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CONSIDERATIONS ABOUT THE PROMULGATION
OF THE PAKISTAN ORDINANCE ON QISAS AND DIYA
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On September the 5th 1990 Pakistan’s President promulgated the Ordinance called “of Qisas and Diya”, to amend the Penal Code and the Code of Criminal Procedure in order to bring them in conformity with the injunctions of Islam as laid down in the Holy Quran and Sunna. It was a clear indication of the will to continue along the same lines the islamization process began under the late Zia ul-Haq in 1979 with the Hadd, and Zakat and Ushr Ordinances. Premier Nawaz Sharif seems to have paid in this way his debt with the traditionalist and fundamentalist forces which contributed to his advent to power. It is true that no Pakistani government can afford to ignore the Islamic issue, and that the quest of legitimation on Islamic basis has been a constant in Pakistan’s history since the very beginnings of the state, having the juridical question as its focus. But the problem connected with the relation between shari’a and state’s laws – i.e. shari’a is to be considered as a source of inspiration and an ultimate point of reference or as a law to be applied in its entirety? Who are the interpreters of the law? Is legislative activity possible, and if so, in what ways and to what extent? – has not a univocal solution. Modernists and traditionalists, secularists and Islam-pasands have been proposing their theories to the politicians, who inclined towards the ones or the others at different times. The measures adopted, anyway, seem to have been always more respondent to the political needs of the moment than to a sincere will to try a full-scale socio-political experiment implementing one or the other of the various proposals for an Islamic state.

2 Dr. Mushir Al-Haq, “Pakistan aur qanun-i shari’a”, in Dr. Saiyyd `Abid Husayn, Islam aur `usri jadid, New Delhi 1963, pp. 79-89.
Even the Islamization policy of Zia ul-Haq has been classified as "political noise".

The law on qisas and diya, draft in December 1980 by the Council of Islamic Ideology, was passed by the Majlis-i Shura in August 1984, and then came to a standstill. This was due, perhaps, to a changed political situation, or also to the realization of the inherent difficulties. In fact, from a juridical point of view, the modification of that monument which is the Penal Code (Act XVI of 1860) by the introduction of rules providing for talion and blood-money in cases of homicide and hurt, implies bigger problems than the introduction of the Hadd punishments. A comparative analysis of the Ordinance’s text will help to grasp the implications of its adoption. The comparison will be not only between the amended and substitutive texts, as it is obvious, but will also take into account the relevant parts of the law-books that were considered as authorities in India before the advent of the Penal Code.

The Qisas and Diya Ordinance substitutes sections 53 and 299-338, and amends section 109 of Act XLV of 1860, amending moreover sections 337, 338 and 381, together with Schedule II of Act V of 1898.

Section 53 of Act XLV of 1860, on punishments, provided for five of them – death, imprisonment for life, forfeiture of property and fine –, before which the new text puts other five – qisas, ta’zir, diya, arsh and zaman. Qisas is Arabic for lex talionis, applied to the cases of wilful murder and certain kinds of hurt. Diya is blood-money for culpable homicide; arsh is the indemnity due for hurt.

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3. S.C. Sirkar in his The Muhammadan Law, Calcutta 1983, p. 56, states that among the legal texts generally used in India the most followed were Fatawa-i Alamgiri and Hidayat, translated in Persian before the British period. As for criminal law the British took care very soon to get translations of the books on Jinaya and Hadud of the above mentioned texts, first in Persian and then in English.
7. Ibidem, sub voce “diya”.
8. Ibid.
and zaman, literally security 11, here indicates a fine awarded by the judge when hurt is not liable to arsh 12. The Islamic terms do not mean anything really new – except phisical injury now made legal as talion for hurt – because death can be awarded as qisas; imprisonment as ta’zir; fine as diya, arsh or zaman. The real difference lies in the legal system to which the terms introduced make reference and in the concepts underlying them. Without a complete reformulation the rule becomes a juridical hybrid, where concepts derived from a system are inserted on a basis belonging to another one.

Section 109, on abetment, which provided the same punishment fixed for the offence to be awarded to the culprits of abetment if the act abetted was committed in consequence of the abetment, is now integrated by a paragraph, to be added at the end, where the abettor of an offence provided for in Chapter XVI and not committed under constraint – ikra-i tam – shall be awarded the punishment provided for the aforesaid offence as ta’zir. Here, for ta’zir can be understood simple imprisonment, rigorous imprisonment, imprisonment for life, and death; including death among the discretionary punishments though ordinarily the ta’zir means a lesser punishment 13.

Section 299-338 comprise the rules about homicide and hurt of Chapter XVI, on offences affecting the human body.

Section 299, that defined the offence of culpable homicide, now is a list of definitions necessary to the understanding of the terms borrowed by the classic Muslim law. In it the term “adult” is defined in conformity with Muslim law, and takes as parameter for the coming of age not only the completion of a stated number of years but also the attainment of puberty, whatever comes first.

Section 300 once defined murder, now translates it in qatl-i ’amd. Intention remains the element distinctive of the offence, and nothing is said about the criterion of its ascertaining. Hanafi law, the most widespread in the subcontinent, adopts the instrument of the killing as an indication of ’amd, stating that “as the intention is a thing concealed, which we cannot discover but by inference from something affording an argument of it, and the use of an instrument of murder does afford such argument, it may be concluded, where

12 Ordinance’s text, p. 399.
such an instrument is used by the slayer, that murder was his intention" 14. In this way, killing by drowning or poisoning cannot be classified as qatl-i ‘amd. This was one of the reasons for the implementation of the so called Cornwallis Code of 1793, which enforced the modification advocated by Lord Cornwallis 15 in the Muslim criminal law then administered by the British 16.

Section 301 provided that in case of mistake in the victim, the offence had to be considered as identical to that the offender meant to commit. Now it states the same thing, substituting qatl-i ‘amd for murder. Muslim law casuistry do not comprise this offence, for which there is no specific term, but the modern legislators have accepted the idea that death provoked with the intention to kill must be punished even when it reaches the wrong objective, in obedience to the concept of the transferred malice.

Section 302, once punishment for murder, is now, as should be expected, punishment for qatl-i ‘amd and, like the former, provides for death and imprisonment for life, but under the shape of qisas and tażir. Tażir can also mean imprisonment up to twenty-five years when the offence is not liable to qisas. The last two clauses of the substitutive text signal the concern to limit as much as possible the occurrence of offenders escaping punishment thanks to the technicalities of the law of qisas. Once again, this concern seems to be shared with the XVIII century British administrators of Bengal 17.

