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The Rule of "Death as the Normal Penalty for Murder": A Case Study of the Qisas and Diyat Law in Pakistan

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Abstract

Death is regarded as normal penalty for murder in the subcontinent since the enactment of the Code of Criminal Procedure, 1898 (Cr.PC) particularly its section 367(5). This clause required trial courts to state reasons when capital punishment was not imposed in a capital offence with other sentencing options. Section 302 of the Indian or Pakistan Penal Code (PPC) provided that the punishment for murder did not attach any preference to capital punishment or its alternative of life imprisonment. Judicial interpretations of section 367(5) Cr.PC, practically qualified section 302 PPC, resulting in the development of the rule: death as the normal penalty for murder. Superior courts in Pakistan followed and enforced this rule. Under this rule, lesser punishment can only be imposed if mitigating factors are established. When the Islamic law of homicide and hurt was enforced in Pakistan, it provided punishment of death as qiṣāṣ *(retaliation) for* qatl-i ʻamd *(intentional murder) as fixed penalty. For the punishment of* qatl-i ʻamd *as* taʻzīr, *it provided death or imprisonment for life as sentencing options, keeping in view the circumstance of the case. Punishment of* qatl-i ʻamd *as* qiṣāṣ *remained a rare phenomenon practically rendering this aspect redundant. This issue of redundancy of penal provision of* qiṣāṣ *was never addressed judicially or legislatively. Instead courts in Pakistan invoked death being normal penalty rule developed under the old law, while punishing for* qatl-i ʻamd *as* taʻzīr. *On the other hand, as per opinions of Muslim scholars and judgments of superior courts steering the Islamisation of the law of homicide and hurt,*

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It is clarified that the views expressed here are our personal and in no way represent the official position of above-mentioned institutions. Despite the academic analysis of the jurisprudence in this article, We are bound as judges by the precedents of Honourable Superior Courts as provided under article 189, 201 and 203 GG of the Constitution of Pakistan.

punishment of ta'zīr in qatl-i 'amd *can reach up to capital punishment if aggravating circumstances so demand. In view of this conflicting position, death being the normal penalty for murder rule is inapplicable under the existing statutory Islamic law of homicide and hurt. To establish this point this article has analysed the metamorphosis of capital punishment under English law and its influence on the jurisprudence of India and Pakistan. It also studied the above-mentioned rule before and after the promulgation of Qisas and Diyat Law in Pakistan in 1990. It finally argues that invoking this rule under the umbrella of section 302(b) PPC, which provides the punishment of* qatl-i 'amd *as* ta'zīr *has resulted in jurisprudential paradox, which needs to be addressed.*

Keywords

death, capital punishment, *qiṣāṣ*, *diyat*, *ta'zīr*, normal penalty, *qatl-i 'amd*, murder.

Introduction

This article critically analyses the application of the rule, "death as the normal penalty for murder" to the cases of *qatl-i 'amd* (intentional murder) punished as *ta'zīr*[1] under section 302(b) of the Pakistan Penal Code (PPC). This penal clause is part of the statutory Islamic law of *qiṣāṣ*[2] (retaliation) and *diyat* (blood money) on homicide and hurt and has been brought on statute book by the Criminal Law (Amendment) Act, 1997. This enactment and its predecessor (Ordinance No. VII of 1990) were promulgated as a part of efforts to Islamise the penal legal structure of Pakistan.

For this purpose this article in Part I traces the origin of death penalty in ancient codes. It then analyses the status of the death penalty under English law as it prevailed in the nineteenth century and onwards. It also highlights the influence of English law on the codification process of criminal law in colonial India. It then establishes the link of death being the normal penalty for murder rule to English law. It traces the statutory origin of this rule to the enactment of section 367(5) Code of Criminal Procedure, 1898 (Cr.PC). It also explores that even prior to statutory re-enforcement through section 367(5) Cr.PC death sentence was treated as preferred penalty for murder.

In Part II, to appreciate the jurisprudential developments after enactment of section 367(5) Cr.PC, the article analyses different judgments, which interpreted the above sub-section and explained the statutory basis of death

[1] *Ta'zīr* means punishment other than *qiṣāṣ*, *diyat*, *arsh*, or *ḍamān*. Section 299(l) PPC.

[2] *Qiṣāṣ* (retaliation) means punishment by causing similar hurt at same part of the body of the convict as he has caused to the victims or by causing his death if he has committed *qatl-i 'amd* in exercise of the right of the victim or a *walī*. Section 299 k PPC.

being the normal penalty for murder rule. Analysis in this part is divided in two sections. In the first section, this article analyses the initial recognition of the rule immediately after promulgation of Cr.PC in 1898. In the second section, it discusses the development of this rule in India, as long as section 367(5) Cr.PC remained unaltered.

In Part III, this study analyses the development of the rule, "death as the normal penalty for murder" in Pakistan. Analysis of Pakistani jurisprudence regarding application of this rule has been made in five sections. In the first section this article analyses the application of the rule by Pakistani courts prior to promulgation of the *qiṣāṣ* and *diyat* law, as the colonial legacy of penal law remained unchanged till this point. In the second section, it proceeds to analyse the process of judicial Islamic scrutiny of existing penal laws and efforts to legislate penal laws in line with the *sharīʿah*. In the third section, case laws of superior courts employing the death penalty rule while deciding cases of murder under *taʿzīr* have been analysed. In section four, it discusses the case law, which deviates from the application of the rule under the *taʿzīr* punishment of *qatl-i ʿamd*. In the last section of this part, the article highlights the paradox resulting from the application of the death penalty rule on the cases of murder punishable as *taʿzīr*.

It concludes that use of this rule after promulgation of *qiṣāṣ* and *diyat* law is result of seeing the Islamic law through prism of English jurisprudence. Under Islamic law, the primary punishment of *qatl-i ʿamd* is *qiṣāṣ*, which is a fixed penalty. If *qiṣāṣ* is not imposed for any reason, then under *taʿzīr*, death is not a normal penalty for *qatl-i ʿamd*. For imposing death as *taʿzīr* for *qatl-i ʿamd*, some aggravating circumstances need to be pointed out. Thus, the application of the rule while punishing a convict for murder under *taʿzīr* is not in line with Islamic jurisprudence.

Part I. Death Penalty for Murder: Historical Developments

(a) Death Penalty in Ancient Codes

The history of death as a penalty for murder can be traced back to the Code of Ur-Nammu, the oldest surviving law code.[3] This code stipulated death penalty mainly for four offences including rape, robbery, adultery, and murder.[4] The Code of Hammurabi (1754 BCE) mentioned at least twenty offences for which

[3] Wu Mingren, "The Code of Ur-Nammu: When Ancient Sumerians Laid Down the Law, Everyone Obeyed," accessed March 20, 2019, https://www.ancient-origins.net/artifacts-ancient-writings/code-ur-nammu-when-ancient-sumerians-laid-down-law-everyone-obeyed-009333.

[4] Julian B Knowles, *The Abolition of the Death Penalty in the United Kingdom: How It Happened and Why It Still Matters* (London: Death Penalty Project, 2015), 6.

the death penalty was prescribed.[5] Similarly the Code of Hittite (1650 BCE–1100 BCE) provided the death penalty for six offences not only for persons but also for animals.[6] Draco, an Athenian legislator, proposed Draconian Code in Athens in the seventh century BCE,[7] which provided the death penalty for almost every offence. Due to its harshness, it was said to be written in blood rather than ink. The Roman Twelve Tables, which were promulgated in the fifth Century BCE, also contained the death penalty as punishment for certain offences including judicial corruption,[8] murder, treason, incest, public violence, and forgery of coins and documents.[9] The Manu Code (200 BCE) mentioned four categories of punishment starting from gentle admonition, harsh reproof, fine, and corporal punishment including death.[10] Thus, death as a penal sanction is as old as human civilisation itself.

(b) Death Penalty under Islam

Islam did not endorse the abolition of death penalty altogether. However, under Islamic law, death penalty is reserved for worst of the crimes. Despite some difference of opinion among the jurists, crimes punishable with death penalty include (i) intentional murder (*qatl-i ʿamd*) (ii) creating unrest on earth (*fasād fi 'l-arḍ*) (iii) *zinā* (fornication) committed by a married person (iv) apostasy (v) blasphemy, and (vi) waging war against Islam. Despite permitting death penalty for certain offences, Islam has ordained the protection of human life as one of the greatest virtues. The Qur'ān ordains, "If anyone slew a person—unless it be for murder or for spreading mischief in the land—it would be as he slew the whole people. And if anyone saved a life, it would be as if he saved the life of the whole people" (5:32).[11] The Prophet (peace be on him) also stated that on the Day of Judgment first accountability

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[5] "The Code of Hammurabi," trans. L. W. King, accessed February 20, 2019, http://www.general-intelligence.com/library/hr.pdf.

[6] Martha T. Roth, *Law Collections from Mesopotamia and Asia Minor*, 2nd ed. (Atlanta, GA: Society of Biblical Literature, 1997).

[7] Federica Carugati, Gillian K. Hadfield, and Barry R. Weingast, "Building Legal Order in Ancient Athens," *Journal of Legal Studies* 7, no. 2 (2015): 291-324.

[8] Allan Chester Johnson, Paul Robinson Coleman-Norton, and Frank Card Bourne, trans., *Ancient Roman Statutes* (Austin, TX: University of Texas Press, 1961), accessed March 20, 2019, http://avalon.law.yale.edu/ancient/twelve_tables.asp.

[9] P. Garnsey, "Why Penalties Become Harsher: The Roman Case, Late Republic to Fourth Century Empire," *The American Journal of Jurisprudence* 13, no. 1 (1968): 141–62, doi:10.1093/ajj/13.1.141.

[10] Durga Pada Das, "Discretion in Sentencing Process: A Case Study of Indian Criminal Justice System" (PhD diss., University of Burdwan, 1999), 52.

[11] The translation is of 'Abdullah Yūsuf 'Alī, trans., *The Meaning of the Holy Qur'ān* (Beltsvill, MD: Amana Publications, 2004), 32.

would be regarding unjustified murder.[12] This reflects the importance, which Islam attaches to the protection of human life. Death penalty is undoubtedly an element of Islamic law but it is for limited offences. The first offence for which death penalty is reserved is murder. While prescribing this penalty there is a persuasion for pardoning, which reflects that imposition of death penalty in murder case is not an object in itself. On this point Almighty ordains in the Qur'ān,

> O ye who believe! The law of equality is prescribed to you in cases of murder: the free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand and compensate him with handsome gratitude. This is a concession and a mercy from your Lord. After this, whoever exceeds the limits shall be in grave penalty. (2:178)[13]

The Qur'ān further explains the wisdom of *qiṣāṣ* saying, "In the law of equality there is (saving of) life to you, O ye men of understanding" (2:179).[14] It is clear from this verse that real intention while prescribing death penalty for murder is saving of life and protection of humanity. Standard of proof for imposition of death penalty as *qiṣāṣ* is also very strict. Similarly, in cases of *zinā* standard of proof is the most stringent.

