PAKISTAN LAW COMMISSION

TENTH REPORT

REPORT OF THE COMMITTEE OF PAKISTAN LAW COMMISSION ON OFFENCES AGAINST HUMAN BODY (ENFORCEMENT OF QISAS AND DIYAT) ORDINANCE,1984

REPORT OF THE COMMITTEE OF PAKISTAN LAW COMMISSION ON OFFENCES AGAINST HUMAN BODY (ENFORCEMENT OF QISAS AND DIYAT) ORDINANCE,1984

Before commenting on the intrinsic merits or demerits of the "Offences Against Human Body (Enforcement of Qisas and Diyat) Ordinance, 1984" two main questions requiring consideration are:-

(i) Whether it was necessary to have an absolutely new Statute for the purposes of enforcement of Injunctions of Islam, as laid down in the Holy Quran and Sunnah,in accordance with the administration of Criminal Justice in the Country or the present Penal Code could, by suitable amendments, be brought in conformity with the injunctions of Islam, and

(ii) Whether the draft Ordinance,in its present form,is enforceable,or it suffers from any serious lacunae,contradictions or other defects which make it difficult, if not impossible,to enforce in the Country.

I. 2. As regards the first question, it may be mentioned that the two previous Law Commissions; one of 1958-59 and the other of 1967-70 headed by late S.A.Rahman and late Hamoodur Rahman,Chief Justices,respectively, did not advocate the substitution of existing penal laws by new Statutes.The latter Commission was particularly of the view that the laws in

force in the Country were not,by and large,against the tenets of Islam and that these laws could be modified and brought in consonance with the injunctions of Quran and Sunnah by means of carefully drafted amendments. The Federal Shariat Court also, in its judgment dated the 23rd December 1980, delivered in nine connected shariat petitions (Gul Hassan etc vs. The State) expressed the view that the provisions of the Pakistan Penal Code relating to harm to human body could be brought in line with the injunctions of Quran and Sunnah with suitable amendments. The same Court in another case Muhammad Riaz etc Vs Federal Government etc (PLD 1980 FSC 1) concurred with the view of the former Shariat Bench of the Peshawar High Court dated 1st October 1979, in Gul Hassan Khan vs The Government of Pakistan (PLD 1980 Pesh 1 at p.59) declaring that Sections 54, 55 and 302 of the Pakistan Penal Code and Sections 345(7), 401,402 and 402-B of the Code of Criminal Procedure with the relevant parts of the Schedule were repugnant to the injunctions of Islam to the extent of cases involving predominance of Haqooqul Ibad.

3. The Federal Shariat Court also held,by majority, that Section 302 of the PPC was repugnant to injunctions of Islam on the additional ground that no exemption from death sentence had been provided for an offender, who was insane at the time of commission and a parent killing his or her son. Sections 304 and 304-A were also considered repugnant because they did not provide for composition and payment of Diyat. Similarly Sections 324, 325, 326, 329, 331 and 333 of the PPC were also declared to be repugnant to Islam as they had no provision for Qisas or composition. Section 335 and 338 did not provide for payment of Diyat. The other provisions relating to hurt were repugnant to Islam for not providing for absolute compoundability.

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

5. It is, therefore,clear that the directions contained in any judgment of the Federal Shariat Court regarding repugnancy of any law are binding upon the Federal and the Provincial Governments. Since most of the principles involved in the proposed draft Ordinance are already included in the appeals pending before the Appellate Shariat Bench of the Supreme Court, the draft Ordinance which has been recommended by the Majlis-e-Shoora should not be given effect to.

6. The object of Islamisation of laws could have conveniently been achieved by making suitable amendments in the above mentioned sections of the Pakistan Penal Code and the Code of Criminal Procedure instead of repealing certain sections of the two Codes and drafting an altogether new Statute consisting of 130 Clauses.

