

IN THE SUPREME APPELLATE COURT GILGIT-BALTISTAN

Cr. P.L.A No. 04/2011.

Before: **Mr. Justice Muhammad Nawaz Abbasi, Chief Judge.**
 Mr. Justice Syed Jaffar Shah, Judge.
 Mr. Justice Muhammad Yaqoob, Judge.

The State **Petitioner**

Versus

- 1. Muhammad Azam s/o Mir Nabi R/o Jagir Basin.**
- 2. Jumma Din s/o Janiya R/o Bargo Paine.**
- 3. Khan Baz s/o Sheate R/o Bargo Paine District Gilgit.**

..... **Respondent**

**APPEAL AGAINST ORDER DATED 20.10.2010 OF
CHIEF COURT GILGIT-BALTISTAN, WHEREBY THE
HON'BLE CHIEF COURT MAINTAINED THE
ORDER/JUDGMENT OF ANTI TERRORISM COURT
GILGIT-BALTISTAN IN THE CASE FIR NO. 134/2005
DATED 25.02.2005 POLICE STATION CITY.**

Present: Advocate General Gilgit-Baltistan for petitioner.
 Malik Haq Nawaz Advocate for respondents.

 Mr. Ali Nazar Advocate on record.

Date of hearing: 25-05-2011

JUDGMENT

Muhammad Nawaz Abbasi, CJ: This petition for leave to appeal has been filed by the state through Advocate General Gilgit-Baltistan against the order dated 20-10-2010 passed by the Chief Court in a state Criminal Appeal filed by the State whereby the Chief Court maintaining the Order of trial court regarding payment of diyat to the legal heirs of deceased by the State dismissed the appeal.

2. The short facts giving rise to this petition are that Muhammad Azam and two other respondents herein were tried in a case registered against them under Section 427/148/149/302/34 PPC at Police Station City, Gilgit and having been found not guilty have been acquitted. The Case was registered on the report lodged by one Khushlim Hussain that he and ten (10) other passengers were proceeding to village Bargo from Gilgit, in a Suzuki vehicle and on reaching at some distance from the place of occurrence, they having come to know about tension in the area, were reluctant to go further but, a

Magistrate on special duty with police Squad giving assurance of safe crossing the sensitive area, instructed them to follow his vehicle and they while following the Magistrate with police squad when reached near Basin RCC Bridge, a group of persons armed with lethal weapons opened firing and pelted stones at the vehicle as a result of which a few passengers sustained injuries and one Tahir Ali ultimately died in the Hospital. The Magistrate and Police Officials present at the spot remained silent spectators and did not bother to take any action to prevent the offence or protect the life of passengers.

3. The learned Trial Judge having examined the prosecution evidence brought on record held that it was a case of Qatl-i-Khata punishable under section 319 PPC and since the driver of vehicle proceeded to cross the sensitive area on the instruction of Magistrate and sad incident happened in presence of the Magistrate and police officials on duty but they did not interfere to prevent the commission of offence, or to protect the life of passengers, therefore, they would be equally responsible for the fateful incident, and having not taken any preventive measure, were guilty of Criminal negligence.

4. The learned trial Judge in the light of the principle of State responsibility of the protection of life and property of the people directed for payment of Diyat to the legal heirs of the deceased in terms of the notification of the Federal Government published in the Official Gazette for the relevant year.

5. The state by way of filing an appeal under Section 25 of Anti-Terrorism Act, 1997 read with Section 561-A Cr.PC in the Chief Court questioned the legality of order of payment of Diyat without challenging the acquittal of the accused.

6. The precise question requiring determination in the present petition would relate to the responsibility of protection of life and property of the people which is sacred trust in a Muslim State and the concept of Qisas and Diyat in Islam in respect of the cases of Qatl and hurts. The security of a person is one of the fundamental right as provided under Article 3 of Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 and Article 9 of the Constitution of Pakistan, and people of Gilgit-Baltistan being citizens of

Pakistan have the guarantee of fundamental rights provided in the Constitution of Pakistan.

7. This Court having considered the matter in the command of Holy Quran and Sunnah of Holy Prophet (PBUH) required Anjuman-e-Imamia Gilgit, Tanzeem Ahl-e-Sunnat wa Aljamat, Gilgit and Ismaili Regional Council Gilgit to express their views in the matter for guidance of the Court. The presidents, Supreme Appellate Court bar Association with cooperation of the president Chief Court Bar Association was required to constitute a panel of Advocates well conversant with the Islamic Law for assistance of Court and Attorney General for Pakistan was directed to depute a Deputy Attorney General for Pakistan for our assistance and in addition Dr. Muhammad Aslam Khaki Advocate, Islamabad and consultant in Sharia Law was also asked to assist the Court, but except Ismaili Regional Council and Dr. Muhammad Aslam Khaki, no one has responded. The Ismaili Regional Council without rendering any assistance on the legal question under reference, simply asked for supply of detail facts, whereas Dr. Muhammad Aslam khaki has sent an exhaustive research paper on the subject, and we deem it proper to reproduce the same hereunder for the benefit of examination of proposition:-

ISLAMIC CONCEPT OF QISAS –O- DIYAT.

The Security of life of a person had been a sacred trust in custom, law& the driven law throughout the history. The security of a person is one of the fundamental rights of citizens of Pakistan as enshrined in Article 9 of the constitution of Islamic Republic of Pakistan 1973. The concept of Qisas and that of Diyat is a divine as well as customary. As far as its fundamental principles like right of retaliation in murder (Qatl-I- Amd) or Diyat in Qatl-I-Khata(culpable homicide by mistake) and equality of mankind in taking Qisas are concerned, it is a divine law as far its application and modalities in a specific time & territory (مکان و زمان) is concerned, it is a customary law e.g. amount of diyat, mode of payment of Diyat etc. The fundamental principles being divine are unchangeable & uncompromisable while the customary law will be changed with changing needs & demands of the society on the support famous legal maxim of Islamic law.

لا ينكر تغيير الأحكام بتغيير الازمان (مجلته)

“ The change in ruling or law shall not be resisted with change in time” Before dilating upon the liability of an offender to pay Diyat and the right of the victim or

his heirs to receive Diyat, we deem it appropriate to discuss the concept & philosophy of Qisas & Diyat in Islam.

The Dictionary Meanings of Qisas.

- (a) To root out (قصُّ الشَّعْرِ) to root out hair.
- (b) To follow the foot prints or to repeat the act.

In Quran it is said:-

In Quran it is said :-

وقالت لاخته قصيبي

“She (Moses mother) asked his sister to trace him (Moses Box) by going back on the same way.

In Arabic use, it is said:

قصص الابل القصصيـة

“The camel followed the Qasisah i.e she camel: which leads and is followed by other camels”

Quran says about the Moses & his servant.

فارتد اعلى آثار هـا قصصـا

“They returned on their own way tracing their own foot prints”

Definitions of Qisas:

A. In Fiqh, Qisas means ”Qawad” (قود) and its means:

القتل بالقتل حـبـالـجـرـ وـالـجـرـحـ

“killing a man for killing and causing injury for the injury”

b. “ Qisas” is punishment by causing similar hurt at same part of the body of the offender as he has caused to the victim, or by causing his death if he (Offender) has committed Qatil-I- amd.

In Islamic law it is applied in cases of offences against the body of the person whether it proves fatal or leaves wound or Jurh (جرح).

If the offence proves fatal and the victim is killed, the retaliation by the wali of the victim against the offender by killing him is called Qisas-fil-nafs(blood).

Vengeance or (قصاص فى لنفس) and if the offence against the body does not prove

fatal but it result in a hurt or jurf in which Qisas is possible is called Qisas-Fi-ma dun al nafs (قصاص فيما دون النفس).

Qisas is ordained in those offence which accepts equality in retaliation. For example, in the offence of Qatl- I-amd (Murder) equality is possible in retaliation is possible by killing the offender. Similarly in Itlaf –J-Udw (اتلاف عضو), equality is possible in retaliation e.g. the nose for the nose, year for the year, tooth for the tooth, hand for the hand etc. but on the other hand if equality is possible, Qisas does not lie against the offender. For the concept of Qisas is enshrined in divine ordinance as revealed in all the divine religions.

Quran says:-

و كتبنا عليهم فيها ان النفس بالنفس و العين بالعين و الانف بالانف و الاذن والسن والجروح قصاص
(5/48).....

“(In torah) we decreed for them all life for a life, an eye for an eye a nose for a nose, an year, a tooth for a tooth and for wounds is Qisas.”

يَا أَيُّهَا الَّذِينَ آمَنُوا كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي لَقْنَاتِ (02/178)

“ O believers Retaliation is decreed for you in slain; freeman for a freeman, a salve for a salve, a female for female. He who is pardoned by his aggrieved brother for some consideration, should follow his commitment fairly and pay the consideration with equity.