Section 303, previously on punishment for murder by life-convict – case not contemplated by the amended text –, is now on qatl committed under ikra-i tam or ikra-i naqis. Definitions (g) and (h) of Section 299 state that ikra-i tam means putting any person, his spouse or any of his blood relations within the prohibited degree of marriage in fear of instant death or instant permanent impairing of any organ of the body or instant fear to be subjected to sodomy or zina bi’l jabr; and that ikra-i naqis means any form of duress which does not amount to ikra-i tam. These kinds of constraint prevent qatl from being ‘amd, intentional. Therefore the actual executioner of the killing is no more liable to qisas, but shall be awarded up to ten years imprisonment, while the agent of the compulsion shall be liable to the same punishment provided for the offence committed.

15 The fullest and most systematic account of criminal law applied in India before the Code is to be found in Beaufort’s Digest of Criminal Law for the Presidency of Fort William, Calcutta 1849.
16 G.K. Rankin, Background to Indian Law, Cambridge 1946, p. 170.
17 M.P. Jain, Outlines of Indian Legal History, Bombay 1972, p. 416.
under compulsion, in case of ikra-i tam. If ikra-i naqis is the case, it is the other way round: the actual executioner is liable to punishment provided for the offence committed, and the agent of the compulsion to imprisonment up to ten years. The juridical concept of ikra is taken here in its Hanafi acceptation, which differentiates absolute violence, tam or mutlaq, described as physical constraint and considered as annihilating one’s freedom of will, and imperfect violence, naqis, exerted through verbal means and describable as moral constraint. This too forces one’s will, but it does not suppress it, and the consent so extorted though not completely free is nevertheless existent. There is no agreement on ikra in doctrine, but the Hanafis maintain that in this case qisas is to be applied to the instigator. Pakistani reformers seem to have followed this opinion and remembered al-Ghazali’s statement that killing of a Muslim cannot be excused even if committed under duress.

Section 304, previously on punishment for culpable homicide not amounting to murder, is now on proof of qatl-i ‘amid liable to qisas etc. This proof must be in the form admitted by classical Muslim law, that is confession – to be rendered before the competent court –, and evidence – to be given in the ways provided for by section 17 of the Qanun-i Shahadat, 1984 (P.O. No. 10 of 1984). As it is known, confession and evidence – of qualified persons in the prescribed number – are the only proofs provided for by Muslim law, which elaborated this subject in detail. But the difficulty of meeting all the requirements of the law was a major obstacle to the action of justice when Muslim law was in force. Discrimination of women, unqualified to render certain kinds of evidence or whose evidence is estimated the half of that of a man excited high-pitched arguments at the time of the introduction of the Qanun-i Shahadat, 1984.

Section 305 does not deal any more with abetment of suicide of child or insane person – this offence has disappeared in the amended Code, which touches the subject of suicide only at section

325 – and states now who is the wali, i.e. the person entitled to ask for the application of talion. In case of qatl the wali is (a) the heirs of the victim according to his personal law; (b) the government, if there is no heir. The attribution to the heirs of the right of requiring the application of qisas, in conformity with classical Muslim law, means that homicide is not considered any more a crime, but a tort. Muslim doctrine, in fact, holds that homicide is not an infringement of God’s right, but of man’s right. When haq Allah is infringed, the right trascends the private interest and the state, as God’s representative, prosecute the offender ex officio and can continue the prosecution even in case of pardon or composition – as it happens for Hadd offences –. But when haqq adami is infringed, as the private individual’s right is regarded as predominant, the injured party, or the Court, will be entitled to drop the case or allow a settlement once it has been started. After more than a century during which homicide was regarded as relevant for the society in general and citizens were taught to take it as such, it becomes now a tort marking a reduction in the value of human life. Classical Muslim concept of homicide finds its foundation in the conditions of VII century Arabia, where blood-feud was almost unrestricted and the law could only try to control it. Islam, in fact, made an effort to minimize the evils of the system by introducing three most salutary restrictions: (a) only the guilty party, and not his fellow-tribesmen, was liable to be killed or wounded, and then only (b) if the homicide or wounding was regarded as both deliberate and wrongful, and (c) after the facts had been established before the ruler or the judge. No attempt was made, however, to change the system, and the original concept of personale vengeance on a basis of tribal custom prevailed upon the emergent idea of punishment by the state on a basis of retributive justice.

The possibility for the government to act as wali in the absence of heirs does not change the status of homicide, which remains a tort, because the government here is merely the heir of those who have no heirs – it can prosecute if the victim has no heirs, but it can’t if the heirs simply choose of not asking for a prosecution.

23 L. Kabir, Lectures on the Pakistani Penal Code, Dacca 1970, p. 9, says “Although two kinds of wrongs are clearly distinguishable, yet many crimes include a tort or civil injury; but every tort does not amount to a crime, nor does every crime include a tort. For example, conversion, private nuisance, wrongful distress, etc., are merely torts. Similarly, forgery, perjury, homicide, etc., are examples of crimes but not torts”.
Section 306, previously on abetment of suicide, provides now a list of cases not liable to qisas for qatl-i 'amd. As in classical doctrine, qatl-i 'amd is not liable to qisas when the offender is a minor or insane, or is a direct ascendant of the victim, while the direct descendants of the offender cannot act as wali even if heirs of the victim. This means that a father cannot be executed in return for the killing of a son, nor that a son can ask for the application of talion to his father if this killed his mother.

Section 307, which defined the attempt to murder – offence not contemplated by the amended text – states now that qisas for qatl-i 'amd cannot be applied (a) when the wali waives the right of qisas or compounds, (b) when the right of qisas devolves on the offender as the result of the death of the wali of the victim, (c) or on the person who has no right of qisas against the offender. It is a completion of the preceding section and the contents of both becomes clear when reading the next section – not any more on the attempt to commit culpable homicide – which establishes the punishment for qatl-i 'amd not liable to qisas. The first clause says that the offender shall pay blood money, and in certain circumstances be liable to imprisonment up to fourteen years as ta'zir. The second clause gives to court faculty to award imprisonment upto fourteen years to the offenders, to be added to the payment of diya.