7. The present structure of Penal Laws in the Country consists of a homogeneous and closely inter-related combination of three Statutes viz, the Pakistan Penal Code, the Code of Criminal Procedure and the Evidence Act, which have been in force for almost a century. It appears prima facie that in order to preserve the present well knit system of Criminal Justice in the Country it might perhaps be desirable to examine the existing Penal Laws thoroughly and

amend them suitably by eliminating any provisions that may be contrary to the tenets of Islam and replacing them by those strictly in accordance with the injunctions of Quran and Sunnah, rather than to replace them by a few hastily drafted Statutes, out of their context, which would become workable by the passage of time only. In a `hurried drafting' there is always a possibility of a number of allied and relevant matters being overlooked, thus causing complications and requiring more and more amendments to cure the defects that may come to light gradually, when the Law Courts administer those laws by means of a`trial and error' method. It would, therefore, be in the fitness of things that the task of overhauling the laws and bringing them into conformity with the tenets of Islam is undertaken carefully and the laws are dealt with, one by one, with detailed reference to their respective contexts, their inter relation with one another and their mutual inter-dependence instead of demolishing the entire edifice all of a sudden without the availability of another equally well knit structure.

8. It is absolutely necessary that the injunctions of Islam, as laid down in the Holy Quran and Sunnah, be enforced in the administration of criminal justice, like other walks of our life. This work should, however, be done by a gradual process and preferably by incorporating the required provisions in the Statutes concerned at their proper and relevant places after eliminating therefrom un-Islamic provisions, if any, in order to make the existing laws self-contained and strictly in accordance with the tenets of Islam,on the one and to cater for our needs for speedy and inexpensive administration of justice, on the other.

II. 9. As regards the second question relating to practicability of the proposed Ordinance and possibility of its enforcement and smooth administration in the Law Courts, it has the following draw backs:-

(a) It has been mentioned in the preamble that the object of the proposed Ordinance is to modify the existing law relating to certain offences affecting the human body so as to bring it in conformity with the injunctions of Islam as set out in the Holy Quran and Sunnah. However, instead of modifying the relevant sections of the Pakistan Penal Code and the other allied Statutes by suitable amendments the proposed Ordinance repeals Sections 299 to 304, 304-A, 313 to 316, 319 to 338 and the Punjab Murderous Outrages Act, 1867, completely, and a new Ordinance containing 130 Clauses has been drafted, making the task of the Trial Courts in connection with the day to day administration of criminal justice extremely difficult.

(b) In the draft Ordinance there is emphasis on Arabic terminology. It would be more desirable if their Urdu and English equivalents are also mentioned so that all concerned may be able to comprehend them more easily.

(c) In the definition clauses there seem to be a number of contradictions. It will suffice to refer to a few of them. For instance, according to Clause 2(f) the term ghair masum means,"a citizen of Pakistan, a Muslim or a non-Muslim citizen of any other State or a mustamin, who has been finally convicted by a Court in Pakistan of an offence punishable by the same kind of hurt which is caused to him by another person". The term mustamin has been defined in Clauses 2(p), as "a non-Muslim citizen of a non-Muslim State who is on a temporary lawful visit to Pakistan". In fact the latter part of the connotation of the term ghair masum i.e. a Muslim or a non-Muslim citizen of any other State also includes a mustamin. Sub-clause 2(p), therefore, appears to be superfluous.If it is said that

the term "mustamin" applies only to those who are on a temporary lawful visit to Pakistan then the question will arise that this term is not wide enough to include those visitors who are Muslim citizens of either a Muslim or a non-Muslim State or non-Muslim citizens of a Muslim State.

(d) The term "imprisonment for life" has been defined in the proposed Ordinance, in Clause 2(k) as rigorous imprisonment till death, whereas in Section 57 of the Pakistan Penal Code, the term imprisonment for life is to be reckoned as equivalent to 25 years' imprisonment. Since Section 57 of the PPC has not been included in the sections of PPC proposed to be repealed in Clause 129 of the Ordinance, these two legal provisions relating to meaning of "imprisonment for life" need reconciliation notwithstanding the direction contained in Clause 3 of the Ordinance that the provisions contained in the Ordinance shall override the provisions of any other law for the time being in force.