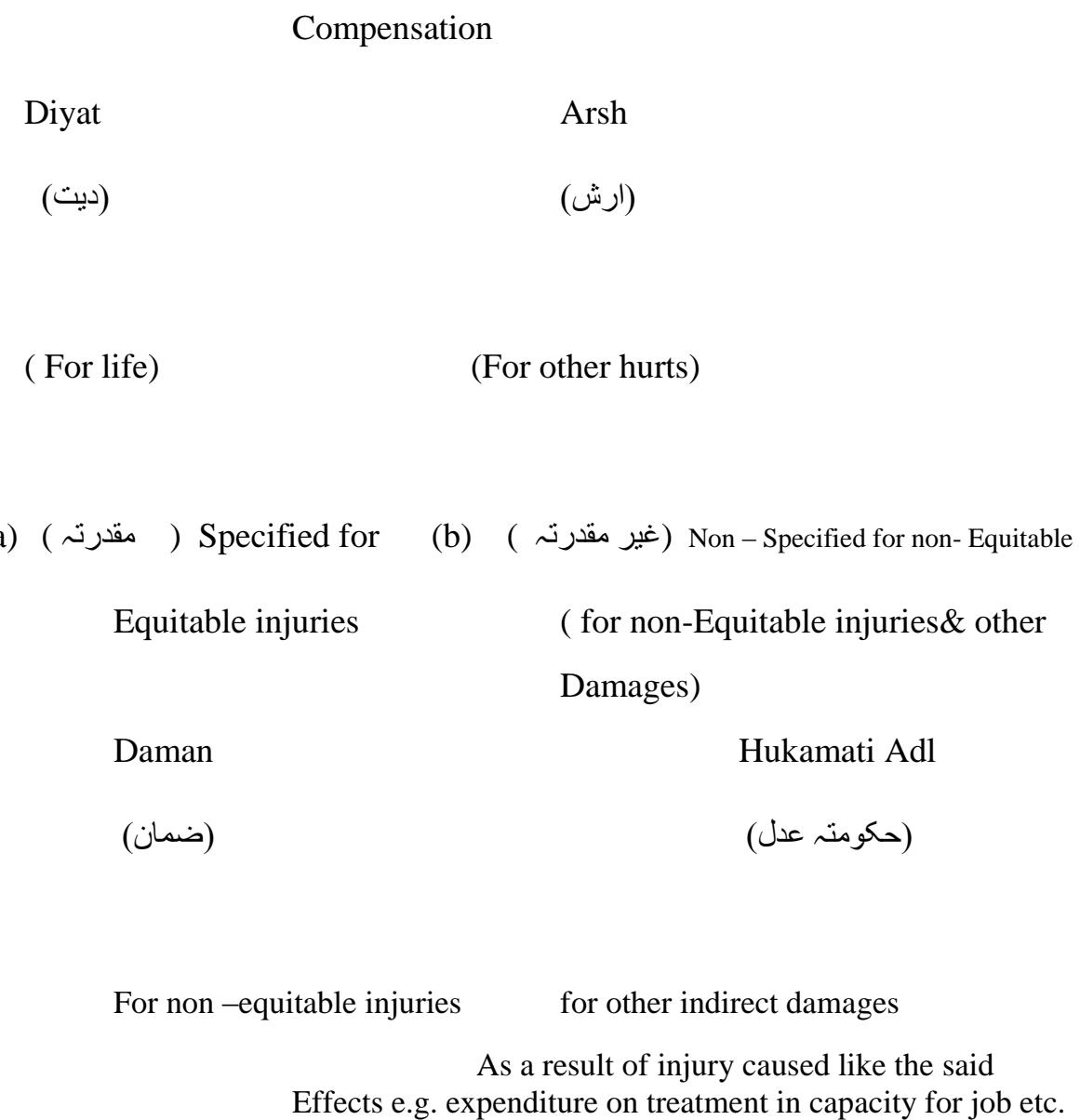
ولكم في القصاص حياته يا ولی الالباب لعلكم تتقون (02/179)

“ In the law of Equality (Qisas) there is saving of life for you O men of understanding (اولى الالباب) i.e. intelligentia.

The victim or his Wali can demand Qisas as a matter of right. He can also forgive and the offender without compensation or compound on accepting badal-I –Sulah it is noteworthy that the cases in which basically the Qisas is ordained but due to some technical or other legal reasons Qisas cannot be executed, Diyat and Arsh are fixed and are not left to the discretion of the victim or of the government or the Judge. While in cases of inequitable hurts in which the execution of Qisas is not possible due to difficulty of equality, the offender would be liable to daman (ضمان) which is to be determine by the Court.

In addition of Diyat, Arsh or Daman which are the monetary compensation, the Court can also award the punishment of imprisonment or stripes to the offender keeping in view the circumstances of case. However, in which Qisas is executed, no other punishment can be awarded to the offender.

It is to be noted that in fiqh (ارش مقدره) sticto sanso, the monetary compensation other then Diyat is further divided into Arsh Muqaddrah (ارش مقدره) (specified compensation) and Arsh- Ghair Muqaddarah (ارش غير مقدره) non specified compensation. Arsh Ghair Muqadarah is further divided into daman and Hukoomat- I- Adl as compensation shown in the chart below.



In case of default of payment of Diyat.

The English law provides imprisonment for indefinite rather for undefined period. It does not differentiate between the accused belonging to different economic groups.

Islam being to torch- bearer of justice & fairness seriously and sympathetically takes into consideration the economic status of the accused for his financial liabilities in the law.

As per Islamic law, the time for payment of Diyat depends upon two factors / variables.

- (A) The Type of Qatl/homicide.
- (B) The economic position of the accused.
- (C) Type of Qatl or Homicide:

If the Diyat has been imposed against Qatl- i- khata &Qatal –Shibh-i-Amd (قتل شبه عمد) , the Muslim jurists agree that it shall be a deferred Diyat (دیت معجلہ) and to some jurists shall be paid in three years i.e/3rd of Diyat shall be paid every year.

(The same view has been incorporated in section 331 and 337-x P.P.C for payment of Diyat or Arsh on the case may be in lump sum or in installments of three years.)

And if the Diyat has been ordered against Qatl-i-Amd in which execution of Qisas is not possible then there difference of opinion among the jurists. Ahnaf Jurists hold that it shall also be a “deffered diyat” like one in Qatl-e-Khata and Qatl-e-Shibh-e-Amd. On the other hand the majority jurists like Shafis & Malikis have the view that such Diyat shall be a prompt Diyat (دیت معجلہ) i.e. to be paid promptly and in lump sum. According to them, suchinst Qisas and it requires prompt execution. So its alternate (Diyat must also be promet. Moreover the murder is not entitled for concessions, while deferring the payment of Diyat in installments is a concession.

The authority for “ deferred Diyat payment” in three years by installments is derived from the conduct of second Muslim Caliph Hazarat Umar as he made it so in a case before him. However in the present day, it will change with change in the economic condition of the accused and those of the society.

The jurist have considered the payment of Diyat as that of debt (دین) which a man owes to other man. So the Akham of Debt shall mutatis mutandus apply for the recovery of Diyat- Some jurists have allowed the imprisonment of the debtor against the debt due. However they made four conditions for it.

1st Condition:

- (i) That the debt should be prompt or has become due.

Second Condition:

- (ii) The second condition for awarding imprisonment in default of payment of Diyat is that the debtor should not be the parents (how- high so) of the creditors, as in Islam, the parents (H.H.S) cannot be imprisoned for the debt of their children (H.L.S). The arguments for the said position area as follows.

وصاجهما فى الدنيا معروفا(قرآن) (a)

“ In this world be with your parents in good conduct” .(31:15)

وبالوالدين احسانا.(قرآن) (b)

“ Behave with your parents nicely” (2:83)

(c) A son complained to the Holy Prophet (P.B.U.H) about his father that he takes the money from his account.

The Holy Prophet (P.B.U.H) said ” انت و مالك لا بيک you & your property belongs to your father’.

So the jurist have consensus that a father cannot be imprisoned for the debt of his children due from him.

However, the father can be imprisoned for non- payment of maintenance of his minor children and that too as Tazir and not as against a debt.

Third Condition:

- (iii) The third condition for the imprisonment against the debt is that there must be a request by the creditors to the judge for the imprisonment of their debtor. In the absence of such request, the Judge Suo-moto cannot imprison the debtor except in case when the creditor or the beneficiary of the Diyat are minors. This is because the Judge has the parental position and is guardian of the minors.

Fourth Condition:

- (iv) The Fourth and the most important condition for the imprisonment of the debtor against the creditor is his sound financial position to pay off the debt. The issue of granting time to the offender to pay Diyat is a double

edged weapon, it cuts both ways. On one hand it impairs the right of the creditor and on the other hand it is against the interest of the destitute debtor if refused. As far as the destitute debtor is concerned, Islam ordains convenience & concession.

When the debtor is rich موسى enough to pay the debt and his financial position is known & proved so.

In such case, if the debtor refuses to pay he may be humiliated and punished. The Holy Prophet (P.B.U.H) said

لِي الْوَاجِدُ ظُلْمٌ يَحْلُّ عَرْضَهُ وَ عَقْوَبَتِهِ (أَبُو دَاوُدْ نَسَائِي)

قال ابن المبارك يغلظ له و يحس

“The default of the rich debtor is ‘zulm’ (injustice of the debtor against the creditor), his humiliation and punishment is permitted. Abne-Mubarak said that he will be dealt strictly will be imprisoned.

“ The Jurist Ahmed & Waki (وكيع) have also interpreted the punishment as to “ imprisonment” (Nail- UL- Autar by Al- Shaookani 5/255).

Imam abu Hanifa and his disciple Imam Zufar hold that he (Rich debtor) shall be imprisoned for indefinite period till he pays of the debt. However imam Abu yusuf, imam Muhammad among the Ahnaf and the jurist of other Schools of thought are of the view that if he does not pay the debt even after specific period of imprisonment says one, two or three months or higher(at the discretion of Judge keeping in view the circumstances of the people), he shall be placed under Hajr حجر (interdict) by declaring him honcompos mentis , and his property shall be attached & sold and the debt (Diyat) shall be discharged.