Section 309 – once on attempt to commit suicide, offence now dealt with in Section 325 – provides for the waiving of qisas in qatl-i 'amd and gives the right to renounce the talion to the sane and adult wali at any time and without any compensation, but not to the government acting as wali. When there is more than one wali, every one of them has the right of waiving qisas, provided that the heirs who do not renounce maintain their right to receive their share of blood money. When the victims are more than one, the waiving of the wali of one of them does not touch the right to qisas of the heirs of the others. Finally, if there is more than one offender, the wali waiving qisas towards one of the offenders keep his right towards the other ones. The subject of waiving of talion is variously discussed in doctrine and there is no agreement among the schools nor among the major representatives of one school. Doctrinal disputes, with their extremely detailed casuistry, display the nature of private vengeance that Muslim law attributes to the punishment for homicide. In fact the choice of requesting the application of talion, or pardon-

\footnote{\textit{Hedaya}, vol. IV, pp. 281-2.}
ing the culprit with or without compensation, rests always on the discretion of the wali 26.

Compensation, sulh, is the subject of the following section — previously on thugs, now dealt with in section 326 — which establishes the right of the heir to accept it instead of requesting talion. Compensation cannot be less than blood money, nor the mere giving a woman as wife can be considered sufficient sulh. The government acting as wali cannot waive qisas except in exchange of a sum which cannot be less than diya. The rule is in conformity with Hanafi doctrine, that admits composition in every case of homicide, but excludes it in hadd offences — because these are infringements of God’s right, which in Muslim law is the equivalent of the modern public law 27.

Section 311, previously on punishment of thugs, carries on the subject dealt with in the preceding two sections, and tries to mitigate the fact of leaving unpunished offenders for homicide who received wali’s pardon, either unconditioned or in exchange for compensation. It states that, in case of waiving of talion, the court can award the offender imprisonment up to ten years, fourteen in case of relapse, as ta’zir.

The private vengeance’s nature of punishment for homicide as conceived by classical Muslim law emerges again in Section 312, which is not any more on causing miscarriage — subject now provided for in Section 338-338C —, but deals with the killing of a pardoned culprit by the wali of the victim. In this case the wali is liable to qisas if he was the one who waived talion, with or without compensation, but if he was unaware of the pardon he’ll be liable to diya only. This introduces the subject of the execution of qisas, provided for in Section 314, legalizing the possibility that a private individual takes the law into his own hands. This introduces the concept of lawful homicide, which finds its source in the Quran:

“Neither slay any one whom God hath forbidden you to slay unless for a just cause” (XVIII, 35).

In later times the jurists elaborated the principle recognizing three just causes: apostasy, deliberate homicide and adultery. Anyway, until the state structure is not sufficiently articulated as well as solid and generally accepted, the right of taking human life, within the limits of the cases provided for, does not belong exclusively to the state. As the offender, committing a prohibited act, excludes

himself from the community’s protection, he becomes fair game, as it happened in ancient German custom and in the practice of the Republic of Venice up to the XVI century. The case provided for in section 312 is an extremely restricted instance of direct individual intervention, nevertheless it is a clear indication of the fact that the Pakistani state, in receiving classical Muslim law, admits that an individual citizen, if qualified as wali, can kill a human being, if qualified as culprit of wilful homicide.

Section 313, replacing that on causing miscarriage without woman’s consent, is a resumption of what established in section 305, because it confirms that the right to request talion belongs to each of the heirs of the victim, that the right goes to the government if there is no heir and that it devolves to the father, grandfather etc. if the heir is a minor or insane. The rule is wholly in conformity with Hanafi law, and the fact that the government can act ultimately as wali is not to be regarded as an innovation, because in classical law the ruler or judge is considered as the guardian or representative, for all purposes, of those who have no natural guardians or heirs. It seems interesting to note that Muslim law, even still regarding homicide as a tort, adumbrates here the possibility to develop a conception of it as a crime.

Section 314, previously on death caused by act done with intent to cause miscarriage, fixes now the form for execution of qisas in qatl-i ‘amd. The execution shall be performed by a functionary of the government in agreement with the directions of the court, in presence of the walis or their representatives. Otherwise it is necessary that an officer authorised by the court gives his permission to carry on the execution in their absence. As it is provided for in the Hadd Ordinances, 1979, if the convict is a pregnant woman the court can grant a delay in the execution of two years after delivery, and in the meantime she may be released on bail or furnishing of security, or be kept in prison and be dealt with as if sentenced to simple imprisonment.

Hanafi law prescribes that the wali must execute qisas personally, by means of a deadly weapon, preferably a sword, and takes care that the executioner does not exceed his right, because “if the executer of retaliation executes upon the murderer the same act that he had committed on the deceased, and the end is not thereby answered, and he then puts him to death, he takes more than he is

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28 F. Cordero, Criminalia, Bari 1985, p. 11.
entitled to, a thing which must be carefully avoided” 30. When the wali is a minor or insane, great care is taken again in establishing exactly who will execute talion personally. Thus, the infliction of talion is clearly regarded as satisfying an individual thirst for vengeance by acting in person in killing the culprit. Classical law, in giving the directions for the execution, attributes to the authority the minimal object of acting as supervisor of the vengeance. The marginal role given to the government authority, rather than humanitarian considerations, prompted Warren Hastings to advocate the abolition of the rule which required the children, or the nearest of kin of the deceased, to execute the sentence passed on the murderers of their parents or kinsmen, as well as he asked for that of the privilege granted to the sons or nearest of kin to pardon the murderers of their parents or kinsmen. In Hastings’ opinion, in fact, these rules underlined the prevalence of the right of the individual against that of the government, and deprived the state of one of its fundamental powers, thus contradicting the first principle of civil society, by which the state acquires an interest in every member which composes it and a right in his security 31.

Section 315, which dealt with act done with intent to prevent child being born alive or to cause it to die after birth, defines now the offence of qatl shibh-i ‘amd, that Hamilton, in his translation of Hedaya, renders as manslaughter 32. The definition corresponds to the classical one, reference to the instrument included. Literally qatl shibh-i ‘amd means homicide similar to the intentional, in which the victim dies in consequence of a voluntary act, not always but sometimes fatal. This killing is a sin and bring with it, without qisas, the obligation upon the kinsmen of the slayer to pay the heavier diya and to lose any possible inheritance from the deceased, and in addition the slayer is bound to perform kaffara, expiation. In the attempt to conform with these rules, the following section provides that the culprit of this type of homicide shall be liable to diya. The legislators, while deeming it right to stick to the classical typology of homicide, cannot adopt Muslim law rules in their entirety, especially when they refer to principles which do not find place in modern juridical systems – for example that of the collective liability of the ‘aqilas, kinsmen, of the culprit. Therefore in this section no hint is made to kinsmen as responsible for the payment of the diya, to

30 Ibid., p. 283.
31 Jain, op. cit., pp. 408-416.
32 Hedaya, op. cit., vol. IV, p. 274.
which the culprit only is obliged, making no attempt to question the
principle of the personal responsibility. Finally, there is no trace of
kaффara, because even those who pretend to enforce the shari'a com-
pletely, have assimilated the distinction between sin and offence,
ethics and law, and see the inopportunity to revive the practice of
expiation, that used to consist in the manumission of a slave or in a
two months fast. The rule provides instead for the culprit being
liable to imprisonment of either description for a term which may
extend to fourteen years as ta'zir.