(e) In Clauses 4, 21, 23 and 26 of the Ordinance which define various kinds of murder, i.e. qatle-amd, qatle-shibul amd and qatle-khata and qatl-bil-sabab, the definitions of "Culpable Homicide" and "Murder" as mentioned in Sections 299 and 300, respectively, of the Pakistan Penal Code, which are very precise and have been expounded by the Law Courts for a fairly long time, should have been retained, in one form or the other, as they have made the concept in this respect very clear and un-ambiguous.

(f) Similarly the five "Exceptions" mentioned in Section 300 PPC reducing an offence from "Murder" to "Culpable Homicide not amounting to Murder" being

a necessary and integral part of the definitions, should not have been lost sight of, even if it was decided to have a different set of definitions in the proposed Ordinance.

(g) According to Clause 5(b) (ii) of the Ordinance, relating to punishment for qatle amd if the victim of the offence is ghair masum aldam as defined in Clause 2(g) thereof, the offender would not be liable to penalty of death as Qisas, but to imprisonment and whipping as taazir, but he will be liable to Qisas or 25 years imprisonment or even death under taazir if the victim was masum-aldam. This provision discriminates among the victims and determines the quantum of punishment not according to the nature or seriousness of the offence but according to the status of the victim, i.e. either masum or ghair masum, which will be difficult to justify under any principle of equity, justice and good conscience. This provision is against the injunctions of Holy Quran with regard to Qisas.-

178. 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.
(Abdullah Yousaf Ali)

179. In the Law of Equality
There is (saving of) Life
To you, O ye men of
understanding!
That ye may
Restrain yourselves.
(Abdullah Yousaf Ali)

(h) The provisions of Clause 8 of the Ordinance with regard to death caused under ikrah-i-tam or ikrah-i-naqis are extremely confusing and need further clarification. According to Sub-clause (a) thereof, a person committing Qatl under ikrah-i-tam, which has been defined in Clause 2(i) as "putting any person, his spouse, or any other blood relation of prohibited degree of marriage in fear of instant death or instant permanent impairing of any organ of the body", shall be punished with imprisonment for a term which may extend to 10 years or with whipping not exceeding 39 stripes, or with both, and the person causing ikrah-i-tam shall be punished for the kind of Qatl committed as a consequence of his ikrah-i-tam. According to Sub-clause (b) ibid, however, a person causing death by Qatl under ikrah-i-naqis (Cl.2(g) i.e. any form of duress not amounting to ikrah-i-tam, shall be punished for the kind of Qatl committed by him; while the person causing ikrah-i-naqis shall, unlike a person causing ikrah-i--tam, be punished with imprisonment which may extend to ten years or with whipping upto 39 stripes or with both. This definition of ikrah-i-naqis is defective as it is too wide. If a person is put to such a duress that he is compelled to commit Qatl

Amd, which technically speaking does not amount to ikrah-i-tam, the person causing that kind of ikrah-i-naqis should get the same punishment as one causing ikrah-i-tam.

(i) Clause 9 in the original draft of the Islamic Ideology Council providing that whoever aids or conspires in the Commission of Qatl-e-Amd and it is committed in consequence, shall be liable to imprisonment upto 25 years and with whipping not exceeding 39 stripes and even to death in certain circumstances of the case, should not have been deleted in the revised draft.

(j) Clause 10 relating to proof of Qatl-e-Amd liable to Qisas provides that in case an accused person does not confess, at least two Muslim, adult, male witnesses about whom the Court is satisfied, having regard to the requirements of the Tazkia-tul-Shahood, that they are truthful persons, should give evidence as eye witnesses of the offence or give such other evidence which proves guilt of the accused beyond any reasonable doubt. According to this clause the females and non-Muslims, where an accused is a Muslim, and persons who after the process of Tazkia-tul-Shahood are not found to be pious, are excluded from giving evidence in a murder case irrespective of any consideration of its circumstances. No hard and fast rules can, however, be laid down for judging the piety of a particular witness, as different yardsticks are being applied by various schools of thought. According to some of the Ulema even minor faults may render a person impious and such persons being non-adil shall not, according to those Ulema, be competent witnesses in a murder case. It will be recalled that while examining the draft Law of Evidence, this provision was the subject matter of a good deal

of controversy and the Pakistan Law Commission has already made on it detailed observations in its report on the Law of Evidence.