The debt is not written off even in case of the death of the debtor. In such case the debt shall be recovered from the assets of the deceased as first priority:

Quran Says:

فَإِنْ كَانَ لِهِ أَخْوَةٌ فَلَا مَهِمَّ السَّدْسُ مِنْ بَعْدِ وصِيَّتِهِ يُوَصَّى بِهَا الْوَدَيْنَ (4:11)

Translation: The distribution in all cases is after the payment of legacies and debts. (4/11)

To secure the transparency & return of the debt, Quran has asked the muslims to reduce the deal in writing and also to make witnesses to it .

It says:

يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا تَدَإِنُتُمْ بَدِينَ إِلَى أَجْلٍ مَسْمَى فَاکتُبُوهُ الکتب بینکم کاتب بالعدل او لایاب کاتبان یکتب كما علمه الله فليكتب و ليملل الذى عليه الحق وليتق الله ربه ولا ينجس منه شيئاً فان كان الذى عليه الحق سفيها او ضعيفاً او لا يستطيع ان يمل هو فليملل و ليه بالعدل واستشهدوا شهيدين من رجالكم----(2/282)

Translation: O ye who believe When deal with each in transactions involving future obligation in a fixed period of time, reduce them to writing let a scribe write down faithfully as between the parties: let not the refuse to write as God has taught him, son let him write , let him who incurs the liability dictate, but let him fear his lord God, and not diminish aught of what he owes if the party liable is mentally deficient, or weak, or unable Himself to dictate, let his guardian dictate faithfully. And get two witnesses, out of your own men. (2/282)

In Islam, payment of debt has been emphasized to facilitate & promote the issuing of debts by the creditors.

The sunnah of the Holy Prophet reveals that the Holy Prophet Muhammad (P.B.U.H) refused to offer the funeral prayer of the person who died without discharging his debts. The person who does not repay the debt against him despite his capacity to repay has been condemned by the Prophet and it is permitted to insult him & punish him.

The Prophet Said:

لِيَا لَوْ اَجَدْ ظُلْمٌ يَحْلِ عَرْضَهُ وَ عَوْبَتَهُ (حدیث) (1)

“the willful default in payment of debt by the rich debtor is injustice or Zulm, it is permitted to insult him and to punish him.

حَطَلَ الْغَنِيَ ظُلْمٌ (ii)

“The deferring debt by the rich debtor is injustice “ (Muwatta Imam Malik) when the debtor is known or is proved as too poor to pay the debt. i.e. d pauper or Muflis (مفلس)

In such case, he cannot be imprisoned as per all the jurists because the purpose of imprisonment is to force the debtor to pay the debt while a poor person is not able to pay the debt, hence his imprisonment is Zulm Islam

does not believe in imprisonment for imprisonment. Even otherwise Islam lays emphasis on leniency with the poor debtor.

Islam is a religion of convenience and concession and not of inconvenience. One of the salient features of Shariah is "Principle of convenience" as compared to inconvenience. This principle of convenience & concession is based upon the following verses & Ahadith.

Quran Says:

يُرِيدُ اللَّهُ بِكُمُ الْيُسْرَ وَلَا يُرِيدُ بِكُمُ الْعُسْرَ (القرآن)

Translation: "Allah intends convenience with you and not "inconvenience with you (2:185) even in the recitation of Quran, the muslims have been asked to read the easy verses or Ahkam and do not get fatigued:

Quran Says:

فَاقْرُءُوا مَا تَيْسِرُ مِنَ الْقُرْآنِ (73:20)

Translation: "Read from the Quran what is easy or convenient"

Quran has been made easy and not difficult. (73:20)

Quran Says:

وَلَقَدْ يُسِّرَنَا الْقُرْآنُ لِذِكْرِ فَهِلْ مِنْ مَذْكُورٍ (54:40)

Translation: indeed we have made Quran an easy book for guidance, is there any person to who contemplates into it. (54:40)

Similarly the purpose of sending the prophet and also his conduct as a role model was to remove the difficulties and the undue constraints over the mankind.

Quran Says:

وَيُضْعَفُ عَنْهُمْ أَصْرَهُمْ وَلَا عُلُلُ النَّبِيِّ كَانَتْ عَلَيْهِمْ (القرآن)(7:157)

Translation: He releases them from their heavy and from the yokes that are upon them. (7:157)

Quran Says:

إِنَّ اللَّهَ يَا مَرْبُّ الْعَدْلِ وَالْإِحْسَانِ (القرآن)(16:90)

Translation: Allah ordains you to hold justice & concession. In Islamic term, justice means giving the man to which he is entitled rights Ihsam means giving him more than his right keeping in view his circumstances.

The Prophet Said:

علموا ويسروا ولا تعسروا

Teach the people and make easy way and do not make it in a difficult way.

It reported that wherever the prophet was confronted with many solution of a problem, he opted for the easiest.

It is on this principle of convenience that ordains the Muslims to make the repayment of their debts due from the or debtors as convenient and give maximum allowance to the poor & destitute.

It is pertinent to note that in Islam normally the repayment of debt is a responsibility & a liability which must be honored by the debtors. The purpose of strict injunctions to the debtors to repay the debts by Islam is in the interest of debtor and creditors. Islam makes strict directions to repay the debt.

Quran Says:

وَإِنْ كَانَ ذُو عَسْرَةً فَنُظِرْهُ إِلَيْهِ مِسْرَةً

“if the debtor is poor, he should be given time (2:280)

لَا يَكْلُفُ اللَّهُ نَفْسًا إِلَّا وُسْعَهَا (الْقُرْآن) (2:286)

“ Allah does not require anything from a person but as per his capacity”

However if the poor person has some property that will sold to satisfy the debt leaving the property which is required for his working or living. There are many traditions which require the creditors to deal with the poor debtor in leniency and forgiveness. Some are as below:

وعن أبي هريرة قال قال رسول الله كان فيما كان قبلكم تاجر يدين فكان الناس فكان ازاراً على معاشر القال لفتين انه تجاوز واعنه لعل الله يتتجاوز عن اتفجاوز الله عنه (بخارى مسلم،نسائى بحواله صحاح اته كتاب الدين)

It is reported from Abud Hurairah that the Holy Prophet said that in the past time, there was a trader who used to lend loans to the people and when he found a debtor in difficulty he asked his workers to ignore the recovery with the hope that Allah will also ignore our sins. The Prophet said that in fact Allah ignored his sins.

There is another narration about a person who did never do any good deed. But he used to lend money to the people and instructed his workers to recover the loan from the rich and ignore the poor in recovery with the hope that

Allah will ignore our sins. When this person died Allah asked him if he has done any good deed he replies “ No except that I used to give the loan to the people and said it my recovery worker to recover from the rich and ignore the poor in recovery with the hope that Allah will ignore our sins Allah said to the man:

“I have ignored your sins “

وعن ابى قتادة انه طلب غريماله فتوارى عنہ ثم وجد فقل انی معاشر فقال اللہ قال اللہ فانی دمعت رسول اللہ .
يقول من سره ان ينجيه اللہ التعالی من كرب یوم لقيامة فلينفس عن معسر او يضع عنه.

“ it is reported by Abut Qatadah that he went to his debtor who initially did hide but later on appeared and on the demand of Abu Qatadah, the debtor deposed on oath that he was poor. Abu Qataqah said that he had heard from the holy Prophet that whosoever wishes that Allah Should Protect him against the miseries of hereafter, he should give time to the poor or write off his loan (Muslim)

Another tradition of the Holy Prophet(PBUH) as reported by Abu Saeed is as follows.

“A man in the period of Holy Prophet(P.B.U.H) suffered loss in the business of a fruit and his debt exceeded the Prophet(P.B.U.H) said to the companions ‘Give him help’, so the people contributed for him as sadqah(صدقہ) or help but it did not satisfy the debt completely, the Prophet(P.B.U.H) said to his creditors, you take what is there for you and you are not entitled for which is not there. (Nail-ul-Autor, 5/255)

(c) When the debtor’s financial position is not proved either way. In this case, the debtor will be imprisoned and an inquiry will be conducted into his financial position. However, such imprisonment for inquiry shall not exceed three months as per majority jurists.

It is also worth noting that in case there is no chance of improvement in that financial position of the debtor of Diyat, it can be waved and be paid out of public exchequer.

عمران بن حسين (عمران بن حسين) that a poor boy cut the ear of a rich boy. The family of the poor boy came to the Holy Prophet (P.B.U.H) and told the Holy Prophet (P.B.U.H) that they are destitute payment of any compensation.(Abu Daud, Nissai)

Amount of Diyat is not fixed.

On many surprised to note that the law of Qisas o Diyat was not exclusively divine, it was pre-islamic and customary as well. The main law Qisas was also revealed by Allah Almighty to the nations before Muslims.

Quran Says:..... و كتبنا عليهم فيها ان النفس بالنفس

And we have made a law for them that the life will be taken against a life.

Quran did not provide the details and working of enforcement of Qisas and Diyat. It only provided the right of Qisas and of Diyat to the victim or his legal heirs, equality of various classes of people in retaliation, and right of victim or his legal heirs, as the case may be, to forgive the offender However , the working &details were left unspecified to be specified by the people in the so cio-economic conditions of their own time. The Holy Prophet worked out the details like amount of Diyat, kinds of Diyat etc in his own time and for his own time as a role model and as head of the state.