While permitting death penalty for *fasād fi 'l-arḍ*, and waging war against Islam, death sentence is not the only option. The Qur'ān itself prescribes alternative sentencing options, which include amputation and exile. Again the Qur'ān provides an option of repentance to the accused by stating, "Except for those who repent before they fall into your power. In that case, know that Allah is Oft-Forgiving and Most Merciful" (5:34).[15] From the above-quoted wording of the Qur'ān it is clear that if there is an indication of repentance then forgiveness is preferred option. Some Islamic jurists are of the view that repentance washes away the liability of punishment even in cases of apostasy and blasphemy. Even in case of *zinā* committed by a married person, some Muslim scholars are of the view that in the light of interpretation of different Prophetic traditions, the real punishment is hundred lashes and that stoning to death is not established.[16] Some even argue that Islam prescribes death penalty

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[12] Muḥammad b. Ismā'īl al-Bukhārī, *Ṣaḥīḥ*, Kitāb al-diyāt, Bāb qawl Allāh ta'ālā "wa man qatala mu'minan. . . .

[13] The translation is of 'Alī, *Meaning of the Holy Qur'ān*, 71–72.

[14] Ibid., 72.

[15] Ibid., 258.

[16] Javed Ahmad Ghamidi, "Islamic Punishments," http://www.al-mawrid.org/idex.php/articles/view/islamic-punishments1.

for only two offences namely murder and *fasād fī 'l-arḍ*.[17] However, this is not the dominant view of Muslim jurists. From the discussion in the Federal Shariat Court judgment on blasphemy, it is reflected that majority of Muslim jurists are of the view that punishment of apostasy and blasphemy is death if it is not adequately repented. Even on the punishment of *zinā* committed by a married person existing law in Pakistan provides sentence of death by stoning.

Above discussion clearly reflects that Islam does not altogether oust death penalty as a penal tool. However, it is not a preferred or favourite penalty under Islamic law. The Qur'ān and *sunnah* intend to avoid this extreme penalty as far as possible in the circumstances of the case. In case of *ḥudūd* (fixed penalties) even the Prophet (peace be on him) himself encouraged people to avoid reporting such incidents to give an opportunity to the accused to repent.[18] *Ḥudūd* with death penalty are no exception to this rule. Thus Islam permits the imposition of death penalty in extreme cases mentioned above but provides all reasonable chances to the accused, legal heirs, and witnesses to avoid the same so far as possible.

The death penalty has descended to modern states of recent era including the English legal regime. English law has influenced the subcontinent to a great deal. Thus, a look at death penalty in English jurisprudence is pertinent.

(c) Death Penalty under English Law

Capital punishment remained in vogue in different parts of the United Kingdom until 1964.[19] From the end of the seventeenth century until the start of the nineteenth century, the number of capital offences grew gradually in England.[20] Until 1547, there were just eleven capital offences including murder.[21] From 1660 to 1750 number of capital offences tripled from 50 to 150 and there were 288 capital offences until the end of 1815.[22] This era of a growing number of capital offences in England from the late seventeenth century to the early nineteenth century is termed as the Bloody Code.[23] The number of capital offences in England decreased gradually with the

[17] Ibid.
[18] Bukhārī, *Ṣaḥīḥ*, Kitāb al-ḥudūd, Bāb idhā aqarra bi 'l-ḥadd wa lam yubayyin hal li 'l-imām an yastur 'alayh.
[19] Knowles, *Abolition of the Death Penalty in the United Kingdom*.
[20] Ibid.
[21] "The Origins of Judicial Hanging in Britain," accessed December 12, 2017, http://www.capitalpunishmentuk.org/origins.html.
[22] Public Record Office, "Crime and Punishment," accessed December 12, 2017, http://www.nationalarchives.gov.uk/education/candp/punishment/g06/g06cs1.htm.
[23] "The Bloody Code," *Crime and Punishment in Durham, 1750-1900*, accessed March 20, 2019, https://community.dur.ac.uk/4schools.resources/Crime/Bloodycode.htm.

introduction of different reforms to address the sentiments against the death penalty.

Thomas Babington Macaulay (d. 1859), in his draft of the Indian Penal Code (IPC) prepared in 1838, reserved the death penalty for only two offences, murder and treason. Regarding murder, Lord Edward Coke (d. 1634) observed that for intentional and deliberate murder the laws of England provided sentence of death since time immemorial.[24] Blackstone also mentioned that willful and deliberate murder was almost universally punished with death.[25] These observations of scholars of English law reflect that death penalty, as a penal sanction for murder, remained an established norm in England. This penal aspect of English law also left its bearing on the colonial India's legal regime.

(d) Influence of English Law over Colonial India

Stokes categorically stated that English penal law had deeply influenced the penal legal structure in undivided India.[26] It is held that except for affairs reserved for personal law, English common law has governed the *inter se* relationships of people in India.[27] English law is, therefore, called the foundation of all civil and criminal laws in India.[28] It is also claimed that Macaulay's masterpiece, the IPC, is nothing more than the simplification of English criminal law.[29] Not only criminal law but the whole codification process is seen as a transplantation of English law in the colonised India.[30] The main codes implemented in India are materially based on English law.[31] Exemplifying this point Straight J. of the Allahabad High Court pointed out that the law on the accomplice as incorporated sections 114 and 133 of Indian Evidence Act, 1872 was in no manner different from the law of England.[32]

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[24] "Commentaries on the Laws of England in Four Books," 403, accessed February 8, 2019, https://oll.libertyfund.org/titles/blackstone-commentaries-on-the-laws-of-england-in-four-books-vol-2.

[25] Ibid., 407.

[26] Whitley Stokes, *The Anglo-Indian Codes*, 1:xxvi, https://ia902609.us.archive.org/24/items/angloindiancodes01stokuoft/angloindiancodes01stokuoft_bw.pdf.

[27] M. C. Setalvad, *The Role of English Law in India* (Jerusalem: Magnus Press of the Hebrew University, 1966), 5.

[28] Ibid., 5, 36.

[29] Frederick Pollock, *The Expansion of the Common Law* (London: Stevens and Sons, Limited, 1904), 17.

[30] David Skuy, "Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century," *Modern Asian Studies* 32, no. 3 (1998): 513–57.

[31] Stokes, *Anglo-Indian Codes*, 1:xxvi.

[32] *Queen-Empress v Ram Saran and others* ILR Allahabad (1886) vol. 08, p. 306.

Even the claim of Macaulay regarding the originality of IPC as drafted by him was questioned by Hay and Cameron, the two commissioners, who reviewed the draft. They asserted that draft of IPC reflected no major departure from principles of English law and originality claimed by Macaulay was more imaginary than real.[33] Therefore, the influence of English law over the IPC and other penal laws is evident.

When the IPC was being drafted and promulgated, mixed feelings of revulsion and romance with the death penalty were working side by side in England, which was manifest from the discussion under section (c) above. Therefore, for intentional murder the IPC provided two alternative punishments of death sentence or transportation for life. In the original code, there is no preference to the death penalty over the other legal sentence of transportation for life. However, feeling that favoured the death penalty resulted in the enactment of section 367(5) Code of Criminal Procedure, 1898, which provides, "If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed." This provision is termed as affirmation of English law on the death penalty at that time.[34] To understand the position prevailing prior to the enactment of section 367(5) Cr.PC, it is pertinent to gauge the trends of courts and legislative status in India before the enactment of this provision.

(e) Jurisprudence Prior to 1898 in India

As far as contents of judgment are concerned, section 464 of the Code of Criminal Procedure, 1872 corresponds with section 367 of Code of Criminal Procedure, 1898. The former Code had no such parallel provision requiring the courts to specifically state reasons in case of opting for lesser penalty out of two sentencing options of capital sentence or transportation for life. The requirement of stating reasons to justify the lesser penalty under section 302 of the IPC and other capital offences was added in the statutory regime for the first time in 1898 by the enactment of the Cr.PC, specifically its section 367(5). However, owing to the influence of English law the death sentence was taken as an ordinary penalty for murder even prior to 1898. To avoid the death penalty, some sort of mitigation was always looked for. Though there was no mandatory requirement of mentioning reasons for choosing a lesser penalty but the court always provided some reasons while choosing the non-capital

[33] Skuy, "Macaulay and the Indian Penal Code of 1862," 543.
[34] *The State v Vali Mohammad* AIR 1969 Bom 294.

option. An analysis of following cases decided prior to 1898 supports this assertion.

In the Aiyavu case,[35] the accused confessed to the killing of the deceased and was awarded the death penalty. However, during appeal it was held that charge was not properly explained to the accused and their plea of participating in the killing due to the death threat extended by the co-accused was ignored. If their plea of being under coercion had been considered, they would have been entitled to mitigation in the sentence. This approach of the court reflected that in line with the English law prevailing at that time punishment of death was taken as a preferred penalty for murder and that a lesser punishment was only awarded upon showing of mitigation.

In the Ishri Singh case,[36] the accused was awarded the death sentence for committing the murder of Fakir Chand in 1874. Four of his co-accused were already awarded the death sentence in a separate trial and were hanged. He was arrested and produced before the magistrate in May 1886, after absconding for almost twelve years. As he absconded and was arrested later on, his trial was conducted separately and was sentenced to death. On appeal decided on 21 September 1886, upholding conviction, his sentence was reduced to transportation for life, considering the time that has elapsed since the time of occurrence. This reflects that some sort of mitigation was coined by the courts even prior to promulgation of Section 367(5) Cr.PC. In this case, the actual conduct of the accused to remain a fugitive from the law for a considerable period was translated into mitigation in his favour.

In the Mohan case,[37] the accused found his wife missing from her bed. He armed himself and followed her. He found her in conversation with Fakurdin, her paramour, and killed her on the spot. Accused also attacked Fakurdin but he escaped with mild injuries. The accused made a serious attempt to take his own life but was saved. In this case, the referral bench decided that the offence was one of murder and does not attract exception I of section 300 IPC to make out the offence of culpable homicide not amounting to murder. The court held that natives of this country in cases like this are less capable to exercise restraint as Europeans are capable of doing. These factors were considered as mitigating circumstances. The court held that even the sentence of

[35] *Aiyavu and another v Queen-Empress* (1886) ILR 9 MAD, accessed February 8, 2019, 61, http://14.139.60.114:8080/jspui/bitstream/123456789/14674/1/017_Aiyavu%20and%20another%20v.%20Queen-Empress%20%2861-63%29.pdf.

[36] *Queen-Empress v Ishri Singh* (1886) ILR 8, accessed February 8, 2019, ALL672, http://14.139.60.114:8080/jspui/bitstream/123456789/23525/1/112_Queen-Empress%20v.%20Ishri%20Singh%20%28672-677%29.pdf.