(k) According to Clause 14, a person, who is guilty of Qatle-Amd not liable to Qisas under Clause 12, or under Clause 13(c) on account of an offender himself becoming the Wali of the deceased due to death of the previous Wali, is liable to pay Diyat, which is payable by his Aqila and to imprisonment upto 14 years and with whipping upto 39 stripes. Thus in all cases mentioned in Clauses 12 and 13 the offender who is guilty of Qatle-Amd (intentional murder) will be immune from death penalty. In this connection a reference may be made to the following vers of the Holy Quran, which speaks for itself:

If a man kills a Believer
Intentionally, his recompense
Is Hell, to abide therein
(For ever): and the wrath
And the curse of Allah
Are upon him, and
A dreadful penalty
Is prepared for him.
(Abdullah Yousaf Ali) (4/493)

(l) Clause 15 and 16 relate to waiver and composition of Qatle-Amd. There is a good deal of difference of opinion on the right of heirs to waive or compound

Qatle-Amd. It is not, therefore, an absolute privilege of the heirs, and depends upon facts and circumstances of each case in which this right may either be granted or refused by the State. Quranic injunction (2/178) contains in its first Part, general directions addressed to the Muslims asking them to enforce the Qisas. In the latter part thereof it is said, "but if any remission is made by his brother, (wali or injured) then grant any reasonable demand, and compensate him". It may be pointed out that culpable homicide amounting to murder (Qatl-e-Amd) may be of two kinds, one involving the rights of God i.e., (Haqooq Allah) and the other involving the rights of men (Haqoob-ul-Ibad). Some disputes leading to murder directly affect only the accused and the family of the deceased, e.g., disputes over water or trespass in the fields or tribal or personal vengeance, they involve Haqooq-ul-Ibad and permission to patch up the differences are likely to diminish the sense of vindictiveness and cultivate amicable and harmonious relations between the parties. In such cases Diyat will be an apt alternative to Qisas. If, however, the murder directly involves or affects the Society as a whole, like an unjustified murder by a person who, on account of the depravity or immorality of his character, usually takes the law in his own hands and creates problems for the Society, as in case of highway robbery or dacoity or anti-State activities, in such a case the State can provide a law for sentencing the accused to death notwithstanding any pardon by the heirs of the deceased as it relates to Haqooq-Allah. According to Al-maida (5/33), "The only reward of those who make war upon Allah and His Messenger and strive after corruption in the land will be that they be killed or crucified or have their hands and feet cut off on alternate sides, or be expelled from the land". This is the punishment for a murder which causes corruption in the land (Fasad-fil-Araz).

(m) Clause 16 makes the offence of Qatl-e-Amd compoundable in which case also the murderer will be immune from death penalty. It would not be difficult to imagine, the state of law and order in our Country after the introduction of this provision particularly in the rural society where unscrupulous and influential persons will not find it difficult to coerce Walis of the victims and manoeuvre to compound the offences by threats, ;duress and other foul means. No law should be framed without fully taking into consideration the real state of particular society.