The prophet (P.B.U.H) also relied upon the customs in this connection provided the custom was not based upon injustice. However when the time & socio- economic condition prevalent in the time of the Holy prophet upon which the holy prophet based his decisions and order were changed the second caliph Hazrat Umar changed such details given by the Holy Prophet without any reservation because he know that such decisions & orders were not of religious nature but were of the political nature made in Public interest keeping in view the socio-condition of his (Prophet 's) time. So when Umer felt a change in the socio-economic conditions in his Caliphate, he changed the relevant provisions of law despite the fact that these were decided by the Holy Prophet. He knew that the Prophet issued such details in his capacity of head of State and not in the capacity of the Prophet. So he changed the value of Diyat from 800 Dinars to 1000 Dinar, changed the Aaqila composition, waiving the liability of Diyat against some destitute persons etc. On the same analogy and on the same pedestal, such details can be changed rather totally redesigned and worked out by the government or judiciary as authorised by the govt. by empowering it under Article 184(3) of the Constitution of Islamic Republic of Pakistan 1973.

One tradition of Hazrat Umer changing the value of Diyat and its kinds is reproduced as below.

عن ابن عمر و بن الحاص قال كانت قيمته الديد على عهد رسول الله ثمان مائة دينار او ثمانية الاف درهم
ديته اصل الكتاب كو مندعلى العصف من ديته المسلمين الى ان استخلف عمر بن الخطاب فقام خطيبا فقال
ان الايل قد غلت فقر ضها على اصل الذهب الف دينار على اهل الورق اثنى عشر الف درهم و على البقر و
على اهل الشاته ولی امل الحل ماتی حلته-----
(ابوداؤد)

It is reported by Amr Bin AAS that in the period of the holy Prophet (P.B.U.H) the value of Diyat was eight hundred Dinars or Eight thousand Dirahm and Diyat of Ahle kitab at that time was equal to the half of Diyat of Muslim, till the time Umer became Caliph and stood addressing, he said" Indeed the price of camels has gone up" Hence he (Umer) fixed one thousand Dinar for the people dealing in Dinars and for fixed 1200 Dirham for the people dealing in Silver and for the cow-holders 200 cows and for the goats and upon the pearl-holders, two hundred pearls.(Abu Daud)

THERE IS NO FIXED TIME PERIOD FOR PAYMENT OF DIYAT.

Through generally some jurists have stipulated a period of three years for the payment of Diyat by the offender, but it is not obligatory or static. The jurists have based their juristic opinion of fatwa on a decision of Hazrat Umar by which he granted to an offender a period of three years for the payment of Diyat. Hazrat Umar had based his decision on the economic condition of the offender and that of the society of his time. Now the economic conditions of the society have changed with change in time. So the period may be varied keeping in view the conditions & circumstances of the time. There is a famous Islamic legal maxim which is one of the fundamental principles of ijtehad:

لا ينكر تغير الاحکام، تغير الازمان(المجلته)

"The Ahkam (of Shariah) will not be denied a change with change in time"

It is pertinent to note that ijtehad is the pivot of the dynamics of Islam being the last religion providing guidance for all the times to come Ijtehad is the key to the new issues of the modern times. Even one can see that Hazrat Umar also changed some decisions of the Holy Prophet which he made in subjective circumstances of his time keeping in view the public interest. Umar felt for changing such decisions as the Chief executive of the state and not as a Prophet and secondly that the Prophet kept in view the public

interest of the people of his time and that after about a decade, the public interest was changed, hence the decisions were changed. Such decisions of Hazrat Umar deviating from the letters of Sunnah but following the spirit of Sunnah of the Prophet, are called Awliyati- umar or preferences of Umar. A detailed description of such decisions by Umar is given by Dr. Sabhi Muhammasani in his book Al-Falsafa Tashree Islami, (urdu translation) Lahore. While fixing the time as three years, indeed Hazrat Umar translated the Quranic term Maisrar (easy time) as three years keeping in view the economic conditions of the offender and the society of his time and space. While determining the period of payment of Diyat the term " Maisarah" is the focus and not the three years. Maisara can very one time and from one environment to other.

The Quranic verse which refers to the concession for convenient time to the debtor is reproduced below.

فَإِنْ كَانَ زَوْعِرْتَهُ فَنَظِرْتَهُ إِلَى مَيْسِرَتِهِ

If the debtor does not have the capacity to repay the debt, extend the time till he becomes capable of paying it.

Mechanism for recovery of Diyat from Destitute

In the life time of the Prophet a debtor was brought before the holy Prophet (P.B.U.H) by his creditors. The Prophet sold out all his assets but the debts could not be fully satisfied, the Prophet asked the people to give him Sadaqah or Alm. Even after being benefited by sadaqat, the debt was not fully discharged; the holy Prophet asked the creditors to take away what is available with him.

The majority of the jurists have held that defaulter of the debt shall be subjected to the proceedings of Taflees (تفليس) i.e his property & belongings (except of his needed) shall be sold out and he shall in no case be imprisoned.

It is reported by Ibne Nafi that all of his property shall be sold out including his house, horse, slave and extra clothing's but he will not be imprisoned in view of the verse of quran.

وَإِنْ كَانَ زَوْعِرْتَهُ فَنَظِرْتَهُ إِلَى مَيْسِرَتِهِ

It is reported by all Saeed Al-Khudri that a man suffered heavy losses in the purchase of fruit and he went under debts. The Prophet asked the companions to give him Sadaqah for discharge of his debts. The people donated but the debt was not fully discharged. The Prophet said to his creditor "take what is there and there is nothing for you except what is there" The prophet did not order for his imprisonment. This is the opinion of Muaaz bin Jabahal as given by shurah. He will not be asked to earn in future to discharge the debt. However Imam Abu Hanifa holds that even after that, the debtor will be followed with the possibility that he procures some property.

Imam Malik, Shafai and Abu Haneefa hold that the destitute will be imprisoned so that his pauper position etc confirmed. Imam Malik is of the view that he will not be imprisoned except if he has been blamed for concealing his property but if such property is not found out, he will be released and similarly if he is proved pauper, he will not be imprisoned if not found out, he will be released and similarly if he is proved pauper, he will not be imprisoned.

(Al-jame-li-ahkamul Quran by Al-qurtabi Vol.3 Page 372)

The said Sunnah clearly lays down a **model or mechanism for the repayment of debt against the destitute.**

It is in three stages:

- i) At the first stage, he will be made pauper (عمل تقليس) by selling out his assets (excluding assets of basic needs and tools of earning).
- ii) If the price of his assets sold is not enough to satisfy the debt against him, the society will contribute to it and even if the debt is not fully satisfied, then the creditor will be asked to take the available and forego the remaining amount.
- iii) The society contributory includes his relatives, friends, the general public through N.G.O's philanthropists or through government as government exchequer also comes out to the public taxes and also that the govt. is the guardian of a person who has guardian.
السلطان ولی لمن لا ولی له

"The ruler (government) is the guardian of the person who has no guardian".

This principle of general guardianship the government works both ways. The government is entitled to the assistance of a deceased who has no legal heirs i.e. his property will go to the public exchequer or Bait-ul-Mal. Similarly in the case of a destitute person. His liability may be discharged from the public exchequer. This principle is also supported by an Islamic legal maximum which provides under.

الغنم بالغرم

"That person is entitled to the benefit who is responsible for the loss".

The Concept of Islamic state as a welfare state also entails the said principle. The system of Aqilah' the tribe who pays Diyat on behalf of the poor offender, is a Pre-Islamic system and is fit in the environment & hierarchy of a tribal Society in

which had a tribe to whom he paid the tax or contribution. In that society, the tribes used to pay the tax to the government and also revived the same incase of crises or as matter of help. In these days it is nor workable. However the institution of Aaqila may be transformed in multiple complex Fund to whom the government, Philanthropist and the N.G.O's may be the contributory. The destitute offender after passing the substantive punishment of imprisonment and even before it may apply for a grant or soft loan as the case may be. He should be released on easy surety or security so that he should earn and pay.

Some jurist have the view that the Diyat upon the Muflis will be paid out of Bait-ul-Mal. They have relied upon the following traditions.

It is reported by Jabir that the Prophet used to refuse offering funeral prayer who died leaving debt upon him, once a dead body was brought to him, the Prophet asked if there is any debt against him, they said yes two Dinars, the Prophet said you may offer his prayer (I am not), Abu Qaradah said I stand guarantee, then the Prophet offered his prayer. However when the Prophet was bestowed with the victory (of Macca), he declared I am nearer to musim from himself, so whosoever leaves debt, that is upon me and whosoever leaves property that is for his legal heirs. (Ahmed, Abu Daud, & Nissai Ref Nil-ul-autor, by Al-shookani, vol. 5, page 250).

It is also reported by Abu Hurain that the Prophet said in his address "whosoever leaves behind Property or a right, it is for his heirs and whosoever leaves behind liability or debt, it is upon me." Salman as per Tabrani added to it that after me it is no public exchequer (IBID).

Payment of Diyat-Responsibility of the Society.

It is important to mention that Islam lays great emphasis on solving and dissolving the problems & debts of the poor people. Quran has time & again asked the Muslims to release the necks (فَكُرْبَتِهِ) which includes emancipation of the slaves and paying the debts. Such directions of (فَكُرْبَتِهِ) has appeared six times in Quran in four verses (4/92 (three times), 5/89, 58/3, 90/13)

While detailing the eight categories of people for expenditure of Alms, Quran has included the people under debt as one of the categories on which Zakat or Khairat can be spent, Quran Says.

انما الصدقة للفقير والمساكين والغامليين عليها.....(9:60)

Translation: alms are for the poor and the needy, and those employed to administer the (funds) for those whose hearts have been (recently) reconciled (to truth): for those in bondage and in debt: and for the wayfarer (thus is it) ordained by God, and God is full of knowledge and wisdom.