[37] *Queen Empress v Mohan* (1886) ILR 8 ALL 622.

transportation was more severe and recommended commutation to ten years rigorous imprisonment.

The above cases reflect that the courts always tried to supply some sort of reasoning while imposing the lesser penalty of transportation for life.[38] However, the legislature was seemingly not satisfied with these judicial trends. The legislative leaning was in favour of the death sentence in offences where the capital sentence was one of the sentencing options. Therefore, a statutory requirement was added to supply reasons whenever court imposes lesser penalty in capital offences. How this statutory requirement of stating reasons turned into death as the normal penalty for murder rule needs to be analysed. Therefore, the discussion under Part II explores the jurisprudential basis and studies the development of this rule in pre and post-independence India.

Part II. Jurisprudential Basis of Death Penalty Rule: The Normal Penalty for Murder

(a) Initial Recognition of the Rule

From the language of section 7 of the English Homicide Act, 1957,[39] it is clear that prior to this enactment death was the only penalty for intentional murder committed by sane adult convicts. Homicide Act, 1957 regulated this regime in English jurisdiction and created a specific class of aggravated murders where death penalty was the only punishment.[40] The Act[41] trimmed this rule to certain categories of murder detailed in its sections 5 and 6. Ultimately, the death penalty for murder practically came to an end in England by promulgation of the Murder (Abolition of Death Penalty) Act 1965.[42]

However, the above-discussed metamorphosis in English law on the death penalty for murder did not affect colonial law on the subject in Pakistan till promulgation of the *qiṣāṣ* and *diyat* law.[43] Though the punishment of murder was contained in section 302 PPC (old) but it was also regulated by section 367(5) Cr.PC. The former provided two sentencing options for murder namely death and imprisonment for life while later required the trial courts to give reasons if the sentence of death was not awarded. Section 367(5) Cr.PC was translated into death as a normal penalty for murder rule by courts in

[38] *Queen-Empress v Ishri Singh* (1886) ILR 8 ALL 672.
[39] Homicide Act, 1957, accessed March 18, 2019, http://www.legislation.gov.uk/ukpga/1957/11/pdfs/ukpga_19570011_en.pdf.
[40] Ibid., Section 7.
[41] Ibid.
[42] https://www.legislation.gov.uk/ukpga/1965/71/pdfs/ukpga19650071en.pdf, accessed March 18, 2019.
[43] Homicide Act, 1957.

India and Pakistan through long interpretative process. The first judicial interpretation on this line was given by the Chief Court of Burma in the Tha Sin Case[44] within four years after the enactment of this provision in 1898.

The Chief Court of Burma in 1902 delivered the first judgment in the colonial regime expressing the statutory basis of death as the normal penalty for murder rule. In this judgment Chief Court of lower Burma specifically referred to section 367(5) Cr.PC and held that sentence of death in capital cases is a rule and any other lesser sentence is an exception.[45] Chief Judge Thirkell White in this case while dismissing the appeal of the accused against sentence of transportation for life issued a notice for the enhancement of sentence. Guiding the judicial attitude towards capital sentence in murder cases he observed, "It is not for the judge to ask himself whether there are reasons for imposing the penalty of death, but whether there are reasons for abstaining from doing so."[46]

Irwin J, another member of the bench went even further and held, "When a Sessions Judge has any doubt whether a sentence of death should be passed or not, he should pass sentence of death."[47] He was of the opinion that any controversy on capital sentence or its alternate option of transportation for life may be resolved by the Chief Court itself in confirmation or appeal proceedings and therefore Session Courts should lean in favour of death sentence as normal penalty in capital cases.

However, same court immediately felt a need to explain the above ruling without expressly dissenting or overruling the same. Therefore, in the Hamid case[48] the Court held that the opinion in the Tha Sin case[49] never means that where Sessions Judge has sufficient reason for not passing sentence of death he is even then bound to pass the same. It was held that the ratio of Tha Sin only govern those cases where judge is in doubt in the matter of choosing the available sentencing options, he should then lean towards capital sentence being ordinary sentence in cases of intentional murder.

Fortifying the above jurisprudence the Rangoon High Court held[50] that before passing the mitigated sentence a Judge should find that there are really

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[44] *Crown v Tha Sin* Lower Burma Rulings 216 or (1902) 1 Low Bur Rul 216, accessed February 11, 2019, http://www.myanmar-law-library.org/law-library/case-law/lower-burma-rulings-of-the-chief-court-rangoon-1900-1922/lower-burma-rulings-1900-1902.html.

[45] Ibid.

[46] Ibid., 216, at 219–220.

[47] Ibid., at 220.

[48] *Hamid v King Emperor* 1903, at 63, accessed February 11, 2019, http://www.myanmar-law-library.org/spip.php?page=pdfjs&id_document=118.

[49] *Crown v Tha Sin*, at 220.

[50] AIR 1924 Rang 179.

extenuating circumstances. The mere absence of aggravating circumstances is not a sufficient reason to deviate from the rule of imposing the death sentence in murder cases. The Nagpur Judicial Commissioner Court [51] held that it is a mistaken view that sentence of death should only be imposed where aggravating circumstances are brought home. The court observed that in cases of intentional murder the sentence of death should be awarded unless there were reasons to the contrary. The above-referred judgments reflect the continued application of death as the normal penalty for murder rule, prior to independence. How far the application of the rule continued in India after independence needs to be studied.

(b) Post-Independence Development in India

The Bombay High Court after thoroughly discussing the impact of section 367(5) Cr.PC, 1898, which is the basis of this rule, held that said provision was not merely procedural. The court rejected the view that only purpose of the above clause was to require reasoning from the trial court, which was already a requirement of judicial propriety regardless the nature of sentence the court may pass. The Court held

> Thus sub-section (5) of Section 367 as it then stood was a qualification upon Section 302 I. P. C to this extent that although Section 302 merely conferred a discretionary power upon the Court to impose either the sentence of death or sentence of imprisonment for life, for the offence of murder, the provisions of sub-section (5) of Section 367 required that the sentence of death must normally be imposed unless there are extenuating circumstances.[52]

The Bombay High Court also pointed out that section 367(5) Cr.PC cannot be regarded merely a requirement of providing reasons for selecting one of the sentencing options, which is already a well settled judicial norm. The courts are always required to provide reasons for their decisions. Thus, as per the interpretation of the Bombay High Court, this clause has practically qualified section 302 IPC.

However, the Allahabad High Court has differed from the above view regarding the scope of section 367(5) Cr.PC and held that same clause pertained to procedure. Therefore, its amendment by no means has effects upon the substantive law on punishment of murder contained in section 302 IPC.[53] Indian Supreme Court[54] without touching the question of substantive

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[51] *Local Government v Sitrya Arjuna*, AIR 1933 Nag 307.

[52] *The State v Vali Mohammad* AIR 1969 Bom 294.

[53] *Jan Muhammad v The State* AIR 1963 All 501.

[54] Any reference to the superior courts or judges thereof may be deemed to precede with the word honourable, which has been omitted at some places for the sake of brevity.

or procedural nature of section 367(5) Cr.PC (as it stood in Indian Code of Criminal Procedure before 1955) held that death was the normal penalty for murder and where any lesser sentence was passed reasons should be recorded.[55] In 1955, section 367(5) Cr.PC was deleted in India. Later on, a new Code of Criminal Procedure was promulgated in India in 1973, wherein this clause was not restored. In the new Code of Criminal Procedure, 1973, section 367(5) of the old Code of Criminal Procedure, 1898 was replaced by section 354(3). This new sub-section required that in case of imposing death sentence, courts have to record special reasons.[56] Now death penalty is awarded in only rarest of the rare cases in India.[57] Special reasons are to be stated where death sentence is imposed in an offence, which also provide option of lesser sentence.[58]

The above analysis of judgments mainly reflect the development of the death penalty rule, as far as the law remained unchanged in India. It is also manifest that the statutory justification for this rule has been derived from section 367(5) Cr.PC. In India, section 367(5) Cr.PC was amended and then replaced by section 354(3) of the new code in 1973. However, the same is intact in Pakistan. Therefore, the jurisprudential analysis of this rule is of more practical interest in Pakistan. Thus, the developments and recent position regarding application of the rule in Pakistan need to be explored.

Part III. Death Penalty: The Normal Penalty for Murder in Pakistan

Before the survey of the case law on the subject, it is important to understand that the law of homicide and hurt in Pakistan has underwent substantial changes in the year 1990, to bring it in line with Islamic law. In view of these significant changes, it is appropriate to discuss the important legislative developments and case law on the subject in the following sequence:

(a) Jurisprudence before Promulgation of Qisas and Diyat Law

(b) Law of Homicide and Hurt under Islamic Scrutiny

(c) Jurisprudence after Promulgation of Qisas and Diyat Law

(d) Deviations from the Death Penalty Rule

(e) Death Penalty Rule: A Jurisprudential Paradox

[55] *Dalip Singh v The State* AIR 1953 SC 364.
[56] The Code of Criminal Procedure, 1973, India.
[57] *Bachan Singh v State of Punjab* AIR 1980 SC 898.
[58] Section 354(3) of the Code of Criminal Procedure, 1973, India.

(a) Jurisprudence before the Promulgation of Qisas and Diyat Law

After independence, death being the normal penalty for murder rule was followed by superior courts in Pakistan with the same rigour, as was followed before partition. The development of this rule can be traced in different precedents of High Courts and Supreme Court of Pakistan.

(i) Views of Honourable High Courts

The Gurdev Singh case[59] is the first case decided after independence in Pakistan where question of imposing death penalty as a usual penalty for murder came under discussion before the Lahore High Court. In this case, five persons committed murder of one person by beating him indiscriminately with sticks. Only one injury was on the head. The learned Sessions Judge convicted all the four accused facing trial under section 302 PPC to transportation for life. The main grounds for not imposition death sentence were age of the accused (19 to 20 years) and none of the injury being individually fatal to cause death. The High Court rejected both these grounds and observed that imposing death sentence or lesser punishment of transportation for life was within the discretion of the trial court. However, this discretion should be exercised keeping in mind that usual sentence for murder is death unless there are some mitigating circumstances. Without referring to section 367(5) Cr.PC, the High Court observed that trial court must record reasons and grounds for imposing less than usual penalty and emphasised that such grounds must be well recognised. Court added that it was not possible to lay down any exhaustive list of such grounds. After discussing the question of enhancement of sentence in detail and rejecting the grounds taken by trial court, the High Court enhanced the sentence of all the four convicts to capital punishment.