(n) AQILA

Although the draft Ordinance is stated to have been based on the injunctions of Holy Quran and Sunnah of the Holy Prophet (PBUH), but in fact the major part thereof is based on the Fiqah of the earlier centuries. The Fiqhi provisions did, no doubt, suit the earlier Society, but scant attention has been paid to our present day Society with its intricate and complex problems. The entire concept of Aqila, which has been defined in the proposed Ordinance, (Clause 2(b) as "adult, male and sane relations of the offender or convict, through his father, or the person or group of persons from whom he receives or expects to receive financial help or support", is based on Fiqah alone and will create complications. Be that as it may; the present draft Law of Qisas and Diyat rests mainly upon the concept of payment of Diyat by the Aqila. The definition of Aqila has all along been quite controversial. In (page 424) Aqila has been defined as "agnates in collateral line". In certain other works it connotes, "persons or soliders whose names are entered in one register". According to others a

community tribe or family, with common vocation, is deemed to be Aqila. Still some of the jurists maintain that a husband is not the Aqila of his wife and the son is not the Aqila of his mother. Similarly there is a good deal of difference of opinion about the connotation of this term among different jurists. Therefore, the concept of Aqila, if introduced, is likely to create serious complications.

(o) Clause 21 defines Qatl-Shibal-Amd as, "whoever with intent to cause harm to body or mind of any other person causes his death by means of a weapon or an act which, in the ordinary course of nature, is likely to cause death is said to commit Qatle Shibh-al-Amd and Clause 22 ibid, prescribes punishment for this kind of qatl. In the event of victim being masum aldam, the convict is liable to Diyat, payable by his Aqila, and may also be liable to punishment by taazir with imprisonment for a term upto 10 years and in case the person killed is ghair masum aldam, he will be punishable by way of taazir with imprisonment upto seven years and whipping not exceeding 39 stripes. In clauses 5, 22, 24 and 27 prescribing punishment for qatle amd, qatle shibh-al-amd, qatle-khata and qatl-bis-sabab respectively, sentences have been fixed according to the status of the victim, i.e. masum-al-dam or ghair masum aldam, but not according to the nature of offence committed. Again in clause 25 mentioning punishment for qatle-khata, by rash or negligent driving, this distinction between masum aldam and ghair masum aldam has not been maintained in respect of additional punishment, whether victim is masum aldam or not. The provisions relating to Qatl of different categories lack uniformity inter se.

(p) DIYAT

Clause 28 prescribes value of Diyat as 10,000 Dirham Shari, equivalent to 30.63 K.G. of Silver, or its value in money, at the time of decision of the case. Since no amount of Diyat is prescribed in the Holy Quran, the concept that Diyat should be paid according to the customs prevalent in a particular society remained alive in the tribal societies through the ages, each society following a standard of its own e.g. in Egypt, Jordan and Syria, Diyat was taken in all cases except qatle amd. The amount of Diyat also varied from tribe to tribe. It would, therefore, be proper to make allowance for payment of Diyat according to local customs also. Even now in certain cases of homicide and hurt, which are compoundable, the parties settle their claims according to local customs and prevalent circumstances, outside the Court. It would not be out of place to mention here that Diyat was not introduced by Islam for the first time, it was present in the form of a custom in old Roman and German societies and the tribal societies of Arabs. In all these societies the standard amount of Diyat payable for a particular offence varied from tribe to tribe and from time to time.

(q) According to Clause 29, the Diyat of Qatle Amd is payable by the convict himself and the Diyat for other kinds of qatl is payable by his Aqila, but in the case of a confessing accused, in other kinds of qatl too, the Diyat shall be paid by the convict. No cogent reason appears for all these provisions, which are likely to discourage an accused who, being a truthful person, wishes to make a confession in case of a qatl other than qatle amd. Again Clause 34, according to which the Diyat is payable either in lump sum or in installments spread over a period of three years from the date of the final judgment, will create complications and multiply the Court proceedings which may become inevitable

in order to recover Diyat from a defaulting offender. According to the existing procedure the fine is recovered from a convict some times by attaching and selling his property. Diyat can be recovered as arrears of land revenue but after expiry of three years. Clause 107 provides that where an offender committing qatl is not found and no person is liable to Qisas or Diyat, the Government shall pay the amount of Diyat to the heirs of the victim, provided that if at any time the real offender is found the Diyat paid by the Government shall be refunded to it. This clause is so obviously inexpedient that it does not require any detailed comments. If this provision forms part of the proposed law it will play havoc with the exchequer of the Government as the major part of its budget will be required for payment of Diyat in cases of qatl where the culprits are not traceable.