Quran has declared the expenditure for release of debt as great pious deed, Birr (بر)

Quran Says:

لِيَسَ الْبَرُّ تَوْلِيَاً جُوَهْرَكُمْ قَبْلَ امْشَرْقٍ وَالْمَغْرِبِ وَلَا كُنَّ الْبَرُّ مِنْ آمِنَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَالْمَلَائِكَةِ وَالْكِتَابِ
وَالنَّبِيِّنَ إِلَى الْمَالِ عَلَى حِبَّ زَوْيِ الْقَرْبَى وَالْيَتَمَى وَالْمَسَاكِينَ وَابْنِ السَّبِيلِ وَالسَّائِلِينَ وَفِي الرِّقَابِ

Translation: It is righteousness that ye turn your faces towards east or west" but is righteousness. To believe in God and the last day and the angles, and the book, and

he messengers : to spend of your substances, out of love for him, for your kin, for orphans, for the needy, for the wayfarer, for those who ask, and for the ransom of slaves.

(iii) Destitute is not pay Diyat ----- (shah Sitta vol. 5 page 283)

(iv) The debt of destitute is upon the state

فِنْ تَرْكِ دِينَا فَطَلِي

(Nailul autor, vol 5 251,252)

(v) The destitute is not required to pay Diyat, rather is required to fast for sixty days (سورة النکاح 4/92)

Dr. Muhammad Aslam Khaki, Advocate of Supreme Court of Pakistan and a consultant in Sharia law, has rendered very valuable assistance through the research paper and we appreciate his efforts-

8. The learned Advocate General having placed reliance on observation of Mr. Justice Taqi Usmani a member of Shariat Appellate Bench of Supreme Court of Pakistan made in the case titled “Federation of Pakistan VS Muhammad Riaz,” Shariat Appeal No. 19/K/1980 contended that as a result of aggression or Criminal act of a person in a case of private enmity or otherwise, if loss is caused to the life or property of another person or he suffered bodily injury or death of a person is caused due to an intentional act or otherwise or negligence of another person, the wrong doer is individually responsible to pay Diyat/compensation to the victim in accordance with law. The observation of Hon’ble Judge in the case referred above is reproduced as Under:-

اس سلسلے میں قانون رائج الوقت اور قران و سنت کے احکام کے مقابلی مطالعے سے جو صورت حال سامنے آتی ہے وہ یہ ہے کہ دونوں قسم کے قوانین کے درمیان اس معاہلے میں جذوی نوعیت کا اختلاف نہیں ہے، بلکہ بنیادی تصورات کا اختلاف ہے، رائج الوقت قوانین کے تحت قتل خواہ کسی قسم کا ہو، ضرب خواہ کسی قسم کا بھو محض استیثت کے خلاف ایک جرم ہے، اس کا ضرر رسیدہ شخص یا اس کے ورثاء سے براہ راست کوئی تعلق نہیں، اس کے برخلاف قرآن و سنت اور فقه اسلامی کی رو سے قتل اور ضرب خواہ کسی قسم کی ہو، اس کی دو حیثیتیں ہیں، ایک حیثت یہ ہے کہ اس کے ذریعہ ایک انسان یا اس کے ورثاء کا حق پامال کیا گیا، اور دوسری حیثت یہ ہے کہ اس کے ذریعے قانون اور نظم و ضبط کی خلاف ورزی کی گئی، پہلی حیثت سے یہ جرائم ضرر رسیدہ شخص یا اس کے ورثاء کے خلاف ہوتے ہیں، اور دوسری حیثت سے استیثت کے خلاف، قرآن و سنت اور اسلامی فقه کی رو سے ان جرائم میں پہلی حیثیت غالب ہے، اور دوسری حیثیت مغلوب ہے۔

کی آیت نمبر 178 میں بیان کیا ہے:-
فَمَنْ عَفَى لِهِ مِنْ أَخِيهِ شَيْئًا فَاتِّبَاعُ الْمَعْرُوفِ وَإِذَا إِلَيْهِ بِالْحَسَنِ ذُلِّكَ تَخْفِيفٌ مِّنْ رَبِّكَ وَرَحْمَتٌ مِّنْ فَمْنْ اعْتَدَى بَعْدَ ذَالِكَ فَلَهُ عِزَابُ الْيَمِّ۔

اس کے فریق کی طرف سے کچھ معافی ہو جائے تو معقول طور پر مطالبہ کرنا اور خوبی کے ساتھ اس کے پاس پہنچا دینا یہ تمہارے پروردگار کی طرف سے تخفیف ہے، اور ترحم ہے پھر جو شخص اس کے زیادتی کا مرتکب ہو تو اس شخص کو بڑا دردناک عذاب ہو گا۔ (سنن ابن داود، حدیث نمبر 4591 ص 196 ج 4 و مصنف عبدالرزاق حدیث نمبر 37203) علامہ ابن اثیر جزری، اندھی لڑائی، کی لغوی تشریح کرتے ہوئے لکھتے ہیں۔

یعنی امرہ ولايتین قاتله "

کوئی ایسا مقتول پایا جائے جس کا معاملہ اندھیرے میں ہو، اور اس کا قاتل معلوم نہ ہو۔

اس کے برخلاف اسلامی احکام کی رو

سے قتل اور ضرب کے جرائم چونکہ براہ راست ضرر رسیدہ شخص اور اس کے ورثاء کے خلاف بیں۔ لہذا ان پر معافی دینے یا ان پر معاوضے کے ساتھ یا بغیر معاوضے کے صلح کرنے کا اختیار بھی انہیں کو ہے، اور عدالت سے ایک مرتبہ مجرم قرار پانے کے بعد قصاص یا دیتکی حد تک استیثت

کوئی مداخلت نہیں کر سکتی، بان مقتول کے ورثاء کو معافی یا صلح کرنے کی ترغیب ضرور دے سکتی ہے، چنانچہ حضرت انس بن مالک روایت کرتے ہیں کہ مارا یت رسول صل اللہ علیہ والہ وسلم رفع الیہ شیئی فیہ قصاص الامر فیہ بالغفو۔ میں نے رسول صل اللہ علیہ والہ وسلم کو کبھی نہیں دیکھا کہ آپ صل اللہ علیہ والہ وسلم کے سامنے کوئی ایسا مقدمہ لایا گیا ہو جس میں قصاص آتا ہوا راپ صل اللہ علیہ والہ وسلم نے اس میں معاف کرنے کا ترغیبی حکم نہ دیا ہو۔ (سنن ابی داؤد، حدیث نمبر 4497 ص 69 ج 4 مطبوعہ بیروت) لیکن یہ ترغیب محض ترغیب ہی کے درجے میں ہے، معافی دینے یا نہ دینے کا آخری فیصلہ مقتول کے ورثاء ہی کے اختیار میں ہے۔ اس کے برخلاف اسلامی احکام کی رو سے قتل اور ضرب کے جرائم چونکہ براہ راست ضرر رسیدہ شخص اور اس کے ورثاء کے خلاف بین لہذا ان پر معافی دینے یا ان پر معاوضے کے ساتھ یا بغیر معاوضے کے صلح کرنے کا اختیار بھی انہیں کو ہے، اور عدالت سے ایک مرتبہ مجرم قرار پانے کے بعد قصاص یا دیت کی حد تک استٹیٹ کوئی مداخلت نہیں کر سکتی، بان

The learned Advocate General however submitted that this is duty of the State machinery to effect the recovery of the amount of Diyat or compensation as determined by the Court under the law from wrong doer for payment to the victim and also conceded that in the light of principle of State responsibility of Muslim State, if damage is caused to the life and property of citizens as a result of an act of state or Government or an act of an agent of state directly or indirectly or as a result of natural disaster, the state is under legal obligation to pay compensation for the loss caused to the victims.

The doctrine of legal sovereignty as enshrined in Holly Quran and sunnah of Holly Prophet (PBUH) over the entire universe belongs to Almighty Allah alone and in a Muslim State concept of State sovereignty is that authority must be exercised by the people through State government within the limits prescribed by Allah as a sacred trust. It has been ordained in Holly Quran in sura Al-Imaran ayat No. 27 as Under:

قُلْ أَللّٰهُمَّ مَالِكُ الْمُلْكِ تَوْتَى الْمُلْكَ مِنْ تَشَاءُ وَتَنْزَعُ الْمُلْكَ مِنْ تَشَاءُ وَتَعْزِمُنَّ تَشَاءُ وَتَرْزُلُ مِنْ تَشَاءُ۔

Says, ‘O allah, Lord of sovereignty, Thou givest sovereignty to whomsoever thou pleases; and thou takest away sovereignty from whomsoever Thou pleases. Thou exaltest whosoever Thou pleases and Thou abasest whomsoever Thou pleases.

Pakistan is a sovereign Islamic State and Gilgit-Baltistan is an essential part of sovereign of Pakistan and in the light of doctrine of state sovereignty in Islam, the Government of Pakistan and Government of Gilgit-Baltistan being trustees for the discharge of sovereign functions and responsible for all affairs of the trust have legal obligation to provide protection to the life and property of State subjects on the basis of principle of State responsibility.

In Islam the human dignity is inviolable and right of life cannot be taken away except in accordance with the injunction of Islam. This is basic responsibility/obligation of an Islamic State to provide bread and butter to its citizen and also protect their life, liberty and property.