In Khirdi Khan case,[60] Chief Justice Munir, speaking for the Lahore High Court held that the death penalty is the normal penalty for murder and the lesser sentence can only be imposed where sound reasons are put forth by the trial court for resorting to mitigated sentence. The High Court took strong exception to the trend of Session Judges awarding lesser penalty on unjustified reasons. The court held that a "judge who is mentally incapable of awarding capital punishment where law and facts demand it is a complete misfit in judicial machinery. Being placed in that system he has no right to play the part of a conscientious objector."[61]

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[59] *Gurdev Singh and others v Emperor* AIR 1948 Lah 58.
[60] *Khairdi Khan v Crown* PLD 1951 Lah 322.
[61] Ibid.

In above referred case,[62] the Lahore High Court went on to remind the Sessions Judges in line with the Tha Sin case[63] (though without referring to it) that the primary duty of imposing the death sentence is of High Court as every sentence passed by the Sessions Court is anxiously considered by it before confirming it. High Court advised the Session Judges to "disabuse their mind of the notion that they are the final arbiters of the life of the man whom they convict and sentence to death or that a man will die simply because they condemn him to death." With this observation, the court enhanced the sentence of three accused to that of death.

This trend of the Lahore High Court continued and the court refused to convert the death sentence of two accused to life imprisonment merely on the ground that their co-accused with similar role were not awarded normal penalty of death.[64] The Lahore High Court continued to follow this rule in other cases decided prior to promulgation of Qisas and Diyat Law.[65]

The Full Bench of the Peshawar High Court also followed the above judicial trend and expressed its strong disapproval of the tendency of Session Judges to avoid the normal penalty of death by giving disingenuous reasons.[66] Similar views were expressed in the Skindar Shah case.[67] The court held that reasons, which section 367(5) Cr.PC contemplates for avoiding the normal penalty of death are genuine and correct reasons distinguishable from whimsical reasons coined by the court merely to award lesser penalty of transportation for life. In the Akram case,[68] the Division Bench held that the extreme penalty of death is normal sentence and lesser penalty is an exception. The court articulated the attitudinal framework of judicial thinking in such cases by reiterating the rule, "It is not for the Judge to ask himself whether there are reasons for imposing the penalty of death, but whether there are reasons for abstaining from doing so." The Peshawar High Court echoed the death penalty rule in other cases as well.[69]

The High Court of Sindh also imposed sentence of transportation for life after considering different extenuating circumstances and held that it was inexpedient to impose the death sentence in the light of mitigating factors.[70]

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[62] Ibid.
[63] *Crown v Tha Sin* Lower Burma Rulings 216.
[64] *Zia ul Hassan etc v The State* 1980 PCr.LJ (Lah) 531.
[65] *Nisar Ahmad v The State* 1981 PCr.LJ 476; *Muhammad Abdullah v The State* 1985 PCr.LJ 1580.
[66] *Sheikh Hassan v Bashir Ahmad* PLD 1966 (W.P.) Pesh.97.
[67] *Skindar Shah v The State* PLD 1965 (W.P.) Pesh. 134.
[68] *Akram Khan v The State* PLD 1978 Pesh.150.
[69] *Iftikhar v The State* PLD 1972 Pesh. 27.
[70] *Kamber Ali Shah v The State* PLD 1959 (W.P) Kar, 460.

The High Court of Sindh followed the death penalty rule in the Waloo,[71] Abdul,[72] and Samad[73] cases.

(ii) Views of the Honnourable Supreme Court of Pakistan

The Honourable Supreme Court of Pakistan, in the Fateh Khan case, held that the death penalty as the normal penalty for murder rule was being followed since pre-partition and courts of Pakistan also followed the same rule.[74] In the same case, the Supreme Court, while interpreting section 367(5) Cr.PC, discovered the legislative intent and held that in the language of above clause there was clear indication of the legislative mind to treat the death as the normal sentence in offence under section 302 PPC.[75] In this case, the Supreme Court of Pakistan has not specifically declared section 367(5) Cr.PC a substantive law. However, the above observations are practically in line with the view of the Bombay High Court,[76] which considered section 367(5) Cr.PC substantive in nature and a qualification over section 302 IPC.

In the Dost Muhammad case,[77] the Supreme Court further extended the rule and held that the mere lack of premeditation or enmity is not sufficient to avoid the normal penalty of death in murder cases. As per facts of this case, the accused committed murder of a person who only asked him to stop chasing the victim. He, leaving the original target aside, committed the murder of intervener. He then contended that there was no previous enmity nor there was any premeditation, therefore, in case of conviction lesser penalty may be imposed. Referring to section 367(5) Cr.PC, the Supreme Court in its majority judgment held that normal punishment for offence of murder was death and mere lack of premeditation or enmity was no ground to award a lesser penalty.

In the Shaheb Ali case,[78] the Supreme Court dealt with the death penalty rule, in cases where single murder had been committed by several accused. This was a case of single murder by three brothers on account of previous enmity. Trial court convicted and sentenced all the three accused to death. However, the High Court maintained the sentence of death of one accused that launched the first blow and converted the sentence of others to life imprisonment by holding that all the three accused were brothers and courts

[71] *Waloo etc v The State* PLD 1970 Kar. 677.
[72] *Abdul Salam v The State* 1977 PCr.LJ Kar. 788.
[73] *Abdul Samad v The State* 1979 PCr.LJ 409.
[74] *Fateh Khan v The State* PLD 1963 SC 89.
[75] Ibid.
[76] *The State v Vali Mohammad* AIR 1969 Bom 294.
[77] *Dost Muhammad v The State* PLD 1963 SC 285.
[78] *Shaheb Ali v The State* PLD 1970 SC 447.

had always been reluctant to impose capital punishment against more than one person for murder of single person. The Supreme Court was not pleased with this treatment and held that it was a pick and choose without rule. One accused has been made the scape-goat while others with same role have been awarded a lesser penalty. In such like cases, long arm of law must reach to all culprits with same force without remorse. It was held that courts had wide discretion in the matter of imposing sentence but in the matter of murder discretion had been further regulated. Death is the normal penalty for murder and it can be only avoided if there are any mitigating circumstances.

In the Asad Ullah case,[79] it was held that mere acquittal from the High Court resulting in expectancy of life to the accused was not a bar to the normal penalty of death. In this case six family members were killed by the accused. Sessions Court convicted and sentenced six accused while the High Court acquitted all the accused. The Supreme Court on appeal restored the death sentence of the principal accused and life imprisonment of other five accused. The court held that the death penalty is the ordinary penalty in a murder case and plea of the accused that he earned expectancy of life due to acquittal from High Court was rejected.

In the Muhammad Sharif case,[80] the Supreme Court enlisted different safeguards provided in the administration of justice against wrongful convictions coupled with executive clemency to further filter the chances of failure of justice. The court then lamented the hesitation of courts to award the normal penalty of death in cases of intentional murders. The Supreme Court deprecated the trend of finding laboured pretexts by the courts to convert normal sentence of death in murder cases into life imprisonment.

In the Ajun Shah case,[81] the Supreme Court observed without referring to section 367(5) Cr.PC that in the case of murder death sentence should ordinarily be imposed unless the trial court recorded reasons for not imposing the same. Similarly, the Supreme Court also declined to convert the death sentence into life imprisonment in the Barkat Ali case[82] as no mitigating circumstances were pointed out. In the Zulfiqar Ali Bhutto case,[83] the Supreme Court extended the rule even to abetment of murder. In its order on the review petition of the above judgment, the court again approvingly referred to the death penalty as the normal penalty for murder rule and held that lesser sentence can only be imposed if mitigating circumstances existed in favour of

[79] *Asadullah v Muhammad Ali* PLD 1971 SC 541.
[80] *Muhammad Sharif v Muhammad Javed alias Jedda Tedi* PLD 1976 SC 452.
[81] *Ajun Shah v The State* PLD 1976 SC 633.
[82] *Barkat Ali v State* 1976 SCMR 368.
[83] *Zulfiqar Ali Bhutto v The State* PLD 1979 SC 53.

the accused.[84] However, in the Tahir Khan case,[85] the Supreme Court softened the noose and held that in order to attract the normal penalty of death in murder cases the prosecution must exclude all possible mitigating circumstances.

In the Sharif case,[86] the Supreme Court again expressed its displeasure as the lower forums failed to award the normal penalty of murder to the accused without disclosing proper reasons. The Supreme Court reaffirmed its disapproval regarding the hesitancy of lower courts in awarding the normal penalty of death in murder cases. It held that while administering justice all aspect of a case must be dealt with properly and alternatives should not be unnecessarily molded in favour of guilty to avoid the normal sentence of death.

The above-mentioned case[87] was decided under the old law of murder but as the process of Islamisation of laws had already started, therefore, court referred to Islamic law of *qiṣāṣ*, diyat, and *taʿzīr*. On the point of punishment of murder as *taʿzīr*, the court held, "In the matter of decision of taz'ir penalty in murder cases, there is further consensus on the award of death penalty as *taʿzīr* in appropriate cases."[88] However, there is no detail or reference in the judgment as to where such consensus has been reached and what are the appropriate circumstances? This is the case where the Supreme Court without deeper analysis of the concept of *taʿzīr* under Islamic law pushed forward the death penalty rule, even where the punishment was *taʿzīr* in a murder case. Some of these cases will be discussed in part III, (c) (ii) of this article.

The above-analysed cases also reflect that the death penalty rule was being followed by courts in Pakistan without any major change till the promulgation of the Qisas and Diyat Law. It is also manifest that this rule has not been derived from the substantive law contained in IPC or PPC. The rule owes it genesis to section 367(5) Cr.PC, which is mainly a procedural statute. Judgments of superior courts, which steered the Islamisation of law of homicide and hurt scrutinised different penal clauses of PPC, Cr.PC and Evidence Act 1872. The question begging answer is whether section 367(5) Cr.PC, from which the death penalty rule has been derived was scrutinised in light of the injunctions of Islam.[89] This requires an analysis of important

[84] Ibid., 741.
[85] *Muhammad Tahir Khan v The State* 1983 SCMR 1169.
[86] *Muhammad Sharif v The State* 1991 SCMR 1622.
[87] Ibid.
[88] Ibid.
[89] Section 338-F of Pakistan Penal Code specifically provides that interpretation of any provision of Qisas and Diyat Law as laid down in sections 299 to 338-G PPC is to be made in

judgments, which steered the Islamisation of law of homicide and hurt in Pakistan.

(b) Law of Homicide and Hurt under Islamic Scrutiny

The Martial Law regime in 1977 expressed a new resolve for the Islamisation of legal system of Pakistan. It mentioned imposition of Islamic order in the country as one of the three objectives of its takeover.[90] The regime adverted to the judicial process of Islamisation of laws by promulgation of President Order 22 of 1978, which established the Shariat Benches of Superior Courts.[91] To incorporate this regime of Shariat Benches in the Constitution, President Order 3 of 1979 Constitutional (Amendment) Order 1979 was promulgated.