(r) HURT

The definition of hurt as contained in Clause 35 and its division into a number of categories viz, (1) Itlaf-e-udw, (2) Itlaf-e-salahiyat-e-udw, (3) Shajjah, (4) Jurh etc, described in succeeding clauses, are bound to create complications in the practical application of the law, particularly in the field of medical jurisprudence. It is, therefore, suggested that the existing definitions in the Pakistan Penal Code of simple and grievous hurt should be adopted in so far as they are not in conflict with the mandates of Quran and Sunnah. Like cases of different kinds of qatl, in the matters of hurt also, distinction between masum and ghair masum has been introduced while prescribing punishment for different kinds of hurt.

(s) Clause 41 defines Shajjah as hurt on the head or face of any person which does not amount to Itlaf-e-udw or Itlaf-e-salahiyat-e-udw. Clause 42 describes different kinds of shajjah, viz, Shajjah-i-khafif, Shajjah-i-Mudihah, Shajjah-i-Hashimah, Shajjah-i-Munaqqilah, Shajjah-i-ammah and Shajjah-i-Dimigha, whereas Clauses 44, 45, 48, 50, 52 and 54 prescribe punishment for various kinds of shajjah. Similarly in Clause 55 jurh has been defined as causing hurt at any part of the body of a person other than head or face leaving, a mark of the wound, whether temporary or permanent. Jurh is further divided into jurh jaifa (Cl.56) i.e. a hurt in which wound enters the body cavity of the trunk, and ghair jaifa, i.e., hurt by jurh which does not amount to jaifa. Ghair jaifa is further sub-divided into Damia. Badiah, Mutalahimah, Mudihah Hashimah and Munaqqila. The distinction between hurts of shajjah (Clause 41) and of jurh (Clause 55) will often lead to confusion in the Law Courts, make the trial of cases complicated, cause delay in their disposal and lead to accumulation of arrears in the Law Courts, thus defeating the main and primary object of the Government to provide speedy and inexpensive justice to the public.

(t) Punishment by way of Qisas in the cases of hurt with Itlaf-e-udw, if the victim happens to be a masum, and the limits of hurt caused to the victim can, in the opinion of the Court to be formed in consultation with the authorised Medical Officer, be determined, is to be inflicted by causing a similar hurt, in public, at the same part of the body of the offender without causing him more harm than that caused by him to the victim. If, however, the Qisas is not executable the offender shall be liable to ursh, which unlike Diyat, shall be the same in case of male as well as female, and may also be liable to taazir (Cl.38). It will be

observed that in many classes of hurt mentioned in the draft Ordinance execution of Qisas is not possible. Consequently the punishment prescribed in a number of cases of hurt consists of payment of ursh, or by taazir. Some times very peculiar situation is likely to arise, e.g., shajjah mudiha (Cl.45) is caused by exposing any bone of the victim without causing fracture and this offence is punishable with Qisas also, in case the victim happens to be masum. Now Qisas in this case will involve exposure of the same bone of the offender, to the same degree, without causing a fracture, in public. One can visualize the difficulties to be experienced by Surgeons and law enforcing agencies if these provisions form part of the law. In this connection reference may be made to the observations of the Federal Shariat Court in Muhammad Riaz Vs. Federal Government (PLD 1980, F.C. at P.41-paragraphs 149 to 152).

(u) A study of Clause 79 reveals that classification of hurt into Itlaf-i-udw, Shajjah, Jura etc, along with their further sub-classes is not collectively exhaustive and a provision had to be made in this clause for other kinds of hurt, which are not covered under Clauses 37, 39, 41, 43, 45, 47, 49, 51, 53, 55, 57, 59, 60, 62, 64, 66, 68, 70, 72 to 78, which may endanger life or cause sufferer to remain in severe bodily pain for 20 days or more etc, etc. This state of affairs is bound to create a large number of problems for the Trial Courts, medical witnesses and public at large.