The Holly quran, ordains in Surah (4:93) “Anyone who kills a believer deliberately will receive as his reward (a sentence) to live in Hell forever”. “God will be angry with him and curse him, and prepare dreadful torment for him”. In surah (2:188) says. “Do not devour one another’s wealth by false and illegal means”

Islam prohibits homicide except in truth and due process of law to carryout justice in the command of Holly Quran. Islam also with equal clarity conferred the right of security of property as ordained in Surah 2:188 supra and as was said by Holly Prophet (PBUH) in address at the occasion of farewell Hajj.

9. The Criminal law of Pakistan without any exception is enforced in Gilgit-Baltistan and Criminal justice system is also based on same Criminal law. The Qisas and diyat Ordinance, 1979 relating to the offences affecting Human body in the spirit of injunction of Islam inserted in Pakistan Penal Code defines different kind of qatl and Hurts, in Chapter XVI PPC. Qatl-i-Amd has been defined in section 300 PPC and punishment of Qatal-i-amd has been provided under section 302 PPC, whereas Qatl-i-Shibh-i-Amd and qatl-i-Khata have been defined in section 315 and 318 PPC and punishment of Qatl-i-Shibh-i-Amd and Qqtl-i-Khata has been provided under section 316 and 319 PPC respectively, Whereas qatl-bis-Sabab is punishable under Section 321 PPC, qatil-i-Amd, Qatl shibh-i-Amd and qatl-i-Khata have been described in Holy Quran whereas Qatl-bis-Sabab has been described in Sunnah of Holly Prophet (PBUH).

10. The detail examination of the matter in the light of the law of Islam as ordained Holly Quran and Sunnah of Holly Prophet (PBUH) would show that concept of Diyat, arsh and Daman in Islam is different to the law of compensation in Civil, Criminal and general law. Diyat is defined in Section 323 PPC payable by the offender to the legal heirs of the deceased in cases of Qatl-i-amd, Qatl-i-Khata, and Qatl-bis-sabab but Diyat is not a simple compensation, in lieu of damages rather it is a sort of punishment which is only payable in the cases in which the offence is not liable to the enforcement of Qisas, or Qisas is not enforceable, whereas, Arsh and Daman is paid in hurt cases.

In Short, Diyat is a compensation/blood money as specified in injunction of Islam, and is payable in Cases of Qatl-i-Amd if it is not liable to Qisas or Qisas is not enforceable. Diyat is also payable as punishment in Cases of Qatl-i-Khata or Shibh-i-Amd and Qatl bis Sabab, because these offences are not liable to Qisas. Qisas means punishment by causing similar hurt on the same part of body of offender in the same manner as he has caused hurt to the victim in committing Qatl-i-Amd and if offence of Qatl-i-Amd is not proved to be liable to Qisas or punishment of Qisas is not enforceable, the offender may be liable to the punishment of Diyat with imprisonment as Tazir.

“The Holly Quran in Surah Albaqrah addressing the believers says “O you have faith; Qisas is prescribed for you in the matter of unlawfully murdered. In the same Surah of Holly Quran, concept of forgiveness and payment of blood money has been described. The command of Holly Quran in the above Surahs and in some other verses of Holly Quran revealed at different occasions is that in addition to the individual responsibility of offender, the Government in a Muslim State being responsible to provide full protection to the life and property of its citizens is directly or indirectly responsible to pay compensation for the damage caused to the life or property of a citizen, in accordance with the injunction of Islam.

11. The essential question requiring determination relates to the classification of offences for the purpose of payment of diyat or compensation in case of loss of life to the legal heirs of victim and in case of bodily injury to the injured. There are distinct offence and the offences relating to human body also are of different characteristics, therefore, the payment of compensation or diyat as the case may be, in such offences in all circumstances may not be an obligation of Government. The sectarian hatred and difference of opinion in religious matters is not as such an offence whereas sectarian violence or killing for difference of religious opinion or sectarian hatred is an offence within the ambit of terrorism. The imposing or spreading a religious opinion on others by force and violence is also a crime of the

nature of terrorism and sectarian crimes accordingly can be categorized with reference to the nature of transaction. There is no concept of division of Muslim in different sects or religious difference in Islam, therefore, killing of each others on account of difference of opinion is a *fasad-fil-ardh* which is a serious crime and is strongly prohibited in Islam. The use of derogatory and insulting language showing disrespect to the sacred and Holy persons is religious offence under the law and in general terms is called Blasphemy.

The religious offences have been defined in Section 295 to 298-C PPC and a person by using derogatory words against the sacred and Holy persons commits an offence of Blasphemy and may not be entitled to any concession in law or also may not deserve to any leniency in the matter of punishment as the religious offences apart from causing injury to the religious, feelings of the people considered serious crime against the society. The religious offences are not compoundable and neither the state nor an individual or a group of religious sect can compound such an offence and grant pardon to an offender of religious offence. Blasphemy is irreverence towards God, religion, a religious icon "Holy Person" and something considered sacred. Blasphemy is malicious revilement of God and religion which was considered a crime is common law of England and in some of the countries of world it is an offence under Statutory Law.

12 The insult and disgrace of Holy Prophet (PBUH) is a most serious offence in Islam and in the words of Holy Quran if an act of Blasphemy in respect of Holy Prophet (PBUH) is committed by a Muslim by faith, he is Murtid and a Murtid is wajib-ul-qatal in Islam. The insult of Holy prophet (PBUH) in any manner is an offence under Section 295-C which is punishable with death or life imprisonment as under:-

"295-c. Use of derogatory remarks etc., in respect of Holy prophet.
Whoever by words, either spoken or written, or by visible representation, or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy prophet Muhammad (PBUH) shall be punished with death, or imprisonment for life, and shall also be liable to fine."

The insult of Holy Prophet (PBUH) by words or otherwise directly or indirectly is very serious matter in Islam and if a person Muslim by faith is found guilty of an act of disgracing the Holy Prophet (PBUH), he is treated most hated person in Muslim society and may be a Murtid. The disgrace or insult of Holy prophet Muhammad (PBUH) is extremely a sensitive matter as no Muslim in Muslim or Non-Muslim state can take any exception to the high respect and honour of holy prophet. The Holy Quran in Surah Ahzab Ayat No. 06 and 36 ordained as under:-

Surah Ahzab Ayat No. 06

یہ نی مسلمانوں کا ان کی جان سے زیادہ الگ ہے (ف ۲۷) اور ان کی بیان ان کی بائیں ہیں (ف ۱۵) اور شدہ والے اللہ کی کتاب میں ایک درس سے زیادہ تر بیان (ف ۲۶) ہے نسبت اور مسلمانوں اور مجاہدوں کے (ف ۲۸) اگر یہ کہ تم اپنے دوستوں پر کوئی احسان کرو (ف ۱۸) یہ کتاب میں لکھا ہے (ف ۱۹)

الَّذِي أَوْتَ إِلَيْهِ الْمُؤْمِنِينَ مِنْ أَنفُسِهِمْ وَأَزْوَاجُهُمْ أَمْهَنْتُهُمْ وَأُولُو الْأَرْحَامِ
بَعْضُهُمْ أَوْلَى بِعَيْنٍ فِي كِتَابِ اللَّهِ مِنَ الْمُؤْمِنِينَ وَالْمُهَاجِرِينَ إِلَّا
أَنْ تَفْعَلُوا إِلَيْنَا أُولَئِكُمْ مَعْرُوفُونَ كَلَّا ذَلِكَ فِي الْكِتَابِ مَسْطُورٌ ①

“This prophet is the owner of the Muslims even more than their own selves and his wives are their mothers. And blood relations are nearer to one another in the Book of Allah than other Muslims and emigrants but that you do any favour to your friends. This is inscribed in the Book”

Surah Ahzab Ayat No.36

وَمَا كَانَ لِمُؤْمِنٍ وَلَا مُؤْمِنَةٍ إِذَا قَضَى اللَّهُ وَرَسُولُهُ أَمْرًا أَن يَكُونَ لَهُمْ
الْخِيَرَةُ مِنْ أَمْرِهِمْ وَمَن يَعْصِي اللَّهَ وَرَسُولَهُ فَقَدْ ضَلَّ ضَلَالًا مُّبِينًا

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It is not far a believing man or a believing woman, when Allah and His messenger have decided a matter, that they should (thereafter) have any choice about their affair. And whoever disobeys Allah and His Messenger has certainly strayed into clear error.

The Holy Prophet (PBUH) in the context said as under:-

“None of you can be a Momin (Complete) until you love me more than your children, parents and the whole Mankind”.

13. The Almighty Allah further in Surah Al Imran Ayat No.30, Surah Al Nisa Ayat No.115, Surah Al A’raf Ayat No. 184 and Surah Noor Ayat No. 63 dictates for the love and high respect of Holy Prohpet(PBUH) as under:-

Surah Al Imran Verse 30

يَوْمَ تَجِدُ كُلُّ نَفْسٍ مَا عَمِلَتْ مِنْ خَيْرٍ مُّحْضَرًا وَمَا عَمِلَتْ مِنْ سُوءٍ تَوَدُّ
لَوْ أَنْ بَيِّنَهَا وَبَيِّنَهُ أَمَدًا بَعِيدًا وَيُحَذِّرُ كُمْ أَنَّ اللَّهَ نَفْسَهُ وَأَنَّ اللَّهَ رَءُوفٌ

بِالْعِبَادِ

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The day when every soul shall find presented whatever it did of good and whatever it did of evil; it will long, would there be a far distance between it and me. And Allah warns you of His torment; and Allah is kind enough over His bondsmen.