The Shariat Benches in the each High Court consisting of three of Muslim judges[92] were created. The Shariat Appellate Bench consisting of three Muslim judges of the Supreme Court was created in the Supreme Court of Pakistan to hear appeals against the decisions of the Shariat Benches of the High Courts.[93] The Constitution Amendment Order empowered the Shariat Benches of the High Courts to examine the vires of any law on the basis of the Qur'ān and *sunnah*.[94] Any citizens of Pakistan, provincial or federal governments were empowered to invoke the jurisdiction of these Shariat Benches. However, Constitution Amendment Order itself excluded from the scrutiny of these Benches the Constitution, fiscal laws, Muslim Personal Law and laws relating to procedure of any court or tribunal. The above arrangements prompted different aggrieved persons to assail the existing law on homicide and hurt. This assailing was not always with exclusive purpose of enforcing the *sharī'ah* but also perhaps to get some concessions from the rigours of existing law. Islamic scrutiny was two-pronged. On the one side, judicial scrutiny of existing laws in light of Islamic injunctions was taken up by the courts. On the other side, efforts to bring new legislation on homicide and hurt in line with the injunctions of Islam were initiated.

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line with the injunctions of Islam. The injunctions of Islam as per said provision are the Qur'ān and *sunnah*. The same meanings are given in Article 203-D of the Constitution of Pakistan.

[90] The other two were restoration of law and order and holding fresh election within ninety days. See the Gazette of Pakistan 5 July 1977. Also see Tahir Wasti, *The Application of Islamic Criminal Law in Pakistan: Sharia in Practice* (Leiden: Brill, 2009), 102.

[91] President Order 22 of 1978 Shariat Benches of Superior Courts Order, 1978 PLD 1979 Central Statutes, 6.

[92] Article 203-A (10) inserted through President Order 3 of 1979, PLD 1979 Central Statutes, 31.

[93] Article 203-C (3) inserted through President Order 3 of 1979, PLD 1979 Central Statutes, 31.

[94] Article 203-B inserted through President Order 3 of 1979, PLD 1979 Central Statutes, 31.

(i) Judicial Scrutiny of Existing Laws

In the process of judicial scrutiny of existing laws on homicide and hurt, first case in the row was *Gul Hassan v Federation of Pakistan*.[95] Gul Hassan, a death row convict, mainly assailed section 302 PPC (old),[96] sections 401, 402, 403 Cr.PC and its Schedule II. The petitioner, claiming to be a minor at the time of offence, argued that section 302 PPC (old) was against the injunctions of Islam as it allows *qiṣāṣ* from a minor. The second point of attack on these provisions was that they do not allow compromise. The Shariat Bench of Peshawar High Court declared that section 302 PPC (old) is in line with the injunctions of Islam if condonation or compromise by legal heirs is allowed with addition of concept of *diyat*. The court also held that minor (non-pubescent) cannot be subjected to *qiṣāṣ* and instead punishment of *ta'zīr* may be provided for him. Regarding remissive powers of government, the court held that options of remission, commutation or reduction of sentences can only be exercised by the courts in accordance with the injunctions of Islam and no government can exercise such power under Islamic dispensation. The court added that the punishment of *ta'zīr*—even up to sentence of death—may be provided in cases of recidivist where legal heirs choose to pardon.

In this case, the court did not entertain the objection of the Advocate General that different provisions contained in the Code of Criminal Procedure cannot be scrutinised as laws regarding procedure of the courts have been saved from such scrutiny by the Constitution Amending Order itself. The court held that provisions regarding compoundabilty although contained in Code of Criminal Procedure are substantive in nature. The court observed that merely a fact that provision is contained in a procedural statute is no ground to treat it as such if it addresses some question of substantive law. Overruling the objection, the court declared section 345(7), 401, 402-A, 402-B of Cr.PC repugnant to the injunctions of Islam. However, in the entire judgment section 367(5) Cr.PC, which practically governed the penal clause of section 302 IPC and PPC and resulted in coining of the death penalty rule, was not discussed. In this judgment court did not lay down that option of *ta'zīr* could be resorted to where prosecution failed to adduce the proof of murder liable to *qiṣāṣ*. Said option is the hallmark of existing statutory law of *qiṣāṣ* and diyat as reflected in section 302(b) PPC.

As a successor of Shariat Benches in High Courts, the Federal Shariat Court was created.[97] Different petitions pending in the High Courts were

[95] PLD 1980 Pesh 1.
[96] PPC before amendment through Ordinance No. VII of 1990.
[97] The Constitution (Amendment) Order, 1980, President Order No.1 of 1980 promulgated on May 27, 1980, Article 203-H.

transferred to the Federal Shariat Court.[98] In the Muhammad Riaz case,[99] which is the second important case in the row of the judicial Islamisation of laws, the Federal Shariat Court was mainly asked to declare sections 109, 111, 302, 325, 326, 329, 331, 333, 335, and 338 PPC (old) as un-Islamic. It was contended that these offences are not compoundable and sentences provided therein are also not in accord with the injunctions of Islam. The same punishment to the abettor as to the principal accused under section 109 and 111, PPC was also assailed being un-Islamic. Sections 337, 338, 339, 381, 401 to 402-B 544-A Cr.PC and Section 114 and 133 of Evidence Act, 1872 were also assailed being against the injunctions of Islam. It was contended that the evidence of an approver cannot be made basis of conviction nor can he be absolved from punishment if he confesses the commission of an offence. It was also contended that imposition of compensation under section 544-A Cr.PC is also not in-line with the Islamic principles of *arsh*, *ḍamān* or *diyat*.

Main judgment in this case was authored by Justice Aftab Hussain. In the beginning of his discourse, he rejected the premise that existing statutory law and *sharī'ah* law are poles apart. He pointed out that many customs of Arab society were recognised by Islam. He also mentioned that existing statutory law is mainly based on common good, which is also recognised by the *sharī'ah* under the principles of *istiḥsān*[100] and *maṣāliḥ murasalah*.[101] Thus he proceeded on the assumption that existing laws are in accord with the *sharī'ah* barring few exceptions. On this criterion, he sifted the assailed provisions and held that only amendment required in section 302 PPC "is that the alternative sentence of payment of blood-money should be added."[102] Before proposing amendment in the PPC he warned against any fundamental structural change in PPC. He opined that any such change would render the interpretation of the PPC, made up till now useless, which would be a great loss. With these precautionary words, he proposed three fold amendment in section 302 PPC

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[98] Ibid.

[99] *Muhammad Riaz v Federal Government* PLD 1980 FSC 1.

[100] It literally means juristic preference. It refers to the principle that permits exceptions to strict and/or literal legal reasoning in favour of the public interest (*maṣlaḥah*) guides decision making in cases where there are several potential outcomes. See http://www.oxfordislamicstudies.com/article/opr/t125/e1136.

[101] *Maṣlaḥah* is the consideration, which secures a benefit or prevents harm but is, in the meantime, harmonious with the aim and objective of the *sharī'ah*. See B. Elvan Syaputray et al, *Maslahah as an Islamic Source and its Application in Financial Transactions*, http://webcache.googleusercontent.com/search?q=cache:http://www.questjournals.org/jrhss/papers/vol2-issue5/G256671.pdf.

[102] *Muhammad Riaz v Federal Government* PLD 1980 FSC 1 at 24, para 65.

which may be summarised as under:[103]

(a) If a *wali* of the deceased pardons the accused, the court may in a fit case accept the compromise and impose *diyat*, quantum of which shall be indicated in the schedule to be attached with the PPC.

(b) If *diyat* is not paid, the sentence of death shall be executed.

(c) If the accused is insane, less than fifteen years old, or is accused of killing his own son he shall not be executed in *qiṣāṣ*.

In his conclusion that accused who fails to pay diyat should be executed, the learned judge did not cite any principle or authority from the Qur'ān or *sunnah*. He even upheld the present scheme of execution of murderer by hanging to death as provided in the Cr.PC. He viewed that by carrying on the execution, the state actually performs this function on behalf of the legal heirs. He referred to the Qur'ān (17:33), which says, "Nor take life—which Allah has made sacred—except for just cause. And if anyone is slain wrongfully, we have given his heir authority (to demand *qiṣāṣ* or to forgive): but let him nor exceed bounds in the matter of taking life; for he is helped (by the law)."[104] He maintained that the above verse gives right to the society or the state to arrange the execution of the murderer. Concurring with the Shariat Bench of Peshawar High Court, he declared that government cannot remit or commute the sentences by invoking sections 401.402-A and 402-B Cr.PC, where it is imposed as vindication of right of victim or his legal heir. However, where punishment is one of the *ta'zīr*, which as per his opinion is right of the imam, the state will have such right to remit, commute or suspend the sentence.[105] However, the existing law[106] has taken away this right of remission from the state even in cases of homicide and hurt punished as *ta'zīr*.[107]

Referring to the Qur'ān (2:178), the same learned judge observed that "there is no contest that in case of culpable homicide amounting to murder (qatl-i-amd) the normal sentence prescribed by Holy Qur'an is death."[108] However, this observation did not point out that under Islamic law death as *qiṣāṣ* was not in the discretion of the court as was the case in colonial law of murder. Therefore, phrase "normal sentence" referred in this judgment even if

[103] Ibid., at 38, para 137–138.
[104] The translation is of 'Alī, *Meaning of the Holy Qur'ān*, 683.
[105] *Muhammad Riaz v Federal Government* PLD 1980 FSC 1, at 32.
[106] Proviso to Sections 54, 55 and 55-A PPC.
[107] Chapter XVI of PPC.
[108] *Muhammad Riaz v Federal Government* PLD 1980 FSC 1.

countenanced, its meaning are different from the death penalty rule analysed above.

In Islamic law, the sentence of death as *qiṣāṣ* is a fixed sentence, which can only be bargained with legal heirs whereas the death penalty rule, coined on the basis of colonial codified law of murder, is an apparatus of structuring sentencing discretion in the matter of choosing between the two sentencing options i.e., death or transportation (imprisonment) for life.

Quoting from Ibn Taymiyyah's *al-Siyāsah al-Shar'iyyah*, Justice Aftab Hussain specifically mentioned that a person repeating the offence punishable with death could be awarded death as *ta'zīr*.[109] This opinion reflects that some sort of aggravation is required to impose sentence of death as *ta'zīr* in cases of murder. The Honourable Judge while referring to sentencing option of imprisonment for life and fine under section 302 PPC (old) pointed out that where proof as required by the *sharī'ah* was not available, accused still could be convicted and sentenced under this option.[110] He specifically mentions that section 302 PPC (old) provided two alternative sentencing options leaving it upon the court to opt any one depending upon the circumstances of the case.[111] Thus it can be inferred from this judgment that where proof for murder as required by the *sharī'ah* is not provided, then in absence of aggravating circumstances, tilt should be towards a lesser penalty. In the whole judgment, section 367(5) Cr.PC was not discussed despite the fact that in the majority opinion different sections of Code of Criminal Procedure were excised rejecting the objection of ouster of jurisdiction regarding provisions of court procedure.