(v) QASAMAT

In Clause 104 of the draft the concept of Qasamat (Oath) has been enunciated as under:-

"Where the offender committing qatl is not known or is not traceable after adequate inquiry, such adult male person or persons in the locality or the place where the dead body is found or where qatl is alleged or appears to have been committed, whom the Wali or Awalyia of the victim suspect to have committed the qatl shall, on the demand of such Wali or Awalyia, be required to take Oath (Qasamat) before a Court competent to try the offence or any judicial officer authorised by such Court in this behalf".

Sub-clause (2) provides the form of Oath and (3) lays down that the maximum number of persons required to take Oath (Qasamat) shall be fifty and if the number of persons required to take Oath (Qasamat) once and if the number of such persons is less than fifty, they shall take Oath as many times as to make the number of Oaths to be fifty. The concept of Qasmat is a pre-Islamic concept and had its origin in earlier societies. These days circumstantial evidence accompanied by scientific investigations can affectively achieve the same objectives.

In the original draft, Clause 106 contained two sub-clauses, (1) and (2). Sub-clause (1) provided that where oaths under clause 104, had been taken, the persons taking oath shall be liable to Diyat payable to them or their Aqila. In sub-clause (2), however, it was provided that if at any time the real offender is found, the Diyat already paid shall be refunded to the person or persons who had paid it. Curiously enough in the revised draft, sub-clause (1) has been omitted,

while sub-clause (2) has been retained which is meaningless because sub-clause (2) is the consequential clause only.

(w) In clause 109 relating to general exceptions, while discussing the right of private defence, it has been stated in sub-clause (m), inter alia, that an act done by a person in exercise of the right of private defence of his own life or the life of a Masum Aldam or Masum against any offence affecting human life, shall not be an offence and also to defend chastity of a person or his property, whether movable or immovable. The principle enunciated in the proposed Ordinance is not practicable because before exercising the right of private defence in respect of the life chastity or property of another person, it would be extremely difficult, if not impossible, to ascertain first whether he is a masum aldam or masum; or qhair masum aldam or qhair masum. By the time some conclusion is arrived at it may be too late.

(x) Under clause 113 the provisions of the "Execution of the Punishment of Whipping Ordinance, 1979", has been made applicable to the punishment of whipping awarded under this Ordinance. Framing of this altogether new Statute, replacing relevant provisions, already existing in different laws relating to criminal justice, will make the trial offences in the law Courts more complicated and lengthy. Had the desired provisions of the proposed law been incorporated in the already existing relevant laws at their proper places by means of suitable amendments the object of Islamisation of laws would have been achieved in a much more convenient manner. Clause 114, 115 and 116 are procedural in nature and relate to cognizance of offences under this Ordinance, information by

the Police of commission of offences to a competent Court and submission challans, etc., respectively. The provisions contained in the above mentioned clauses have already been included in the Qazi Courts Ordinance in a more detailed and precise form and it was unnecessary to incorporate them in the proposed Ordinance. In any case, it would be desirable to avoid likely conflict between the two proposed ordinances.

(y) According to clause 118 the trial of offences under this Ordinance and all proceedings in relation to such trials are to be taken by such competent Court as may be appointed under the rules to be framed by the Provincial Governments and not by any Magistrate. In clause 119 it has been provided that an appeal shall lie to the Sessions Judge from an order passed by the competent Court and from the Sessions Court to the High Court and the High Court's order in appeal shall be final. The Provincial Governments may also file appeals from the judgments of the competent Courts to the Sessions Court or to the High Court against the order of the Sessions Judge in exercise of his original jurisdiction.