Surah al Nisa Ayat No. 115,

وَمَنْ يُشَاقِقُ الرَّسُولَ مِنْ بَعْدِ مَا تَبَيَّنَ لَهُ
 الْهُدَىٰ وَيَتَبَعُ غَيْرَ سَبِيلِ الْمُؤْمِنِينَ نُولِهِ مَا تَوَلَّ وَنُصِّلُهُ
 جَهَنَّمُ وَسَاءَتْ مَصِيرًا



And whoso opposes the Messenger after the right way has become clear and follows a way other than the way of Muslims, we shall leave him on his own conditions and shall cause him to enter; and what is an evil place of returning.

Surah Al A'raf ayat No. 184

أَوَلَمْ يَتَفَكَّرُوا مَا يَصَاحِبُهُمْ مِنْ جِنَّةٍ إِنْ هُوَ إِلَّا ذِيْرٌ مُّبِينٌ



Do they not ponder that there is no relation of insanity to their companion? He is only a warner manifests.

Surah Noor Ayat No. 63

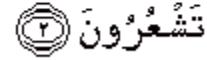
لَا تَجْعَلُوا دُعَاءَ الرَّسُولِ بَيْنَكُمْ كَدُعَاءِ بَعْضِكُمْ بَعْضًا قَدْ يَعْلَمُ اللَّهُ
 الَّذِينَ يَتَسَلَّلُونَ مِنْكُمْ لِوَادِأً فَلَيَحْذِرِ الَّذِينَ يُخَالِفُونَ عَنْ أَمْرِهِ أَنْ
 تُصِيبَهُمْ فِتْنَةٌ أَوْ يُصِيبَهُمْ عَذَابٌ أَلِيمٌ



Make not the summoning of the Messenger among yourselves, like one calls the other among you, Undoubtedly, Allah knows those of you who slip away quietly taking shelter of any excuse' therefore let those who do against the command of the messenger fear lest some trial befall them or painful torment overtake them.

The Holy Quran in Surah Al Hujraat Verse No. 2 commands as under:-

يَتَأْيِهَا الَّذِينَ ظَاهَرُوا لَا تَرْفَعُوا أَصْوَاتَكُمْ فَوْقَ صَوْتِ النَّبِيِّ وَلَا تَجْهَرُوا
 لَهُ وَبِالْقَوْلِ كَجَهْرٍ بَعْضُكُمْ لِبَعْضٍ أَنْ تَحْبَطَ أَعْمَالُكُمْ وَأَنْ شُرُّمْ لَا
 تَشْعُرُونَ



“O believers Raise not your voices above the voice of the Communicator of unseen (the Prophet) and speak not aloud in presence of him as you shout to one another, lest your works become vain while you are unaware.”

14. The Muslims in the world firmly believe in oneness of God and Holy prophet Muhammad (PBUH) as the last Prophet. The entire Muslim world give very high respect and honour to Holy Prophet (PBUH) and true Muslim, having respect and honour for Holy prophet (PBUH) cannot even think of use of any insulting or derogatory language showing disrespect to the honour and dignity of Holy Prophet (PBUH).

15. The killing of a person by his fellow person in ordinary circumstances as has been defined in Section 300 PPC is an offence of Qatal-i-Amd which is punishable under Section 302 PPC and question whether a killer of a person who committed an act of blasphemy of Holy Prophet (PBUH) which is an offence under Section 295-C PPC punishable with death or life imprisonment can also be held guilty of Qatal-i-amd within the meaning of Section 300 and 302 PPC would essentially require determination to distinguish the nature of two transaction for the purpose of punishment, Section 300 and 302 PPC provide as under:-

“300. Qatal-i-amd. Whoever, with the intention of causing death or with the intention of causing bodily injury to a person, by doing an act which in the ordinary course of nature is likely to cause death, or with the knowledge that his act is so imminently dangerous that it must in all probability cause death, causes the death of such person, is said to commit qatal-e-amd.”

302. punishment of qatl-i-amd: Whoever commits qatle-e-amd shall, subject to the provisions of this Chapter be:

- (a) Punished with death as qisas;
- (b) punished with death for imprisonment for life as ta’zir having regard to the facts and circumstances of the case, if the proof in either of the forms specified in Section 304 is not available; or
- (c) punished with imprisonment of either description for a term which may extend to twenty- five years, where according to the injunctions of Islam the punishment of qisas is not applicable.

16. The plain reading of the provision of Section 300 and 302 PPC may suggest that intentional killing of a person is Qatal-i-amd liable to the punishment of death as Qisas under Section 302 (a) PPC or death or life imprisonment under Section 302 (b) PPC as Tazeer but the killing of a person who insulted Holy Prophet (PBUH) in terms of Section 295-C PPC may not be an offence of Qatal-i-Amd punishable under Section 302 (a) or (b) PPC. The blasphemer of Holy Prophet (PBUH) is liable to the punishment of death or life imprisonment under Section 295-C PPC and a Blasphemer is also a most hated person in the society and in Islam he is Murtid, therefore, it may not be possible to bring the act of killing a person who committed an act of Blasphemy of Holy Prophet (PBUH) within the

ambit of Qatal-i-Amd for the purpose of death as Qisas or Tazeer and transaction in such a case may fall within the ambit of Section 302 (C) PPC for the purpose of punishment.

The provision of Section 295-C PPC with reference to the Quranic version referred above is based on concept of high respect, honour and dignity of Holy Pophet (PBUH) and punishment provided therein is also quite in consonance with the injunction of Islam. Therefore, this is an obligation of state in a Muslim community to set the law at motion against the person who commits an act of Blasphemy of Holy Prophet (PBUH) and in case of failure of state, the killing of such a person by a fellow person for committing act of causing insult to Holy Prophet (PBUH) may not be considered Qatal-i-Amd. The killing of a person for his act of killing of a fellow person as a result of private revenge or enmity is entirely different to the killing of a person for causing hurt to the religious faith and feelings of a Muslim by showing disrespect to Holy Prophet (PBUH). The killer of a Blasphemer of Holy Prophet (PBUH) has no personal motive or private enmity or revenge to equate the two transaction in same scale within the definition of Qatal-i-Amd.

17. The act of disgracing the Holy Prophet (PBUH) in any manner being most sensitive matter in a Muslim society is not at all tolerable by the Muslims and this is well known in all Muslim and non Muslim societies that a true Muslim cannot digest insult of Holy Prophet in any manner as the high respect of Holy Prophet (PBUH) is part of religious faith of Muslims.

18. The reaction of a Muslim on causing the insult to the Holy Prophet Peace be Upon Him is not for nay worldly consideration rather it has deep concern with religious faith of a Muslim and causing hurt to the religious faith of a person, is a grave religious provocation and if in consequence to such provocation, the Blasphemer of Holy Prophet (PBUH) is killed under the influence of religious faith it may not be as such an act of Qatal-i-Amd punishable under Section 302 (a) or (b) PPC.

19. The disrespect to Holy Prophet (PBUH) in any manner is not acceptable in Muslim society and consequently no person either Muslim by faith or a non muslim has any right to behave in disrespectful manner in the honour of Holy Prophet (PBUH) . The act of showing disrespect to Holy Prophet (PBUH) may gravely injure the sacred feeling of a Muslim with very serious consequence.

In Islam the place of an offender of an offence of Blasphemy of Holy Prophet (PBUH) after death is hell and he is not an innocent person in life or after death, therefore, the killing of such a person by a fellow person is neither an act of Qatal-i-Amd in terms of terrorism or otherwise nor it is a sectarian killing within the preview of an act of terrorism to be tried by the special court established under Anti-Terrorism Act, 1997.

20. The net result of above discussion is that the insult of the Holy Prophet (PBUH) in any manner and in any circumstance is not digestible by a true Muslim

and if a Muslim under the influence of his religious feelings kills a Blasphemer of Holy Prophet (PBUH), he may not be liable to the punishment of Qatal-i-Amd under Section 302 (a) and (b) PPC rather he being guilty of an act of taking law in his hand may be liable to the punishment for an offence within the preview of Section 302-C PPC.

21. The concept of state responsibility in respect of the person and property of a citizen subject to the state loyalty is foundation of state in Islam. The Quran is the Supreme Law in a Muslim State and state loyalty is the basic obligation of citizens in the same manner as the state has fundamental duty of protection of life, liberty and property of its citizen. This is well recognized rule of law that a citizen who is not loyal to the state or is involved in anti-state activities has no right to claim any privilege or concession of law, on the basis of principle of state responsibility and a person guilty of an offence under Section 295-C PPC in a Muslim state is not considered loyal to the state.

In the light of foregoing discussion a killer of Blasphemer is neither liable to pay diyat to the legal heirs of deceased Blasphemer nor the state under the concept of state responsibility has any liability to pay diyat for the death of deceased Blasphemer or give any other worldly award to him after death.

23. In Islam the offences relating to human body are not only against the victims but are also against the society and Muslim State in addition to protect the right of an individual is also responsible to protect the interest of society. The offenses relating to the human body under Chapter XVI PPC are compoundable in the manner provided thereunder, but the State authorities or Courts are not empowered to grant pardon to an offender or compound an offence in the cases of Qatl or hurt without the intervention of legal heirs of deceased or a victim, if he is alive. The legal heirs of a deceased in a case of Qatl and a victim of hurt have the right to grant pardon to an offender with permission of Court and without of state with or without payment of compensation, but the Court or state cannot give pardon to an offender or a convict in such cases without consent of legal heirs of the deceased or the victim as the case may be. The state may peruse the private parties for compromise or pardon and forgiveness with or without compensation in the name of Almighty Allah. The common law is that a person who is responsible for causing death or bodily injury to a fellow person in addition to the normal punishment is also responsible for payment of Compensation subject to law and direction of Court. Whereas in a Muslim State, in the light of concept of State responsibility of protection of life, liberty and property of its citizens in Islam, the exception to the general law of individual liability is that if due to the failure of state machinery to maintain peace in the society and administer justice in accordance with law a person suffers or a victim is not provided aid of law for protection of his life and property, the payment of compensation for the loss of life and property of people may be direct liability of State. This is responsibility of States authorities to enforce law and administer the affairs of State for protection of citizens in accordance with law and if due to the negligent act of a State authority, a person has suffered, whether such an act is intentional or accidental or by mistake, the burden is on the State to make payment of compensation for the loss

caused to the victim. The function of Courts in a Muslim State is dispensation of justice and to step into the cases which are brought before the Courts for adjudication and help the parties in settlement of disputes in accordance with law and injunction of Islam.