Section 317, substituting the provisions for exposure and aban-
donement of child under twelve years by parent or person having
care of it – offence not contemplated in the amended text of the
Code – enforce the classical law rule providing that the culprits of
qatl-i 'amd and qatl shibh-i 'amd are excluded from the inheritance
of the victim.

Section 318, previously on concealment of birth by secret dis-
posal of dead body, continues now the description of the Muslim
law typology of homicide, introducing the offence of qatl-i khata,
translated by Hamilton as homicide by misadventure. Here the
victim dies in consequence of a mistake, be it in the act or in the
fact, as exemplified in the illustrations – A aims at a deer but misses
the target and kills Z who is standing by, A shoots at an object to be
a boar but it turns out to be a human being –, following what stated
in the classic texts. This, like the other homicides not classifiable as
murder, in precedence found place in the category of culpable homicide
provided for in section 299.

Section 319, which before regarded hurt discussed now exten-
sively in sections 332-337Z, is on punishment for qatl-i khata, con-
sisting in payment of diya and, if there is the aggravating circum-
stance of rash or negligent act, also imprisonment upto five years ad
ta'zir. The subject is brought to an end in the following section,
which is not any more on grievous hurt, but on qatl-i khata by rash
or negligent driving, punished with diya and up to ten years impris-
onment. These rules recover those contained before in section 304-
A, on causing death by negligence, that provided for a punishment

33 Pareja, Islamologia, Roma 1951, p. 439.
35 See the illustrations in Qadri, op. cit., p. 297.
36 The other schools distinguish among intentional, accidental and equivalent to
accidental homicide only. V.R. Maydan, "Uqbat: Penal Law", in M. Khadduri
227.
of imprisonment up to ten years and a fine. The provisions of section 320, on grievous hurt, are now postponed in a series of sections which follow in the steps of the detailed Muslim law dispositions.

Section 321, substituting the provisions on voluntarily causing grievous hurt, deals with qatl bi'1 sabab, or indirect homicide, and exhausts the homicides contemplated by Hanafi law, the only one to consider as distinct categories those of the equivalent to accidental and indirect homicide 36. Its definition is taken from the classical texts 37, like the example given as illustration. But the punishment, subject of the following article, does not follow completely the Muslim law rule. In fact, it provides that the punishment for qatl bi'1 sabab, indirect or by intermediate cause homicide, shall be payment of diya, which is due not by the 'aqilas but by the culprit personally. The rule does not mention expiation nor the fact that classical law in this case does not exclude the offender from the inheritance of the victim.

Section 323, that was on punishment for voluntarily causing hurt, subject radically changed with the introduction of talion instead of imprisonment and fine, now fixes the value of diya at the minimum amount of 170610 rupees, equal to the value of 30630 grams of silver, whose official value is to be established every year on the first day of July and published on the Official Gazette. In classical law diya is not always of the same amount, but it is different in different cases – that is, the sum which must be corresponded for manslaughter is different from that to be payed for homicide by misadventure, and the sum that pays the life of a man differs from that to be payed for the life of a woman, and the sum that pays the life of a Muslim is different from that to be payed for the life of a zimmi, and the sum that pays the life of a freeman is different from that to be payed for a slave, and so on. Diya value is fixed in camels, to be handed over to the wali in established groups of different age and sex at fixed days maturities. Disbursement in money is fixed by Hanafis at 1000 gold dinars, or 10000 silver dirms, on the authority of caliph 'Umar 38.

Section 324, previously on voluntarily causing grievous hurt, is now on attempt to commit qatî-l 'amid, offence for which is provided a punishment of imprisonment up to ten years and a fine; provided that the victim maintains his right to request the punishment estab-

37 Ibid., pp. 330-1, Fatawa Alamgiryya, vol. VI, Kitab al-Jinayat, bab VIII, p. 34; E.I., sub voce “diya”.
lished for the hurt he received; provided further that, when qisas cannot be executed, the culprit, in addition to the payment of arsh, may also be awarded imprisonment up to seven years. The first clause of this rule faithfully follows the text of that was previously section 307, attempt to murder, both in describing the offence and in the punishment, merely substituting the term qatl-i ‘amd for murder. The second and third clause, that recall talion and blood money, are completely different, and there is no reference to the attempt to murder by life-convicts – offence that does not exist any more in the amended text –.

Section 325, which was on punishment for voluntarily causing grievous hurt, is now on attempt to commit suicide, and its text is identical to that of section 309 of the previous version of the Code. Attempt to commit suicide is not an offence contemplated by Muslim law, but the legislators deemed right to maintain the pre-existing rule, probably thinking to apply the Islamic precept that forbids suicide, because human life is a divine gift bestowed on man to pursue a certain aim. Suicide’s prohibition, which is absent in the Quran, appears in the Hadith, threatening the suicidal ones with hell, but the canonical law prescribes only their exclusion from funeral ceremonies.

Section 326, substituting the rule on voluntarily causing grievous hurt by dangerous weapons or means, is identical to section 310 of the previous version of the Code, containing a definition of thug. The only difference consists in putting the word qatl instead of murder. This subject is completed by the dispositions of the following section, once on voluntarily causing grievous hurt to extort property or to constrain to an illegal act, and now establishing the punishment for thugs. The rule is literally identical to that once contained in section 311.

Section 328, in substitution of that on causing hurt by means of poison etc. with intent to commit an offence, comprises the same dispositions as those before expounded in section 317, the only difference being a terminological one - qatl-i ‘amd instead of murder, and qatl shibh-i ‘amd and qatl bi’il sabab instead of culpable homicide.

Section 329, previously on voluntarily causing grievous hurt to extort property or to constrain to an illegal act, deals now of concealment of birth by secret disposal of dead body, rule exactly the same as that in section 318 of the preceding version of the Code.

