

Imprisonment for Non-Payment of Diyat: A Critical Analysis of Two Leading Cases

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Abstract: *This research article aimed to examine a leading case regarding imprisonment for non-payment of Diyat, Arsh or Daman and its associated issues contested at the Lahore High Court and the Supreme Court of Pakistan respectively in the light of qualitative research methodology. This work highlighted provisions declared by the court ineffective and directions to the government for legislation in this regard. The article also identified issues and challenges linked with the newly formulated Rules. The research at hand, examined whether or not the larger bench of the Supreme Court or the drafters of the Rules addressed the question of interest on the soft loan, which the government undertook the responsibility to be offered to the convicts who are unable to pay due to financial crisis and the same has to be received as arrears of land revenue.*

Key Words: Diyat, Arsh, Daman Imprisonment, Payment

Introduction

The question of imprisonment for non-payment of *Diyat* came before the High Courts in many cases at the appeal stage. However, the most significant case [[Abid Hussain v Chairman Pakistan Baitul Mal, 2002](#)], in which the issue was raised in a writ petition. The Government of Punjab went on appeal to the Supreme Court of Pakistan against the judgment where a larger bench was constituted to hear the appeal, which the Court decided on 14th December, 2006. The researchers, with the help of qualitative research methodology, critically examined these two judgments and highlighted various potential issues attached with the judgments and government compliance in form of framing Rules in this regard. The research identified gaps in the newly formulated Rules regarding mode of payment, timeframe within which the amount has to be paid, and government responsibility in default of payment. Despite the fact that government undertook the responsibility to pay for the convicts who cannot afford payment of *Diyat*, *Arsh*, and *Daman* in form of soft loan, which the government would recover like arrears of land revenue and default convicts may be imprisoned again. Putting someone behind the bars for life for nonpayment owing to poverty is contrary to human dignity. Islam urges on spending on slaves, prisoners, and those in debts so as to save their necks and reduce their burdens. Being modern manifestation of *Aqila*, state should come forward to assist such convicts from *Zakat*, *Ushr* funds, and Bait-ul-Mal. There are precedents from the Holy Quran, Hadith of the Holy Prophet (PBUH), and Islamic scholars regarding payment of *Diyat* for those who could not pay at their own. This research also explicated whether or not the government imitative of drafting Rules on the matter concerned is compatible with the Islamic injunctions.

For its operational framework, this article has been divided into the following segments: first segment presented an overview of the research article and issues being examined. Second segment investigated judgment of the Lahore High Court, which is further divided into eight parts: first part highlighted issues framed by the Court and suggested changes in framing the issues in the judgment in order to address the questions with the perspective of Islamic injunctions. Second part elaborated how the Court responded to the concerned provisions and instead of filling the gaps in light of Islamic injunctions declared them inconsistent with the fundamental rights. Third part examined payment of *Diyat*, recovery debt, and how such compensation is to be treated. Fourth part explicated mode for payment of compensation. Fifth part elaborated that how state is modern manifestation of *Aqilah* and justified why state should undertake responsibility to pay for the convicts who are unable to pay such

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compensations to the victim or the legal heirs of the deceased. Sixth part explained importance and rationale for compulsory community service, which the convicts should undergo in case the state pays for them. Seventh part articulated how to make equilibrium between the rights of the convict who cannot pay the compensation and the aggrieved victim. Eighth part elucidated about *Diyat* where *Aqilah* is not responsible and highlighted the core issue in this regard. In third segment of the research, verdict of the Supreme Court has been critically examined wherein short order has been pronounced by the Court and how the government responded thereto. This segment explicated post judgment scenario and complexities attached to the Rules formulated by the federal government in compliance of the Court's order. In fourth segment, the research has been concluded, which has been coupled with the personal observation that neither the Court nor the government realized to address the question of interest on soft loans being offered to the convicts, despite the fact that provisions of this chapter and its ancillaries matters have to be interpreted in the light of Islamic injunctions and the same should apply to the Rules formulated thereunder.