24. The careful examination of the matter in the light of command of Holy Quran and the injunction of Islam, a Muslim State can take no exception to the responsibility of State for effective enforcement of law to maintain peace. The ruler in a Muslim State being guardian of the citizen is responsible for the protection of life and property of the citizens and if due to bad law and order situation or as a result of unforeseen events, or in consequence to an act of a state authority intentionally or unintentionally, directly or indirectly, willfully or otherwise, damage is caused to the life or property of a person, the Government in the light of principle of the state responsibility is under legal and moral obligation to pay compensation to the victim for the loss caused to him, as a result of such an act. The State machinery must also provide legal aid and help in the matter of recovery of compensation in case of loss caused to a person as result of Criminal act of a fellow person.

25. In the light of dictate of Holly Quran, the protection of life, liberty and property of a person in a Muslim State is responsibility of the State, and State machinery is responsible to maintain peace in the society. The failure of the State authorities to enforce the law effectively may create unrest in the society and also result in the loss of life and property of people because of bad law and order situation, and State being responsible to protect the life and property of people, is under obligation to pay compensation to the aggrieved person for the loss of life or property. The victims of such circumstance may have legal right to claim compensation from the Government, particularly in the cases, **firstly** if loss is caused to the life or property of a person as a result of an act of State or an act of Government or an act of an agent of Government, either such an act was due to the willful negligence of a State authority or otherwise. **Secondly** the damage and loss is caused to a person due to the failure of State machinery to control law and order situation to maintain peace and administer Criminal Justice in the society and **Thirdly**, the loss caused in unforeseen circumstances to the life or property of a person as a result of a natural disaster or act of God.

26. The guarantee of life and liberty subject to law is fundamental right of every citizen provided under Article 3 of Gilgit-Baltistan (Empowerment & Self Governance) Order, 2009 read with Article 9 of the Constitution of Pakistan, as under:-

Article 3 of Gilgit-Baltistan (Empowerment & Self Governance) Order 2009:
Security of Person:- No person shall be deprived of liberty save in accordance with law.

Article 9 of the Constitution of Pakistan: Security of Person:- No person shall be deprived of life or liberty save in accordance with law.

27. The Government of Gilgit-Baltistan in the light of the above provisions in the Governance Order, 2009, read with constitution of Pakistan and the law as is enforced in Gilgit-Baltistan, subject to the injunction of Islam as laid down in the holy Quran and Sunnah of Holly prophet(PBUH) is under legal obligation to protect the life and property of the people and take preventive measures against wrong doers in the society, and if State machinery fails in effective enforcement of law for protection of life and property of the people, the aggrieved person and victims of bad law and order situation may claim compensation as of right from State for the loss caused to them as result of such abnormal circumstances. The concept of State responsibility in Muslim State is that State Government is considered guardian of the people and has fundamental responsibility towards its subjects to protect the citizen from external aggression and internal disturbance and also provide them basic needs of life with security of life and their property.

28. Gilgit-Baltistan is sovereign part of Pakistan and territory of Gilgit-Baltistan is governed by Gilgit-Baltistan (Empowerment and Self Governance) order, 2009. The laws of Pakistan by virtue of Article 95 of the Governance order 2009 are applicable to the territory of Gilgit-Baltistan and although the Constitution of Pakistan is not directly applicable to this special territory but the principle of Constitution may apply without any exception. In the Constitution of Pakistan Article 2 provides that Islam shall be the state religion and by virtue of Article 2-A of the Constitution, Objective Resolution, 1949 based on the concept of Islamic way of life and sovereignty of State has been made substantive part of the Constitution as under:-

“The principles and provisions set out in the objectives Resolution reproduced in the Annexure are hereby made substantive part of the Constitution and shall have effect accordingly.”

Article 227 of constitution of Pakistan and Article 49 of Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 provide that no law contrary to the injunction of Islam shall be enacted. This is to be seen that (Empowerment and Self Governance) order, 2009 has been issued by the Government of Pakistan in exercise of power under Article 258 of constitution of Pakistan, and under the provision of Article 49 Governance Order, 2009, any Law or provision of law enforced in Gilgit-Baltistan if enacted in conflict to the spirit of Islam shall be treated repugnant to the injunctions of Islam as ordained in the Holy Quran and Sunnah of Holy Prophet (PBUH). The objective resolution 1949 has been made substance part of Constitution of Pakistan by virtue of Article 2-A of the Constitution and people of Gilgit-Baltistan being citizen of Pakistan in terms of Citizenship Act 1951 would be governed accordingly and State authorities in Gilgit-Baltistan must follow the spirit of this resolution and relevant provisions of constitution of Pakistan. The Anti-Terrorism Act 1997 is a special law which has been enacted by the parliament of Pakistan for better administration of Criminal Justice and speedy decision of cases falling thereunder to maintain peace in the society and this law generally except certain provision is in consonance with the spirit of Constitution of Pakistan and Injunction of Islam.

29. The careful examination of the proposition in the light of provisions of constitution of Pakistan and the law on the subject read with Gilgit-Baltistan (empowerment and self Governance), Order 2009, and the concept of responsibility of Muslim state in Islam, we would not take any exception to the direction given by the trial court in the present case and observation made by the Chief Court on the question of payment of Diyat to the legal heirs of the deceased. However it is, necessary to laid down criteria for determination of the question regarding the direct or indirect responsibility of State in respect of payment of Diyat and Compensation to the aggrieved person for guidance as under:-

- a. In criminal cases relating to human body which are compoundable, the parties may at any stage of the proceeding before or after commencement of trial or execution of sentence effect compromise and aggrieved party may forgive the offender with the permission of Court, with or without payment of Diyat or compensation as the case may be.
- b. In case of self defence a person may not be liable to pay Diyat etc but parties may effect compromise with or without payment of compensation and State authorities in such cases without consent of the aggrieved person cannot grant pardon to an accused.
- c. The State Government is liable to pay compensation to the legal heirs of victims of terrorisms or of sectarian killing and in all other Criminal cases which remained untraced either, because of negligence of State functionaries or otherwise or as a result of failure of State to maintain law and order situation for protection of its citizens.
- d. The damage if any is caused to the person or to the property of an individual due to an act of Government or its agent or as a result of an act of State or due to any natural calamity, or disaster, the state/Government is responsible to pay compensation to the aggrieved person.
- e. In all other cases in which a person is victim of wrong act of fellow person, the state must provide necessary protection of law to the aggrieved person and also provide assistant for recovery of the loss caused to the victim. If in consequence to judicial determination a direction is given by the court for payment of Diyat or compensation, by a person to another person, the state is responsible for effecting recovery of the amount of Diyat compensation from the person who has been directed to make payment through the machinery of law for payment to the aggrieved person and in case of failure of state machinery to discharge its duty, the amount of compensation or Diyat etc as the case may be, shall be paid by the Government from state exchequer and may subsequently effect recovery from defaulter.
- f. The payment of amount of Diyat as per direction of the court or in case of compensation between the parties must be paid within reasonable time but not more than three years as provided in Section 331 PPC.

In untraced and national disaster cases the payment of Diyat/Compensation is exclusive responsibility of State and in normal circumstance must be paid within

six months from the date of incident/occurrence, Diyat shall be paid in accordance with the rules notified from time to time by the Federal Government of Pakistan and compensation as per determination of concerned authorities. In all other cases the payment of diyat etc required to be made by a person, if is not paid within the prescribed time, and State machinery failed effect recovery of Diyat amount, Diyat will be paid by the Government from State exchequer and may ultimately recover from the person liable to pay.

g. Subject to all just exceptions the government under the concept of state responsibility has no obligation to pay diyat or compensation as the case may be to the legal heirs of deceased person who was killed by a fellow person for being not loyal to state or for committing an act of Blasphemy of Holy Prophet (PBUH) and such person is also not entitled to any worldly award after death.

30. In consequence to the above discussion, we hold that subject to the exceptional cases referred above, State is under legal obligation to pay compensation or Diyat as the case may be under the principle of state responsibility.

The failure of the official agencies of Government in tracing out the Criminal cases is gross negligence of the state functionaries, and consequently, in the light of principle of State responsibility in all untraced Cases, this is liability of the Government to make payment of Diyat as compensation to the legal heirs of deceased and to the victim in hurt cases, in accordance with law. The Government in all untraced murder and hurt cases either of sectarian nature or as a result of terrorism or otherwise, without any distinction, in the light of principle of State responsibility, must pay diyat/compensation to the aggrieved person/victim within six months.

31. In the light of concept of State sovereignty and responsibility of state Government in Islam, the questing regarding payment of Diyat/Compensation by the state as its liability to the citizens in peculiar circumstances as mentioned herein above has been answered accordingly. The Criminal Petition filed by the state against the Judgment of Chief Court under challenge is dismissed.

Chief Judge

Judge

Judge