Section 330, before on voluntarily causing hurt to extort confession or to compel restoration of property, is now disbursement of diya, and state that the blood money must be divided among the heirs of the victim in agreement with their shares in inheritance, provided that, where an heir foregoes his share, the diya shall not be recovered to the extent of his share. The following section, substituting that on voluntarily causing grievous hurt to extort property or to constrain to an illegal act, fixes now how diya must be payed. Accepting Hanafi opinion that blood money can always be payed in instalments, provided that the entire amount is corresponded within three years, Pakistani legislators ignore the distinction made by the other schools whether the offence is deliberate or not. The second part of the rule takes into consideration the event in which the payment is not completed, wholly or partially, within the established three years. The culprit shall be kept in prison until the completion of the payment, or he may be released on bail if he furnishes security equivalent to the amount of diya to the satisfaction of the court. If the culprit dies before having been able to complete the payment, diya can be recovered from his estate. This with no doubt establishes the personal responsibility of the culprit, while in classical law responsibility, in cases different from deliberate offence, was of the tribal group. In this rule, anyway, emerges the complex legal nature of diya, which appears at one and the same time as a manifestation of the law of private vengeance, as a measure to safeguard the public order and as a means to compensate for the loss suffered.

Section 332, that was on voluntarily causing hurt to deter public servant from his duty – offence disappeared in the amended version of the Code –, opens the part dedicated to the subject of hurt with a definition and a list of the types of hurt contemplated in Muslim law plus all kinds of other hurts. Previously hurt was dealt with in sections 319-338, which made a distinction between hurt and grievous hurt, and between accidental and deliberate hurt, giving an extensive casuistry, as it is evident from the number of sections dedicated to the subject.

Section 333, before on voluntarily causing grievous hurt to deter public servant from his duty, now defines the first of the hurts provided for in the preceding section, i.e. itlaf-i 'uzw, which means dismemberment, amputation or cutting of members or organs. As Muslim law holds that hurt, of a person as well, is a kind of damage, itlaf, the deprivation of a member or an organ corresponds to the

\[^{40}\textit{E.I.}, \text{s.v. } \text{"diya".}\]
destruction or deterioration of a thing which the law considers as property, because the victim is actually deprived of it. And the punishment established in the following section, once on voluntarily causing hurt on provocation, is in line with the provisions of classical law and consists in inflicting an identical hurt. When this is impossible, the offender shall pay a fixed sum as indemnity, arsh, and shall also be liable to imprisonment upto ten years as ta’zir. Previously the Code established that deliberate offence of grievous hurt, in which itlaf-i ‘uzw is comprised, was to be punished with imprisonment upto ten years and a fine. Hanafi texts prescribe talion, adding that here the distinction between ‘amd and shibh-i ‘amd is of no relevance, because “a destruction of any thing short of life (that is, a member) is not different with relation to the difference in the instrument.” However, talion cannot be applied, in offences short of life, between a man and a woman, and a freeman and a slave, and whenever it is impossible the exact ascertaining of the extent of the privation, because the essential condition of equality fails in these cases. Qisas is then substituted with arsh.

Section 335, that before was on voluntarily causing grievous hurt on provocation, describes now the offence of itlaf-i salahiyat-i ‘uzw, that is of destroying the functioning, power or capacity of an organ or causing permanent disfigurement which Muslim law also considers as deprivation, because the part is made useless. The punishment, provided for in section 336, previously on act endangering life or personal safety of others, is qisas, and when this is not executable, in payment of arsh plus imprisonment upto ten years as ta’zir. Here, as in classical law, the criterion for the execution of talion is equality, as it is illustrated by the following passage: “If a person strikes another on the eye, so as to force the member, with its vessels, out of the socket, there is no retaliation in this case, it being impossible to preserve a perfect equality in extracting an eye. If, on the contrary, the eye remains in its place, but the faculty of seeing is destroyed, retaliation is to be inflicted, as in this case equality may be attended to by extinguishing the sight of the offender’s corresponding eye with hot iron.”

Section 337, that was on causing hurt by act endangering life or personal safety of others, now defines the hurt called shajja, lists all the kinds of shajja, and establishes the offences of shajja-i khafifa –

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43 Ibid., p. 294.
causing the various types of this hurt without exposure of bones —, shajja-i muziha — idem with exposure of bones —, shajja-i hashima — idem with fracture of bones —, shajja-i munaqila — idem with fracture and dislocation of bones —, shajja-i amma — fracture of the skull with wound reaching the membrane of the brains —, and finally shajja-i damigha — fracture of the skull with rupture of the membrane of the brains —. Section 337 A establishes the punishment for the various shajja, which goes from the payment of a sum, called zaman, that may be accompanied by imprisonment upto two years as ta'zir, to the payment of an arsh equal to half the value of a full diya, that may be accompanied by imprisonment upto fourteen years as ta'zir, passing through qisas or payment of arsh equal to the five per cent of a full diya, plus, in case, imprisonment upto five years as ta'zir, payment of arsh equal to ten per cent of a full diya plus, in case, imprisonment upto seven years as ta'zir, and payment of arsh equal to fifteen per cent of a full diya plus, in case, imprisonment upto ten years as ta'zir. This provision follows what provided for by classical law, from which takes the detailed casuistry, and borrows the principle that talion can be applied only in deliberate offences, substituting it with payment of damages in all other cases.

Section 337B- 337F describe the other kinds of hurt comprised in classical law and fix the correspondent punishments, consisting all in fines, to which the court may add imprisonment as ta'zir for periods of various extension depending on the seriousness of the hurt.

Section 337G provides for the punishments of hurt caused by rash or negligent driving, consisting in payment of arsh or zaman, according to the kind of hurt, and imprisonment upto five years as ta'zir. This offence in the previous text of the Code was comprised in the provisions of section 337, on committing an act so rashly and negligently as to endanger human life or the personal safety of others. Punishment was imprisonment upto two years and a fine up to five hundreds rupees. These provisions covered also those now contained in section 337H — punishment for hurt by rash or negligent act —. Section 337I, following Hanafi law, establishes that hurt by misadventure is liable to punishment, but in this case the offender shall only pay the fine fixed for the kind of hurt he caused. The previous rules, which distinguished between voluntary and accidental hurt, and hurt and grievous hurt, reputed accidental hurt an offence only when the case might be considered act endangering life or personal safety of others — sections 336-338 —.

Section 337J, on causing hurt by means of poison, exactly follows

section 328 of the previous version of the Code in describing the
defence, and slightly modifies the wording of the provision for pun-
ishment, that imprisonment upto ten years – to be awarded
by all means and not discretionally as ta’zir – and a fine, now called
arsh or zaman, with reference to the kind of hurt.