(z) Clause 120 provides for the confirmation of sentence of death by way of Qisas or Taazir by the appellate Court and in that respect the provisions of the Code of Criminal Procedure shall, mutatis mutandis, apply to the process of confirmation. According to clause 121, subject to the provisions of this Ordinance, all offences thereunder may be waived or compounded and provisions of clauses 15 and 16 shall, mutatis mutandis, apply to such waiver or composition; provided that offences under clause 76 causing hurt to extort property or to constrain to an illegal act; clause 77 causing hurt to extort

confession or to compel restoration of property; 78 causing hurt to deter public servant from his duty; 100 abortion of embriyo and 102 abortion of pregnancy shall not be waived or compounded. Clause 96 relating to attempt to commit suicide has also been mentioned here in spite of its having been omitted from the main draft.

a(i) Clause 122 provides that the President or the Federal Government and the Governor or a Provincial Government shall have no power to grant pardon, reprieve and respite, and to remit, suspend or commute any sentence passed by way of Qisas, Diyat, Ursh or Daman under any provision of this Ordinance. The powers exercisable by the President and the Governors to grant pardon, reprieve and respite etc, seem to be essential and may be retained particularly with regard to cases wherein gross miscarriage of justice has taken place.

b(i) In clause 126 relating to disposal of ancillary matters, which are not covered under the proposed Ordinance, according to Shariah, the term Shariah is vague and unless and until it is clearly defined, it will cause a good deal of confusion in the Law Courts. Instead of Shariah the words "injunctions of Islam as laid down in the Holy Quran and Sunnah" should have been used. The term Shariah apparently includes Fiqah about which there is a good deal of difference of opinion among different schools of thought, which will lead to innumerable conflicts about interpretation and application of Fiqahi provisions to such matters.

c(i) Clause 127 provides that provisions of the proposed Ordinance shall not apply to the cases pending before any Court immediately before its commencement or to the offences committed before such commencement and the same shall be tried under the laws in force immediately before such commencement.

d(i) Clause 128 provides that :-

(1) Notwithstanding any thing contained in the Code of Criminal Procedure, all cases under Sections 302, 303, 304-A, 307, 308, 326, 328, 334, 336 and 338 of the Pakistan Penal Code, pending before any Court, before the commencement of this Ordinance may be compounded on Badle Sulh on payment of compensation to be agreed upon between the accused and the injured or, as the case may be, the Awlya of the deceased,

and

(2) Cases under Sections 302, 303, 304, 304-A, 307, 308, 323, 324, 325, 326, 328 and 334 to 338 of the Pakistan Penal Code, which have been finally decided before the commencement of this Ordinance, shall also be compoundable before the trial Court.

After providing in Clause 127 that matters pending before the commencement of the proposed Ordinance shall be tried under the old laws, a provision in Clause 128 about composition of the pending cases as well as those finally decided, is a

contradiction. Moreover the above mentioned sub-clauses of Clause 128 giving retrospective effect to certain provisions of the proposed Ordinance will reopen a large number of proceedings.The provision making trial Court to be the forum of these proceedings is open to serious objection as mentioned by the Federal Shariat Court in Muhammad Riaz vs Federal Government (PLD 1980-P.30-paragraphs 90 and 91).

e(i) The remaining two Clauses, viz., 129 and 130 relate to repeal of certain provisions of the Pakistan Penal Code and the Punjab Murderous Outrages Act, 1867, totally; and framing of rules by the Federal Government for the purposes of this Ordinance, respectively.

10. From the above it would be apparent that the proposed draft, if enforced in its present form, will create innumerable difficulties and hamper expeditious disposal of cases.

11. It is, therefore, suggested that:

(a) the draft Ordinance, as it is, should not be enforced at least till the appeals involving the same issues pending in the Supreme Court are decided;

(b) in the meantime cases of simple murder which involve the offender and heirs of the deceased only and cases of hurt should be made compoundable on payment of diyat and compensation that may be agreed upon by the parties concerned and subject to the approval of the Court; and

(c) cases of simple murder and hurt which are already pending before the Courts may also be made compoundable with the permission of the Courts; and those

which have finally been decided, but the sentences have not been executed, should be compoundable with the permission of the Superior Courts only.