court concerned."

The observations recorded at page 1329 in this very judgment may also be quoted:--

"It may be observed that Mr. Asif Saeed Khan Khosa seems to be correct in contending that different superior courts have approached the question of applicability of sections 309, 310 and 311, P.P.C., differently but this fact does not in any way, affect the view which we are inclined to take. If an accused person has been awarded death sentence as Qisas, the same can only be undone under section 309 or section 310.P.P.C. However, if the sentence is awarded by way of Ta'zir, the Court has the power to grant permission to the legal heirs of the deceased and the accused to compound the offence under subsection (2) of section 345, Cr.P.C. which will result in acquittal under subsection (6) thereof if the compromise is accepted by the Court."

The other judgments of the Supreme Court wherein the aforesaid view has been adopted and followed are as under:--

- (i) Muhammad Arshad v. Additional District and Sessions Judge, Lahore and others PLD 2003 Supreme Court 547 (page 599).
- (ii) PLD 2003 Supreme Court 635, 639.
- (iii) Abdul Jabbar v. State 2007 SCMR 1496 (1506), Para. 15-E.

Another judgment on the subject is Muhammad Farooq v. State 2008 SCMR page 265. In this case of Ta'zir punishment, father of the deceased had waived his right while the mother did not. The learned Judges Observed as under:--

"With reference to section 338-E read with sections 309, 310 and 311, P.P.C. the mother is entitled to Badl-i-Sulh/compensation. It is to be appreciated that the instant one is not a case of Qisas but that of Ta'zir where the compromise should come from all the legal heirs. The petitioner-convict is directed to deposit a sum of Rs.3,00,000 as Badal-i-Sulh on or before 22-11-2007 with the Registrar of this Court. Further considerations would be taken after deposit. The case be re-listed on 22-11-2007."

This case came up for hearing on 31st March, 2009 and leave has been granted only to examine the question of quantum of sentence as there was a partial compromise between the parties, the mother one of the heirs of the victim had not agreed to pardon the convict.

The proposition that in cases of Qisas, right of granting Afw (Waiver) or to accept Badal-i-Sulh rests in the heirs of the victim as per Shariah Rulings is undisputed and accepted by all religious scholars.

The view expressed in Muhammad Aslam's case supra, which view has been adopted and followed in other reported cases, may now be analysed while discussing effect of the provisions of section 338-E read with section 338-F and sections 309, 310, P.P.C., observation that "*this provision (section 338-E) does not nullify the well-settled proposition of law that in case where an accused person has been awarded sentence for murder as Ta'zir and not Qisas, the legal heirs cannot waive or accept Badal-i-Sulh*" takes a very narrow view of the opinion expressed by Fuqha on the subject. The learned Judges have based the aforesaid view on the statement of Abdul Qadir Audah Shaheed a renowned Egyption Scholar and proceeded to hold that in view of the provisions contained in section 345(2), the Court has the power to grant permission to legal heirs of the victim (deceased) to compound the offence and for this purpose all the heirs have to join in granting pardon or accepting Badal-i-Sulh. The effect of waiving right of Qisas or accepting Badal-i-Sulh, by any one Wali of the victim as per sections 309, 310 read with

section 307 is that death sentence is not to be enforced. This principle was not extended to cases where death sentence was awarded as Ta'zir and all the heirs had not granted pardon (Afw) or accepted composition. The proposition that in cases Of Qisas, the right to grant pardon (Afw) or to accept composition (Badal-i-Sulh) according to Shariah vests in the heirs of victim and if even one of the heirs grants pardon or accepts Badal-i-Sulh. Qisas is rendered Saqit and unenforceable. The heir (Wali) who does not waive the right of Qisas is entitled to his share of Diyat. These principles are contained in sections 307, 309 and 310, P.P.C.

Tazir is a punishment, which the Ruler or a Judge in exercise of sovereign power of the State awards to a culprit for the benefit of the society. The sovereign right of State is exercised by the Ruler or the Judge in the manner provided by the law promulgated by the competent authority or the Parliament under the legal and constitutional scheme of the State. As awarding of sentence of death or imprisonment falls within domain of sovereign powers, the grant of pardon or allowing composition of offence declared punishable as Ta'zir equally falls within the same domain. In the quoted portion from the book of Abdul Qadir Audah the statement

refers to aforesaid power of the rules, Which power include the power to grant pardon, remission, reprieve or compensation on composition. This power vesting in the Ruler or State may be delegated to any authority, body or a Judge. The State may also prescribe the mode or manner and conditions for exercise of this power. Imam Kasani (R. A.) in Vol.7, page 64 says:

Right to grant pardon in Ta'zir in Haqooq-ul-Ibad

Fuqha are in agreement that Afw (pardon) in Ta'zir is permissible and amongst the mode of (Afw) is forgiving or composition on payment of compensation (Badal-i-Sulh). As it is purely the right of a person, so the same rules which apply to the Qisas, which falls in the category of Haqooq-ul-Ibad, fully apply to the case of Ta'zir.

In Ihkam ul Sultaniah (Page 387), Imam Mawar-di-says and
Imam Abi Yallah in his book Ihkam-ul-Sultaniah says (Pages 281 and 287):

The essence of the statement is that "if Taz'ir relates to Haqooq-ul-Ibad and victim or Wali grants Afw (Waiver) his right, it is permissible for him to extend pardon."