Section 337K, on causing hurt to extort confession or to compel
restoration of property, islamizes the text of section 330 of the previ-
ous version of the Code. In fact, the offence is described exactly in
the same words, but the punishment is not, as it was before, impris-
onment upto seven years and a fine, but qisas, arsh or zaman,
according to the kind of hurt, and, when talion is not executable,
the payment of damages can be accompanied by imprisonment upto
ten years as ta’zir.

Section 337L, punishment for other hurts, establishes the liability
to punishment also of those hurts which are not comprised in the
casuistry provided for, if they are somewhat serious. Punishment is
zaman, to which imprisonment upto seven years may be added, if
hurts are healable in a minimum of twenty days time, or imprison-
ment upto two years and/or zaman, if hurts cannot be described by
the preceding provision. These provisions show the legislators’ con-
cern for covering every possible case of offence, being aware that the
minute descriptions of classical law, unlike the wider definitions of
the previous version of the Code, might leave room for escaping law.
Unlike the substituted text, the new one does not provide for
aggravating circumstances, like use of dangerous weapons or means,
or abject aims.

Section 337M, hurt not liable to qisas, states that when the cul-
prit is a minor or an insane talion cannot be executed, but arsh shall
be paid, and imprisonment awarded as ta’zir, depending on the
circumstances. Moreover, talion cannot be executed when the
member or organ of the culprit is defective or does not exist,
because, as Hanafi textes say, in these cases it is impossible to inflict
a hurt perfectly identical to the one suffered by the victim.

Section 337N, cases in which qisas for hurt shall not be
enforced, provides that when the culprit dies or misses the organ to
be subjected to qisas before talion can be executed, obviously the
punishment cannot be applied, but, in the second case, the suitable
fine must be paid. Moreover qisas is not enforced in case of pardon
or composition, when right of qisas devolves on the person who
cannot claim it against the offender, provided that arsh is paid and,
in case of relapse, a term of imprisonment is awarded as ta’zir. As it
can be seen, these dispositions follow the analogous ones for qatl-
'ī'āmd.
Section 3370, establishes who can qualify as wali – a person entitled to request talion or to receive blood money – in case of hurt. The rule is very much like the analogous one in case of qatl-i ʿamd, with the difference that, here, the first wali is the victim. But if this is a minor or an insane, his right can be exercised by his father or other male direct ascendant. If the victim dies before talion can be applied, wali are his heirs, and finally the government, if there is no heir. The text does not leave doubts about the private character of this provision, because it does not touch the discretionality of the victim, or his heirs, in requesting talion, and the state is limited to the role of wali of those who have no wali.

Section 337P, execution of qisas for hurt, provides that talion must be inflicted by an authorised medical officer, in presence of the wali or his representative, and, in absence of these, the court shall authorize an officer to give his permission to the execution. If qisas has to be executed on a pregnant woman, the execution can be delayed to two years after delivery, as it happened for capital execution. It is evident here the private vengeance’s character of this rule, because the state can only control the application of talion, but cannot proceed without the consent of the victim or his heirs, which, theoretically, might act personally without seeking state’s assistance.

Sections 337Q – 337V establish the price of the various amputated or damaged organs, according to their number: the maximum for a single organ, the half for those coming in pairs, and so on, down to the price for fingers and teeth, hair, beard, moustaches, eyelashes and eyebrows, following exactly the classical texts.\footnote{Hedaya, vol. IV, pp. 332-337.}

Section 337W deals with the merger of arsh, stating that when the victim suffered more than one hurt, he has the right to ask for each hurt separately, unless an organ was hurted, and in this case arsh for the organ will be corresponded; or the hurts unite to form a single one, the extent of which will be the basis for calculating arsh. Moreover, when the victim, after suffering hurt, dies, the culprit is liable only to diya, unless he recovers from hurt before dying. The rule finds its foundation in Hanafi texts, which discuss the subject in detail.\footnote{Ibid, p. 344 and 349.}

Section 337X is on the payment of arsh, following closely what established for the payment of diya.\footnote{v. supra art. 331.}

Section 337Y fixes the value of zaman, which varies according to
the court's evaluation of medical expenses, and phisical and psychological damages. When zaman is not paid the culprit may be detailed or released on bail, as it happened for diya

Section 338, substituting the one on causing grievous hurt by act endangering life or personal safety of others, wich closed the part dedicated to hurt, opens now the subject of miscarriage, exhausting it in the following three sections. Miscarriage is now distinguished in isqat-i haml, if it happens before the formation of the organs of the foetus, isqat-i janin, if it happens after the organs be formed. In both cases it is punished, unless it is provoked in good faith to save the life of the mother. In the first case, when there is the woman's consent, punishment is imprisonment upto three years; when not, imprisonment upto ten years. It is provided also that, if the woman suffers hurt or dies, the culprit is liable to the punishment provided for the offence he committed. In the second case, which does not take into account the woman's consent, the punishment is payment of one twentieth of diya if the baby is born dead; payment of full diya if the child is born alive and dies in consequence of an act of the offender; imprisonment upto seven years as ta'zir if the child is born alive and dies for other causes. When there is more than one child, payment must be made for each of them. When the woman suffers hurt or dies, the offender shall also be liable to the punishment provided for such hurt or death.

The substituted rules on this subject punished miscarriage, not otherwise defined, when it was not provoked in good faith or to save the life of the mother, with imprisonment upto three years and/or a fine; and, if the woman be quick with child, the punishment was imprisonment of either description for a term which might extend to seven years, and also a fine, if there was the woman's consent. Without consent, whether the woman be quick with child or not, punishment was imprisonment for life, or for a term upto ten years, and also a fine. If the woman died, punishment was imprisonment upto ten years and a fine, if she gave her consent. Otherwise, it was imprisonment for life, or for a term upto ten years and a fine. Moreover, every act aimed to cause the death of the child before birth or immediately after, if not committed in good faith to save the life of the mother, was punished with imprisonment upto two years and/or a fine. Finally, every act committed on the mother which might result in her death – in this case the offence should have been culpable homicide – that resulted instead in the death of a quick

\footnote{v. supra art. 330.}
unborn child, was punished with imprisonment up to ten years to which a fine might be added.