Both the above analysed judgments were assailed before the Shariat Appellate Bench of the Supreme Court of Pakistan. The Shariat Appellate Bench endorsed the views of Shariat Bench of the Peshawar High Court and Federal Shariat Court regarding repugnancy of different provisions of PPC and Cr.PC. The Shariat Appellate Bench instead of keeping the original text intact favoured the view of redrafting these provisions in a way giving priority to penal clauses of *qiṣāṣ* and *diyat*. Honourable Justices Pir Karam Ali Shah and Muhammad Taqi Usmani in their opinions held that under the *sharī'ah* there was no fixed maximum punishment under *ta'zīr*.[112] The main judgment of Pir Karam Ali Shah quoted Mālik b. Anas that in appropriate cases *ta'zīr* might be even more than *ḥadd*, if it was not based on personal whims of the

[109] Ibid., at 28.
[110] Ibid., at 29.
[111] Ibid.
[112] *Federation of Pakistan v Gul Hassan* PLD 1989 SC 633, at 659–62, 71.

qāḍī.[113] In this judgment, different provisions of Cr.PC were also declared repugnant to the *sharī'ah*, thus constitutional bar of jurisdiction regarding provisions dealing with procedure of courts was not strictly interpreted. Despite this approach, section 367(5) Cr.PC never came under discussion even in this judgment.

In these three judgments discussed above, the courts analysed all the main penal provisions on homicide and hurt whether contained in PPC or Cr.PC but section 367(5) Cr.PC remained a notable miss. Thus its impact as qualifier of section 302 PPC (old) was ignored. However, in Islamic scrutiny of law of homicide and hurt none of the courts specifically endorsed the death penalty rule, where sentence is being imposed as *ta'zīr*. Judicial scrutiny of existing penal laws took almost a decade. Meanwhile some efforts of Islamisation of penal laws on homicide and hurt were also made by Council of Islamic Ideology and several drafts of *qiṣāṣ* and *diyat* laws were chalked out and discussed.

(ii) Legislative Developments

The first draft of the Qisas and Diyat Ordinance was chalked out by Mr. Justice Afzal Cheema, as Chairman of Council of Islamic Ideology in 1980.[114] In section 5(ii) of the draft Ordinance wherein sentence of *ta'zīr* for *qatl-i 'amd* was provided, the capital sentence was also provided as a sentencing option. However, this draft by itself did not mention death as the preferred penalty for *qatl-i 'amd* where sentence is one of *ta'zīr*. This draft was materially revised in 1981 in view of comments received from different quarters.[115] The amended draft also provided the death penalty for murder as *ta'zīr*, where circumstances so permit.[116] Yet another effort of revising the draft of the Qisas and Diyat Law was made in 1988, by a committee headed by Dr. Abdul Wahid Halepota, Chairman of Council of Islamic Ideology. In this draft Ordinance, section 5 dealt with the punishment of *qatl-i 'amd*. Regarding the punishment of *ta'zīr* in *qatl-i 'amd*, it provided:

> Punished as *ta'zīr* with imprisonment for life or having regard to the facts and circumstance of the case, with death if, conviction is not based on the form of proof specified under in section 9. . . .[117]

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[113] Ibid., at 660.

[114] Draft Ordinance, Offences against Human Body (Enforcement of Qisas and Diyat Ordinance, 1980).

[115] Wasti, *Application of Islamic Criminal Law in Pakistan,* 130, 299.

[116] Ibid., 133.

[117] The Offence against Human Body (Enforcement of Qisas and Diyat) Ordinance 1988

The above-quoted provision reflects that in cases of *qatl-i ʿamd* punished as *taʿzīr*, no preference has been shown for capital punishment. Rather the phrase "having regard to the facts and circumstances of the case" is prefixed with option of capital sentence in *qatl-i ʿamd* as *taʿzīr*. It points out that such circumstances have to be mentioned, which require imposition of extreme penalty of death as *taʿzīr*. Thus all these draft ordinances incorporating Islamic law of *qiṣāṣ* and *diyat* on homicide and hurt did not adopt the death penalty rule in cases where punishment is one of *taʿzīr*. Further debate on various drafts continued[118] until the promulgation of Ordinance No. VII of 1990.

Ordinance No. VII of 1990 which brought Qisas and Diyat Law in force provided punishment of *qatl-i ʿamd* liable to *taʿzīr* in section 302(ii) in the following words:

> Punished with death or imprisonment for life as *taʿzīr* having regard to facts and circumstance of the case, if proof in either forms specified in section 304 is not available.

Almost the same is the wording of section 302(b) PPC brought through Criminal Law (Amendment) Act 1997. Language of draft Ordinance of 1988, Ordinance No. VII of 1990 and present provision of *qatl-i ʿamd* liable to *taʿzīr* under section 302(b) PPC, are similar except the placement of phrase, "having regard to facts and circumstance of the case." The draft Ordinance of 1988 is more vocal to solicit explanation of the circumstance requiring death penalty in murder as *taʿzīr*, as it prefixes this requirement with the option of capital punishment specifically. Thus, this Ordinance required reason to impose death sentence as *taʿzīr* for murder (*qatl-i ʿamd*), while quite opposite to it, statutory colonial law on murder insisted on providing reasons for not imposing the death penalty.

However, the present law requires only regard to circumstances while choosing any of sentencing option under section 302(b) PPC. Though the placement of the phrase requiring regard to facts and circumstances while choosing sentencing options under section 302(b) is a bit different from the draft ordinance of 1988, but this provision by no means gives status of preferred or normal penalty to capital punishment as a *taʿzīr*. Ordinance No. VII of 1990 and Criminal Law (Amendment) Act, 1997 have not specifically adopted section 367(5) Cr.PC to give preferential treatment to capital punishment in *qatl-i ʿamd* punishable as *taʿzīr*.

All this survey of debate on Islamic law of homicide and hurt reflects that while discussing or providing for punishment of murder as *taʿzīr*, the death

(proposed draft).

[118] Wasti, *Application of Islamic Criminal Law in Pakistan*, 157.

penalty was not mentioned as ordinary or normal penalty. Reason for this consistent approach is obvious. As Islamic law provides death under *qiṣāṣ* as a fixed punishment for *qatl-i 'amd*, there remains no ground to again propose death as the normal sentence where for any reason *qiṣāṣ* is not imposed. However, there is no limit on the extent of *ta'zīr* punishment. Therefore, in appropriate cases where circumstances so require, death, as *ta'zīr* in *qatl-i 'amd*, may be imposed. Thus death as *ta'zīr* in *qatl-i 'amd* will not be a normal penalty, rather specific aggravating circumstances are required to attract the same. A clear intention to kill may be one of such circumstance.[119]

The present law[120] on homicide and hurt specifically requires that interpretation of these penal provisions is to be made in line with the injunctions of Islam as laid down in the Qur'ān and *sunnah*. The Egyptian jurist 'Abd al-Qādir 'Awdah (d. 1954) explaining the injunctions of Islam regarding *ta'zīr* punishment states that *ta'zīr* starts from reprimand and include whipping and in serious cases may extend to death penalty.[121] Anwarullah also points out that punishment of *ta'zīr* is variable depending upon the time and circumstances of the case.[122] In this scenario, after implementation of the Islamic law of homicide and hurt, the principle of death as the normal penalty for murder (*qatl-i 'amd*) liable to *ta'zīr* under section 302(b) should have been revisited.

(c) Jurisprudence after Promulgation of Qisas and Diyat Law

Despite the shift in jurisprudence from English to Islamic, the death penalty rule continued unabated by finding refuge under section 302 (b) PPC which provided punishment of *qatl-i 'amd* as *ta'zīr*. Under section 302 (a) PPC, which provided punishment of *qatl-i 'amd* as *qiṣāṣ*, imposition of death sentence remained a rare phenomenon,[123] which fraught the application of Islamic law of murder in its true spirit. The main hurdle in invoking section 302 (a) PPC remained the compliance with different tests[124] of *tazkiyat al-shuhūd* (screening of the witnesses).[125] Instead of addressing the issue of *tazkiyat al-shuhūd* to

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[119] *Mool Chand v The State* AIR 1953 All 220.
[120] Section 338-F PPC.
[121] 'Abd al-Qādir 'Awdah, *Islām kā Faujdārī Qānūn*, trans. Sājid al-Raḥmān Kandhlavī (Lahore: Islamic Publications Limited, 1979), 1:166.
[122] Anwarullah, *The Criminal Law of Islam* (Islamabad: Shari'ah Academy, 2005), 243.
[123] Wasti, *Application of Islamic Criminal Law in Pakistan*, 154, 192.
[124] *Secretary to Govt. of N.W.F.P. v Muhammad Ayaz Kan Additional District and Sessions Judge Swabi* PLD 1996 Pesh 76 and *Mumtaz Ahmad v The State* PLD 1990 FSC 38.
[125] The mode of inquiry adopted by a court to satisfy itself as to the credibility of a witness. *Ghulam Ali v The State* PLD 1986 SC 741. *Tazkiyah* is a technical term of Islamic judicial system of evidence, which requires clearing a witness from accusation or suspicion cast upon him by

ensure punishment of *qatl-i ʿamd* as *qiṣāṣ*, the death penalty rule was judicially resurrected (for analysis of such cases see Part I, (c) (i) and (ii) of this article) under section 302 (b) PPC, leaving section 302 (a) PPC only ceremonial. From this judicial approach two inferences can be drawn. First, courts which historically developed under English law and which are manned by persons trained in the same law are at ease to attach redundancy to Islamic provisions. Second, to address any jurisprudential issue recourse is often made to English jurisprudence instead of the *sharīʿah*.

The first inference is self-evident and is also supported by discussion under Part I (c) of this article. Additionally, to become a judge of District Courts, holding of an LL.B degree is mandatory in most of the areas of Pakistan.[126] The curricula of LL.B programmes, in most universities[127] and syllabi of judicial examinations[128] reflect that emphasis is more on English law than on Islamic law. Even the syllabus for examination to register as an advocate does not reflect emphasis on Islamic law.[129] Thus, judges and advocates mainly trained in English law have reduced section 302 (a) PPC, providing Islamic punishment of *qiṣāṣ*, to a mere redundancy. On the other hand, death penalty rule was injected in section 302(b) PPC, providing Islamic punishment of *taʿzīr* for *qatl-i ʿamd*, without considering the underlying jurisprudential difference.

The second inference is also supported by a prima facie conflict between a judgment of the Honourable Supreme Court of Pakistan in *Ali Muhammad v Ali Muhammad* case[130] and the Shariat Appellate Bench decision in *Federation*

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the opposite party, by holding an enquiry by a *qāḍī*, openly or secretly, himself or through an official purgator. Under Islamic law, like other legal systems, the opposite party has every right to test, weaken, or destroy the credit of a witness by cross-examination. Purgation does not bar that right of the opposite party but at the same time, it should not be used to the disadvantage of the party producing the witness. We may mention that while cross-examination is the right of defence, *tazkiyat al-shuhūd* (screening of the witnesses) "is a duty of the Court to ascertain the veracity of witnesses in cases of Hudood, that each one of them is just and righteous, worthy of credence, reliable, truthful and not a previous convict of perjury or other major offence." *Shahid Orakzai v Pakistan* PLD 2017 FSC 63.