The right to pardon vesting in the State may rightfully be extended to or bestowed on a Wali of the victim and no valid objection can be raised for adoption of such a course of action by the Parliament or the competent authority. This aspect of the matter was not brought to the notice of the learned Judges in the above noted cases.

The right to grant pardon or accept composition has been conceded by the State in favour of the heirs under section 345(2), Cr.P.C. Section 338-E of P.P.C. further provides that all offences under Chapter XVI in which section 302 falls may be compounded and to such composition or waiver the provisions, of sections 309 and 310 shall mutatis mutandis apply. The mentioning of sections 309 and 310 and its mutatis mutandis application to the sentences under section 302, P.P.C which includes sentence of death as Ta'zir makes it abundantly clear that intention of the legislature is to accord same treatment to Ta'zir punishment which treatment is being given to the sentence of death by way of Qisas. If the same treatment was not intended to be given, there was no need to specially mention sections 309 and 310, P.P.C. in section 338-E.

The effect of applying, a provision mutatis mutandis was considered in the case of Muhammad Sharif v. State 1999 SCMR 1063 by Shariat Appellate Bench of the Supreme Court. The implication of applicability of the term "mutatis mutandis" was noticed with reference to its meaning as under:

"As per dictionary meaning contained in Chamber's 20th Century Dictionary "mutatis mutandis" means "with necessary changes", Black's Law Dictionary defines the expression 'mutatis mutandis' as under:--

"With necessary changes in points of detail, meaning that matters or things are generally the same, but to be altered when necessary, as to names, offices, and the like."

The legal term "mutatis mutandis" connotes as per Vankataramaiy's Law Lexicon as follows :--

"When a law directs that a provision made for a certain type of case shall apply mutatis mutandis in another type of case, it means that it shall apply with such

changes as may be necessary, but not that even if no change be necessary, some change shall nevertheless be made.

The expression *mutatis mutandis* is an adverbial phrase qualifying the verb "shall apply" and meaning "those changes being made which must be made."

The intent of the legislature is therefore apparent that the provisions of sections 309 and 310, P.P.C. are to be applied with such changes as may be necessary in case of sentences awarded for the offences under Chapter XVI of P.P.C. This Chapter includes section 302 which prescribes death sentence as Tazir along with death sentence as Qisas.

The proviso to section 338-E seen in this context secures power and discretion to the Court that where all heirs do not waive or compound the right of Qisas or if the principle of Fasad-fil-Arz is attracted the Court may having regard to the facts and circumstances of the case, punish an offender despite waiver of the right of Qisas or composition with death or imprisonment for life or imprisonment of either description for a term, which may extend to fourteen years as Ta'zir. So in a Ta'zir case, if all the heirs do not join in Afw or composition and the principle of Fasad-fil-Arz is attracted, the Court may still award Ta'zir sentence. The principles of Shariah as regards determining quantum of punishment seek not only deterrence but also correction of the offenders through mercy, benevolence and social justice.

As observed supra, the Hon'ble Supreme Court in Muhammad Aslam's case has taken a very restricted view, basing the same on the statement of Abdul Qadir Audah Shaheed, the Egyptian Scholar. It appears that the consensus of Fuqha, as maintained by Imam Kasani (R. A.) and others, was not brought to the notice of the apex Court. According to their view, Ta'zir like Qisas falls in the category of Haqooq-ul-Ibad, as such the same rules of composition would apply to the case of Ta'zir as are applicable to the case of Qisas. The Hon'ble Supreme Court may like to revisit its view taken in the said judgment by having a broad based interpretation of the provisions of section 338-E, P.P.C.

It is necessary that full effect should be given to the mandate of the Legislature contained in the provisions of section 338-E, P.P.C. This may be done by the Supreme Court by reviewing the judgment in Muhammad Aslam's case as noted above or the Legislature may add the words, "notwithstanding any judgment of any Court" in section 338-E after the word 'and' and before the words "the provisions of sections 309 and 310".

The amended section will read as follows:--

"338-E. Waiver or compounding of offences.--(1) Subject to the provisions of this Chapter and section 345 of the Code of Criminal Procedure, 1898, all offences under this Chapter may be waived or compounded and notwithstanding any

judgment of any Court, the provisions of sections 309 and 310 shall, mutatis mutandis, apply to the waiver or compounding of such offences."

SUPREMACY OF THE SUPREME COURT AND THE POLITICS OF ARTICLE 270As

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Judicial review is a principle well enshrined in common law legal traditions. In England, the doctrine of Judicial Review is limited in its ambit to reviewing the functioning of the executive when discharging public obligations. However, in countries with a written constitution, the doctrine of Judicial Review also includes the power of the apex Court of the country to determine the constitutionality of legislative provisions. This relatively recent power of reviewing constitutionality of various Acts passed by the legislature was conceived by Chief Justice John Marshal of the Supreme Court of United States of America in the case of *Marlbury v. Madison*¹. In this case the Supreme Court, against-all judicial precedents declared the Judicial Act of 1789, as unconstitutional. This judgment was a beginning of what can be called an end to the doctrine of parliamentary supremacy, because for the first time, the

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