Hanafi law provides that provoking the abortion of a free begotten foetus is punished with payment of one twentieth of diya, to be corresponded by the ‘aqilas of the culprit. If the child is born premature, but alive, and then dies, full diya must be paid by the direct responsible of the act provoking its birth. If the child is born dead, and the mother dies as well, full diya must be paid for the mother and one twentieth for the child, if the foetus dies before the mother. But if the mother dies and the child is born alive, and then dies, two full diyas must be paid. If the mother dies in giving birth to a dead child, one diya only must be corresponded. The sum goes to the embryo’s heirs, to the exclusion of the culprit 49. Abortion and anti-conception measures are condemned by Islam as a sin, but in Muslim law, either civil or criminal, there are no provisions concerning this subject. Classical law takes into account the case where a pregnant woman, having suffered blows, miscarries, because this occurrence appears in the Hadith. In this case, the culprit has to pay one twentieth of the diya of the mother, to be corresponded as many times as many miscarried children. This composition is called ghurra and, for a peculiar juridical fiction, is ascribed to the foetus and from it transmitted to its personal heirs, so that the mother and her heirs do not inherit from the foetus as far as composition is concerned. This same ghurra is due by the mother, if she voluntarily or culpably provoked the abortion, to the ‘aqilas, or gens, to which the foetus belong, and is excluded by its succession 50.

The rules on abortion introduced by the Ordinance on qisas and diya do not implement classical law, but modify the pre-existing rules by use of terms borrowed from Hanafi texts. In particular, the offences and their definitions are taken from the previous version of the Code, while the corresponding punishments are aggravated by additions inspired by classical law.

Section 338D enjoins that the High Court shall confirm a death sentence awarded by way of qisas or ta’zir, or a sentence of qisas for hurt, before their execution. Pakistani legislators show here to share the concern that induced the British legislators to introduce this control on criminal sentences of relevance at the times of the Regulations of Bengal. Actually, mutilation as punishment was abolished in 1791, and death, awarded by way of talion or otherwise, as well as

50 Santillana, op. cit., vol. I, pp. 120-1.
imprisonment for life were to be confirmed by the Sadar Nizamat 'Adalat 31.

Section 338E, reaffirms the right of the victim, or his wali, to renounce to prosecute the offender, either conceeding him pardon or accepting a compensation, in consonance with what established in section 309 and 310 of the Ordinance. Pardon or composition, anyway, do not result in the immediate release of the offender, because the court, having regard to the facts and circumstances of the case, can award ta'zir to the offender according to the nature of the offence. This seem a way to obviate the fact that Muslim law allows many a culprit to escape punishment, if they obtain the remission of the penalty by the victim or his wali. The British tried to achieve the same object by the Regulation of December the 3rd 1790, ordering that in case of pardon or composition trial should be decided by the Sadar Nizamat 'Adalat 32.

Section 338F, on interpretation, states that the rules of the Ordinance shall be applied following the Islamic principles as expounded in the Quran and Sunna.

Section 338G provides that regulations can be approved to enforce the rules of the Ordinance.

Section 338H, finally, declares the non-retroactivity of the rules of the Ordinance, and introduces the amendment of the Code of criminal procedure, Act V of 1898, including in it a chapter XVI A, and modifyng sections 337, 338 and 381, plus schedule II.

Section 337, on tender of pardon to accomplice, is amended by adding a paragraph to subsection (1), where it is stated that a magistrate cannot tender a pardon to a person involved in an offence relating to hurt or qatl if the victim, or his heir, does not give him permission to do so. Section 338, on power to grant or tender pardon, is very similar, because in this rule too individual right prevails against magistrate's authority, which is restricted by the condition sine qua non of the permission of the victim, or his heir.

Section 381, on execution of order passed under section 376, that is on death penalty, undergoes a likely changement, because is made to provide that the wali of the victim holds the power to preserve the convict from execution granting him pardon or accepting a composition.

In figures 302 to 338 of schedule II the amendments concern the names of offences, the indications about the possibility for the police

31 Regulation IV of 1797, quoted in Jain op. cit., p. 420.
32 Ibid., p. 418.
to arrest without warrant, the indications about the issue of warrant or summon in first instance, the possibility of composition, and what court is competent. For example, in no. 303, murder is substituted with qatl-i 'and, the police may arrest without warrant as before, in the first instance a warrant shall ordinarily be issued, and bail is not possible, but, accordingly to what established in the relevant section of the amended Code and in conformity with Muslim law, instead of “not compoundable” there is “compoundable” and the punishments are not “death, imprisonment for life, and fine” as before, but “qisas, or death, imprisonment for life or imprisonment up to twenty-five years”, while the competent court remains the court of session.

A comparative analysis section by section of the modifications demonstrates that the legislators intended to enforce shari‘a law following the Hanafi school. But they made an effort to modernize it, both for the impossibility to apply in toto rules heavily conditioned by social circumstances which do not exist any more – suffice it to mention the distinction in Muslim, zimmi, mu‘stamin and harbi; freeman and slave; the principle of collective responsibility; the practice of kaffara – and for the need to obviate those deficiencies, especially in effectiveness, to which the British too, when invested with jurisdictional powers, tried to find a remedy. When the Company became diwan of Bengal, the British found themselves to administer a law which was meant to dissuade from transgression threatening frightful punishments, but that, as a matter of fact, left a lot of room for the transgressors to escape them. Their first concern was not of humanizing a ruthless law, but of succeeding in applying it with effectiveness and exactitude. In fact, in 1831 they thought that “As a system the Mahomedan criminal law is mild; for though some of the principles it sanctions be barbarous and cruel yet not only is the infliction of them rarely rendered compulsory on the magistrate, but the law seems to have been framed with more care to provide for the escape of criminals than to found conviction on sufficient evidence and to secure the adequate punishment of offenders” 53.

The Muslim rulers of India, Mughals included, held sufficient to have resort to siyasa shari‘a 54, which gave them wide discretionary powers, in order to keep criminal matter under their control. On the other hand, the Mughal department of law and justice was the worst organized: there was no system, no regular gradation of the law

courts from the highest to the lowest, nor any proper distribution of courts in proportion to the area to be served by them. Judging from what Abu’l Fazl says in his preface to ‘Aīn-i Akbari, when he discusses the general principles of punishment, it cannot be said that the Mughal emperors strictly adhered to the Islamic law of punishments. As far as homicide and hurt are concerned, talion was undoubtedly recognized and state’s authorities could intervene only on request of the victim or his wali. But there are significant episodes to indicate that qisas and diya were by no means the only punishments applied, and the famous farman sent by Aurangzeb to the diwan of Gujarat on 16th June 1672, which gives his penal code in a short compass, does not even mention talion, and provides that “when murder has been proved against any man according to the Holy Law or is close to certainty, keep the offender in prison and report the facts to the Emperor.” Those times’ socio-political conditions and type of state organization allowed the ruler the largest discretionality, and because the government’s main functions were collecting taxes and conquering ever new territories, little room was left for legal activity: inter arma silent leges.