[126] Notable exception is appointment of *qāḍī*s in Kalat under Dastoor-ul-Amal Diwani State Kalat, whereby *qāḍī* may be appointed if he hold LL.B degree or has passed *dars-i niẓāmī* course. Also see qualification prescribed in advertisement of Honourable High Court to induct Additional District and Sessions Judges, https://lhc.gov.pk/system/files /Advertisement_ASJ _October_20161.pdf accessed April 6, 2018.

[127] University of the Punjab Syllabus for LL.B, http://pu.edu.pk/images/file/Syllabus_LLB.pdf, accessed on April 6, 2018.

[128] Qualifications prescribed in advertisement of Honourable Lahore High Court to induct Additional District and Sessions Judges.

[129] Section 108 C (5) The Pakistan Legal Practitioners and Bars Councils Rules 1976.

[130] *Ali Muhammad v Ali Muhammad* PLD 1996 SC 274.

of Pakistan v Gul Hassan.[131] The Shariat Appellate Bench of Supreme Court[132] desired new structural arrangement of PPC on hurt and homicide on Islamic lines. It desisted to indorse the opinion of Justice Aftab Hussain[133] to maintain the existing structure of PPC. However, subsequently the Honourable Supreme Court of Pakistan in the Ali Muhammad case[134] again linked the existing *qiṣāṣ* and *diyat* provisions to statutory English law of homicide and hurt. The Honourable Supreme Court held that cases covered by the exceptions to Section 300, PPC (old) are to be dealt with under 302 (c) PPC promulgated through Qisas and Diyat Ordinances and later on through Qisas and Diyat Act, 1997.[135] A five-member bench of the August Supreme Court of Pakistan showed reservation to thoroughly indorse the view in the Ali Muhammad case[136] and put off the detailed discussion for an appropriate case.[137] Thus romance with English law is not over in Pakistan despite the promulgation of Islamic law. The argument here is not to abhor the English law but to interpret and apply the Islamic law in line with its original sources.

In line with approach of interpreting Islamic law through lens of English law, the rule of death being the normal penalty for murder coined under English law, has been resuscitated under section 302 (b) PPC and is being persistently followed in Pakistan. The judgments of the higher courts analysed below further fortify this point.

(i) Views of the Honourable High Courts

The Lahore High Court emphasised this rule in the Inayatullah case and while upholding the conviction under section 302(b) as *ta'zīr* held that as "murder was committed in heartless manner therefore, normal penalty of death under section 302(b) was rightly awarded."[138] Following the same rule in Haji Ali Shan case,[139] the Lahore High Court enhanced the sentence of two accused to death as *ta'zīr*. In the Sher Khan case,[140] it was held that the normal penalty for *qatl-i 'amd* punishable under section 302(b) PPC is death. The same principle is being persistently referred in different cases[141] by the Lahore High Court.

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[131] *Federation of Pakistan v Gul Hassan* PLD 1989 SC 633.
[132] Ibid.
[133] *Muhammad Riaz v Federal Government* PLD 1980 FSC 1.
[134] *Ali Muhammad v Ali Muhammad* PLD 1996 SC 274.
[135] Ibid.
[136] Ibid.
[137] *Zahid Rehman v The State* PLD 2015 SC 77.
[138] *Inayatullah Khan v The State* 1998 PCr.LJ 981.
[139] *Haji Ali Shan v Muhammad Bahadur* etc. 2001 PCr.LJ 1320.
[140] *Sher Khan v The State* 2002 PCr.LJ 222.
[141] (1) *Shukat Ali v The State* 2006 YLR 3270; (2) *Shabbir Hussain v The State* 2006 YLR;

The Peshawar High Court, in the Muhammad Israr case,[142] disapproved the view of the trial court for awarding lesser penalty on the ground that accused had no personal motive to commit the murder and he only did the act as a hired assassin. It held that the normal penalty for murder under section 302(b) PPC is death. As there were no mitigating circumstances, hence sentence was enhanced to death from life imprisonment. The Peshawar High Court also approvingly referred to this rule in some recent cases[143] and specifically stated that death is the normal penalty for murder as *ta'zīr* under section 302(b) PPC.[144]

The High Court of Sindh referred to this principle and held that undoubtedly normal sentence for the offence of murder is death but in appropriate cases the court while keeping in view the extenuating circumstances may resort to less severe option in the matter of sentence.[145] In the Imam Ali case[146] the same court observed that where offence under section 302 PPC was proved, normal penalty of death should be imposed unless strong extenuating circumstances could be gathered from the evidence available on record. In the Mst. Naseeban case,[147] quarrel started from a petty matter, therefore, trial court treating this fact as a mitigating factor awarded life imprisonment to the accused. However, the High Court held that the normal penalty for murder was death and held that taking a life on a petty matter could not be considered an extenuating circumstance; rather, it served as a ground to award the normal penalty of death to such accused. Thus the sentence of the accused Nawaz Khan was enhanced to capital punishment. The same view has been referred to in some other cases.[148]

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(3) *Manzoor Ahmad v The State* 2006 YLR 1756; (4) *Ali Sher v The State* 2011 PCr.LJ 1261; (5) *Gulzar Ahmad v The State* 2016; YLR 1955; (6) *The State v Muhammad Boota* 2016 LHC 2419.

[142] *Muhammad Israr v The State* PLD 1998 Pesh. 73.

[143] (1) *Raza Khan v The State* 1998 PCr.LJ 530 (pesh); (2) *Gul Nawaz v The State* 1998 PCr.LJ 1730; (3) *Ghaffar v The State* 2002 PCr.LJ 1091; (4) *Noor Zaman alias Maney v The State* 2008 YLR 2352(Pesh); (5) *Matiullah v The State* 2010 PCrLJ 676; (6) *Shahzad alias Khanay v The State* 2011 PCrLJ 526(Pesh); (7) *MukhtarAlam v Fazal Nawab* 2012 YLR 764(Pesh); (8) *Khaista Bacha alias Bacha v Habib Khan* 2013 PCr.LJ 492; (9) *Zahidullah v The State* 2014 PCrLJ 545(Pesh); (10) *Imran v The state* 2016 PCrLJN 12 (Pesh); (11) *Muhammad Ameer alias Mery v QadeemGul* 2016 YLR 735(Pesh); (12) *Rehmat alias Kaku v The State* 2017 YLRN 221 (Pesh).

[144] *Sher Hakim v The State* 2012 PCrLJ 959 (Pesh).

[145] *Allah Dino v The State* 2007 PCRLJ 1125 Kar.

[146] *Imam Ali v The State* 2011 PCrLJ 1398 Kar.

[147] *Mst. Naseeban v The State* 2014 YLR 899 Kar.

[148] (1) *Ghulam Haider v The State* 2015 PCrLJ 1227 Kar; (2) *Muhammad Iqbal Makrani v The State* 2015 PCrLJ 1251 Kar; (3) *Mureed v The State* 2015 YLR 1366 Kar; (4) *Izzat Khan v The state* 2016 YLRN 121 Kar; (5) *Javed Ahmad Siddiqui v The State* 2016 YLR 577 Kar; (6) *Nadeem Akhter v The State* 2017 PCrLJN 22 Kar; (7) *Ali Bux v The State* 2017 PCrLJN 222 Kar; (8) *Zahid alias Liaqat v The State* 2017 YLRN 347 Kar; (9) *Sona Khan alias Sonhra* 2017 MLD 388 Kar;

The High Court of Balochistan while dealing with the sentence of murder as *ta'zīr* under section 302(b) PPC has followed the same line and held that old age alone is not a sufficient mitigating circumstance to avoid the normal penalty of death in murder cases.[149] In the Hasil Khan case,[150] the court deprecated the trend of avoiding the normal penalty of death in murder cases on flimsy grounds. The court specifically mentioned section 302(b) PPC and held that under this section the normal penalty of murder was death as *ta'zīr*. In the Bhaktiar Ali case,[151] the same High Court discussed the history of promulgation of the Qisas and Diyat Law. It specifically referred to section 367(5) Cr.PC and held that under section 302(b) PPC out of two alternative punishments death was the normal sentence as *ta'zīr*. If a lesser sentence is to be awarded court must record reasons as required by section 367(5) Cr.PC. In the Khario case,[152] The High Court of Balochistan went on to say that death was the normal penalty of murder as *ta'zīr* and the trial court was not bound even to record reasons, if the same was imposed. Astonishingly, in this judgment the High Court waived the basic principle of judicial propriety to provide reason for every judicial decision. The High Court of Balochistan followed the death penalty rule in other cases.[153] The Federal Shariat Court, in different cases also endorsed this rule and held that death was the normal penalty for murder as *ta'zīr* under section 302(b) PPC.[154]

(ii) Views of the Honourable Supreme Court of Pakistan

Despite the change in law on murder from English to Islamic, the Supreme Court of Pakistan also stuck to its previous view that normal penalty for murder was death. In view of the change in law, the court adjusted this principle under umbrella of section 302(b) PPC, which provided the punishment of *qatl-i 'amd* as *ta'zīr*. The judgments discussed below reflect the

(10) *Namoos Khan v The State* 2017 PCrLJ 34 Kar; (11) *Muhammad Qasim alias Umir v The State* 2017 YLR 185 Kar; (12) *Chetan v The State* 2018 PCrLJN 46 Kar; (13) *Mehboob v The State* 2018 MLD 345 Kar; (14) *Qadir Bux Hajano v The State* 2018 PCrLJ 991 Kar; (15) *SadamHussain v The State* 2018 YLR 86 Kar.

[149] *Ali Khan v The State* 2010 PCrLJ 11 Quetta.

[150] *Hasil Khan v The State* 2010 YLR 1006 Quetta.

[151] *Bhakhtiar Ali v The State* 2016 YLR 2536 Quetta.

[152] *Khair Muhammad alias Khario v The State* 2018 PCrLJ 617 Quetta.

[153] (1) *Muhammad Ali v The State* 2011 MLD 1686 Quetta; (2) *Gul v The State* 2012 PCrLJ 559 Quetta; (3) *Nasrullah alias Nasro v The State* 2012 YLR 832 Quetta; (4) *Rehmatullah v The State* 2015 PCrLJ 1163 Quetta; (5) *Eid Muhammad v The State* 2017 MLD 992 Quetta; (6) *Ghulam Murtaza v The State* 2017 MLD 1235 Quetta; (7) *Noor Zaman v The State* 2018 YLR 1702 Quetta; (8) *Abdul Rehman v The State* 2019 PCrLJ 161 Quetta.

[154] *Asif Ali v The State* 1998 PCRLJ 1708 FSC, *Sher Dil v The State* 2003 YLR 110 FSC, *Sajjad Ali v The State* 2006 PCRLJ 349 FSC, *Shameem Khan v The State* 2017 PCrLJN 109.

position of the Supreme Court of Pakistan on the death penalty rule, in *qatl-i ʻamd* punished as *taʻzīr*, under section 302(b) PPC.

In the Mursalin case,[155] decided under the present law there is no mention of specific subsection of 302 PPC under which sentence was awarded. However, as the occurrence took place on 18-11-1990, after the promulgation of the Qisas and Diyat Ordinace, this case was tried under present statutory Islamic law. In this case there was no confession of the accused nor was there any reference to *tazkiyat al-shuhūd*, which manifestly reflects that the sentence of death was passed as *taʻzīr*. The Supreme Court declined to interfere in the capital sentence and held that this was a fit case for award of the death sentence, which was the normal sentence for murder.

In the Kamal Khan[156] case, the same logic was followed and the apex court declined to interfere in the death sentence awarded by the Baluchistan High Court under section 302(b) PPC by holding that normal sentence had been imposed. In another case,[157] leave to appeal was refused by holding that no mitigating circumstances were pointed out therefore, there was no scope of interference in the normal penalty of death as *taʻzīr*. It was held that if normal sentence of death was not to be awarded then court would have to record reasons. In the Nazir Ahmad case,[158] the apex court upheld the death sentence and held that failure of prosecution to prove motive did not affect the imposition of normal penalty of death under section 302(b) PPC. The same view was taken in the Asim,[159] Asad,[160] Pappu,[161] and Mumraiz[162] cases. In the Dadullah case,[163] the apex court, referring to previous cases, pointed out the hesitancy of courts to impose the normal sentence of death in murder as *taʻzīr* under section 302(b) PPC. The court highlighted the deterrence, retribution, and reformative aspect of sentencing and held that "courts should not sacrifice the deterrence and retribution in the name of mercy and expediency." This line of precedents reflects quite visibly that the death penalty rule developed under the old law is being read into *qatl-i ʻamd* as *taʻzīr* under section 302(b) PPC. However, there are some dissenting voices from this rule, which need to be analysed.

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[155] *Mursalin v The State* 1999 SCMR 2683.
[156] *Kamal Khan v The State* 1993 SCMR 1819.
[157] *Muhammad Akhter Ali v The State* 2000 SCMR 727.
[158] *Nazir Ahmad v The State* 2009 SCMR 523.
[159] *Asim v The State* 2005 SCMR 417.
[160] *Asad Mahmood v Akhalq Ahmad* 2010 SCMR 868.
[161] *Muhammad Imran alias Pappu v The State* 2010 SCMR 1047.
[162] *Mumraiz v The State* 2011 SCMR 1153.
[163] *Dadullah v The State* 2015 SCMR 856.

(d) Deviations from the Death Penalty Rule

The death penalty rule has been followed in number of cases discussed above. However, there are some notable dissents from this rule. The Federal Shariat Court, while analysing the scope of imposition of death penalty for murder under section 302(b) PPC held that death penalty as *ta'zīr* could be imposed where it was necessary to eliminate the criminal to wipe out *fitnah* and mischief from the society.[164] The court also held that *ta'zīr* is discretionary punishment, which was designed to reform offenders. Thus, while imposing punishment of *ta'zīr* the court must consider magnitude and heinousness of the offence. The Federal Shariat Court referred to the position prevailing prior to the promulgation of the Qisas and Diyat Law and explained the present scenario as under:

> Now the position will be little different as a Judge while awarding either of the two sentences will have to give reasons as to why he is exacting extreme penalty of death and does not consider the case fit for awarding lesser punishment of imprisonment for life...[165]

In the Faqir Ullah case,[166] Supreme Court held that death as *ta'zīr* could be imposed in murder cases where *qiṣāṣ* was not available. However, court held that such punishment could be resorted to in special circumstances. In the Hassan case,[167] the apex court held that there was nothing in section 302(b) PPC hinting to treat death as normal penalty for murder. The court held that both sentences provided under section 302(b) were alternative and none of them could be termed as normal sentence. In this case, the august court referred to section 367(5) Cr.PC and held that it is only applicable to trial courts and cannot be invoked before appellate or revisional courts. Thus, the august court observed that question of death being normal sentence is hardly relevant before appellate and revisional courts. However, the jurisprudence developed under this provision was not analysed thoroughly in this case.

In the Ghulam Mohy-ud-Din case,[168] the apex court without referring to section 367(5) Cr.PC held that though a line of precedents declared that death was the normal penalty for murder but the language of section 302(b) PPC did not take away discretion from the court to choose any one of the options. Thus the court held that "it would be difficult to hold that in all the cases of murder, the death penalty is a normal one and shall ordinarily be awarded."

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[164] *Abdul Malik v The State* PLD 1996 FSC 1.
[165] Ibid.
[166] *Faqir Ullah v Khalil-ul-Zaman*1999 SCMR 2203.
[167] *Hasan v the State* PLD 2013 SC 793.
[168] *Ghulam Mohy-ud-din alias Haji Babu v The State* 2014 SCMR 1034.

However, even in this case previous jurisprudence treating death as a normal penalty for murder was not distinguished.

In the Zahid Rehman case,[169] the honourable Mr. Justice Dost Muhammad Khan, in his dissenting note recommended the amendment of section 302 (b) PPC to remove death sentence from this clause. He maintained that if proof required under section 304 PPC is not available then infliction of death as *ta'zīr* is not desirable. In the same case, the honourable Mr. Justice Ejaz Afzal Khan in his dissenting note observed that "there are no two opinions on the point that punishment of *ta'zīr* cannot be as stern and stringent as that of qisas."

Relying upon the Ghulam Mohy-ud-Din case,[170] the Lahore High Court has deviated from the rule with some detailed reasons.[171] The court referred to section 367(5) Cr.PC and also discussed the change in law brought about by promulgation of the Qisas and Diyat Law. It held that section 302(b) PPC while providing punishment of death or life imprisonment had not provided any guidance as to when the death sentence was to be awarded. Infliction of either of the two sentences is on the option of the court, depending upon the circumstances of the case. The court then concluded that "it would be a misconception to say that death is the normal penalty for murder." However, in this case too there is no explanation that how the High Court discarded the rule laid down in the chain of binding cases discussed above. This view was reiterated by the same honourable judge in the Boota case.[172]

(e) The Death Penalty Rule: A Jurisprudential Paradox

It is evident from the discussion under Part II (a) of this article that death penalty being the normal penalty for murder rule has emanated from section 367(5) Cr.PC. It is also clear from the discussion under Part III (b) (i) that section 367(5) was not scrutinised in the light of the injunctions of Islam in three primary judgments,[173] which paved that way for the promulgation of existing statutory law of *qiṣāṣ* and *diyat*. Despite the currency of death penalty rule for almost a century, no effort was made to incorporate it in any of the provisions of Qisas and Diyat Law relating to *ta'zīr*.

Furthermore from the opinions of different authors on Islamic law as quoted in Part III (b) (ii), it is clear that death cannot be treated as the normal

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[169] *Zahid Rehman v The State* PLD 2015 SC 77.
[170] *Ghulam Mohy-ud-din alias Haji Babu v The State* 2014 SCMR 1034.
[171] *Shukat Ali v The State* 2017 PCr. LJ 1221 Lah.
[172] *Muhammad Boota v The State* 2018 PCr. LJ 372 Lah.
[173] *Gul Hussan v Fedration of Pakistan* PLD 1980 Pesh 1; *Muhammad Riaz v Federal Government* PLD 1980 FSC 1; *Federation of Pakistan v Gul Hassan* PLD 1989 SC 633.

penalty for murder under Islamic law where punishment is imposed as *ta'zīr*. This fact is also endorsed by some of the judgments of superior courts referred to in Part III (d). However, in majority of the cases death as the normal penalty for murder rule is being followed, as it has been discussed under Part III (c).

A bare perusal of the existing law of homicide and hurt (Qisas and Diyat Law) reveals that the legislative scheme has changed significantly. It provides death as *qiṣāṣ* being a fixed penalty for murder without any discretion of court in the matter of sentence. It also provides that where standard of proof for imposition of death as *qiṣāṣ* is not met court may impose death or imprisonment for life as *ta'zīr*, depending upon circumstances of the case. Ignoring the fact that death as a fixed penalty is provided under section 302(a) PPC, subsequent jurisprudence also adopted the rule of death as the normal penalty for murder under section 302(b) PPC. Embracing of this rule under new section 302 PPC has led to a jurisprudential paradox.

It says to the accused that you will be put to death if prosecution provided proof of commission of murder as per Islamic standard. It further says to the accused; hold on, if prosecution remained unable to provide proof of murder as per Islamic standard you will even then be put to death as it is normal penalty for murder statutorily since 1898. This approach has materially neglected the shift of jurisprudence from English to Islamic.

Conclusion

From the discussion above, it can be inferred that historically the death penalty was the only penalty for murder under English law. This regime of capital punishment under English law softened with the passage of time. The IPC also provided death and transportation for life as alternative punishments of murder without attaching any preference to any one of the penalties. However, under the influence of English law judges in colonial India always treated death as the preferred penalty for murder and sought some sort of mitigation to impose alternate punishment of transportation for life.

To control the discretion of trial courts, the legislature while providing the new Code of Criminal Procedure in 1898 enacted section 367(5), which required trial courts to give reason if they opted for sentence other than death penalty, in capital offences. This provision was interpreted as the following rule: "Death is normal penalty for murder."

Under the statutory Islamic law of homicide and hurt, legislative scheme has materially changed. In the light of the judgment of the Shariat Appellate

Bench of the Supreme Court,[174] the entire law on homicide and hurt was drafted anew. The advice to keep the existing penal clauses intact, with some necessary amendments, for the sake of continuity of jurisprudence was not accepted by the apex court. In such scenario, continuous application of the death penalty rule under umbrella of section 302(b) PPC has led to jurisprudential paradox, which must be addressed.

Although this rule is being followed in most of the cases, yet some of the precedents have identified this anomaly. They have thus rejected the application of this rule to convictions under section 302(b) PPC. To get rid of such anomalies, courts have to connect themselves with Islamic jurisprudence in the true spirit. They need to stop interpreting the Islamic law in light of principles of English law. Section 367(5) Cr.PC, need to be amended, interpreted or read down in line with Islamic law of *qiṣāṣ*, *diyat* and *ta'zīr*. Death as the normal penalty for murder rule has no application under section 302(b) PPC.

[174] *Gul Hassan v Federation of Pakistan* PLD 1980 Pesh 1; *Muhammad Riaz v Federal Government* PLD 1980 FSC 1; *Federation of Pakistan v Gul Hassan* PLD 1989 SC 633.