The British, after the conquest of Bengal, found themselves included in a rather deteriorated system, that worked quite poorly and confusingly. As for criminal jurisdiction theoretically the highest court was the nawab and the faujdar had the task to suppress serious crime, the kotwal took into cognisance petty criminal cases and the muhtasib took cognisance of drunkenness, selling of liquors and examination of false weights and measures. All of them should have cases decided following the responses of the mufti, who was the specialist in shari’a law and consulted the canonical texts to issue a fatwa suited to every single case. In absence of positive law – Muslim legal texts are doctrinal books and not collections of laws – the administration of justice was discretionary to a degree intolerable for the requirements of the British. They did not intend to leave a matter as important as penal law outside the competence of the state, and tried immediately to find out what was the law as precisely as possible – hence the early translations of legal texts – and to minimize the risk that a strict adherence to the polity of leaving the criminal courts free of control, and let them act according to the

38 Sarkar, op. cit., p. 129.
Muslim law might prove “of dangerous consequence to the power by which the Government of this country is held, and to peace and security of the inhabitants” 39. Slowly, therefore, the law of murder was brought from private to public field. Freed from the discretion of the heirs of the deceased, murder was transformed from a private injury into a public wrong, bringing it into line with the notion that criminal law is meant not so much for private redress but is a public law and that every crime should be regarded as having been committed against the whole society and not merely against the particular individual who was the victim of the offence.

Two centuries after, Pakistani legislators take an opposite way and go back to the privatization of the rules on homicide and hurt, in name of Islamization. They do not work within a complete revision of the whole of penal law, but on an ad hoc basis. They individuate those subjects of the criminal law they inherited from colonial times which are dealt with by Muslim classical law as well, isolate them from their context, try to formulate the rules to govern them in Muslim juridical language, borrowing its detailed casuistry and complex terminology, and include them in an alien system.

In fact, if it is true that the Indian Penal Code of 1860 was framed taking into account Indian social reality after the experience of the Regulations, it is also true that the inspiring principles were western. Without going back to the history of the Code, suffice it here to recall that it was not born as a digest of any existing system, but it was a creature of Macauley, who in perfect good faith and with all his criticism of English penal system was nevertheless a champion of the excellence of the Western culture. The Code originated from a comparison of the existing Indian systems and had as a model the codes of France and Louisiana – the ones that, at that time, appeared the most advanced – and the reference point was inevitably the western notion of justice 40. This notion of justice, born in the West with Illuminism, stays as the fundamant of the ius of punishing together with the need of defence. Arising as an autonomous discipline, penal law, in the age when man acquired consciousness of his own intrinsic value as human being and placed himself dialectically against the state – that was then coming out from the absolutism’s period and looking for different structures – put to himself the fundamental problem of legality and, in an eminently guarantistic sense, of penal sanction. Romagnosi and Beccaria, van-

39 Jain, op. cit., p. 416.
40 B.K. Acharya, Codification in British India, Calcutta 1914, pp. 210-213.
guards of the penal thought of the age, rejected absolute retributionism and anchored penal law to rationalist-utilitarian principles 61.

These premises cannot be said to be close to those of the Muslim law, that was formed in times when the idea of crime as distinct from sin was still in the course of evolution. At this stage it cannot be expected any difference between the conception of crime as distinct from the civil obligation, nor there is any distinction between civil obligation and social duty. Sin and crime, religious, public and moral obligations are all found blended in the same conception of duty, with their relative importance neither understood or well defined 62. Muslim penal law, therefore, is a pre-modern law, comparable to the Roman, which arises from collective catharsis and admits the sovereignty of those concerned where the whole community is not struck. This is why it provides talion, with the alternative of pecuniary composition 63.

Reception and enforcement of a rule based on talion and blood money – call it diya or wedergild – reflects a conception of man and state in which the right of punishing is not conceived, like in modern penal systems, as an exclusive prerogative of the sovereignty of the state on the citizens, but as a redress to a private injury. Because to the right of punishing is not opposed a right of public defence of the citizens by the body that disciplines and represents them, but a pretension to the redress of a private damage. Here lies the contradiction: to put inside a penal code whose premises take for granted the publicistic nature of criminal law rules inspired to a conception of delict as a private business, where the state has the role of guarantor and not of injured party.

Pakistani legislators do not seem concerned with this contradiction, that did not exist for the Hadd Ordinances, because Hadd offences are, in Muslim law, haqq Allah, public law. And the enforcement of these rules on homicide and hurt cannot be taken as an adequate response to the aspiration to an Islamic order, because, beyond all the terms and definitions borrowed from Muslim law, it appears as a short-sighted and restricted interpretation of the Quranic principles. The reasoning behind the Ordinance seems to be: because in the Quran qisas and diya are explicitly mentioned, these institutes cannot be touched and are to be considered as God’s commands. This approach, if satisfies the letter, betrays the spirit of

63 XII Tabulae, 8, 2, quoted in CORDERO, op. cit., p. 13-14.
the Quran and, as it is typical of Islamic fundamentalism, is completely devoid of sense of history. Muhammad, in fact, did not hold wise to change mechanisms, like talion and blood money, still too deeply rooted in the society of his times, but in maintaining them he modified their working and laid the foundations for the emergence of a conception of punishment by authority for the sake of justice. With a little effort of interpretation the Quranic passages on the subject may be found in agreement with the modern idea of penal law. First of all the Quran states positively that the right to live is fundamental and inviolable – VI, 152; XVII, 33; XXV, 68 —; then that preventive function and administration of justice belong to the state – III, 104; XXII, 41; VII, 181; VI, 153; V, 8 —; and finally that the state, having a direct interest in the maintenance of public order, prevails on the right of the individual – Prophet’s message to the pilgrimage of valediction – 64. Therefore it does not seem at all necessary that the penal system of a Muslim country, in order to be in sympathy with Islamic principles, should stick to the letter of the Quran and take out of the dust medieval legal doctrines. The right/duty of rooting the law in their own cultural heritage, revising colonial laws and re-writing them, cannot be denied, but it does not seem that the way chosen by Pakistani legislators can reach this object. In fact, at a close scrutiny, it does not look as a re-foundation of the law on the basis of a clearer understanding of the complex origins and development of Islamic laws, which will enable the sources of Islamic law to meet once again the needs of changing Muslim societies. It appears, instead, as another contingent measure, adopted in a short term political perspective to impress people and appease fundamentalist pressure groups. And it is not clear how it can help Pakistanis in being more loyal citizens and better Muslims than they are already.