Judgment of the Lahore High Court

In *Abid Hussain*, the Lahore High Court examined the issue at length from various aspects of Islamic law, constitutional law, criminal law and civil law. The Court appointed several renowned lawyers as *amicus*, which included Mr. Umar Ata Bandial who is now serving as senior judge of the Supreme Court, Mr. Afzal Haider who was a member of the Council of Islamic Ideology at that time and who later served as judge of the Federal Shariat Court. Mr. Justice *Asif Saeed Khan Khosa* wrote the judgment. Some significant aspects of the judgment will be discussed here.

Issues Framed by the Court

The Court framed the following issues:

- Whether a person can be imprisoned for more period than prescribed for an offence?
- Whether such a person is also to be punished for his poverty beside the offence he has committed?
- Whether there is any way or any legal dispensation whereby payment can be made for such prisoners from any fund for securing their release?
- Whether the relevant law in this regard which requires such a prisoner to be kept in jail for an indefinite period is inconsonance with the Islamic dispensation of justice?
- Whether the law in this regard is unreasonable and oppressive and the same needs to be struck down or suitably amended?
- Whether *Zakat* or *Bait-ul-Mal* Funds can be utilized for the benefit of such prisoners who are otherwise adjudged criminals?

These questions can help examine the issues in the present case. However, some of these questions need alteration because interpretation of the relevant provisions should be done from the perspective of Islamic Injunctions and for that purpose questions need to be framed differently.

Interpretation, Repugnancy or Inconsistency

At the very outset, the learned counsel for the petitioner highlighted that he was contesting the then prevailing interpretation of Section 331, which contained provisions about the payment of *Diyat*. During the proceedings of the case, however, the provisions of Sections 337-X and 337-Y, PPC, regarding payment of *arsh* and *daman*, respectively, were also examined as they were part of the same scheme. As Section 338-F, PPC, explicitly requires the courts to interpret the provisions of this chapter and matters related or akin thereto in accordance with the injunctions of Islam. Various verses and Prophetic traditions also came into discussion. However, instead of attempting a harmonious interpretation of these provisions and filling the gaps with the help of Islamic injunctions, the Court preferred to declare that the provisions of Section 331, 337-X and 337-Y, PPC, were inconsistent with the fundamental rights guaranteed in the Constitution.

Payment of *Diyat* and Recovery of Debt

Sections 299 (b), (d) and (e) of PPC uses the word 'compensation' for *Arsh*, *Daman*, and *Diyat*, respectively. As compensation is paid to the victim or his legal heirs, Mr. Umar Ata Bandial, *amicus*, gave arguments about considering it analogous to liability for the payment of debt. He also elaborated application of the rules of contractual and tortious liability to it. In this regard, he gave details of the procedure provided in Sections 36 to 74, CPC, particularly Section 55.

The Court, however, did not agree with the contention that *diyat*, *arsh* and *daman* are “merely compensation” and that “compensation is another form of a debt attracting various provisions of the civil law for its recovery.” Relying on Section 53 of PPC, which mentions them among ‘punishments,’ the Court found them to be “punishments which are compensatory in nature, but they remain substantive punishments.” It further concluded that a substantive ‘punishment’ provided for a penal offence, which has to be undergone by the convict in the manner provided by the criminal law and there is no escape from it other than any provided by the criminal law itself.

Interestingly, in the later part of the judgment, when confronted with the situation where a convict is released after maximum period of 6 months prescribed in Section 544-A, CrPC, and the amount of *diyat*, *arsh* or *daman* remains unpaid, the Court declared that the liability of mentioned payment remains outstanding and the same has to be recovered as an arrears of land revenue, which has been discussed in the proceeding part.

Modes for Payment of Compensation

About the ‘manner provided by criminal law,’ the Court finds the following two modes for payment of compensation: one provided in the same chapter (Sections 331, 337-X and 337-Y of PPC) and the other provided in CrPC (Sections 544 and 544-A). The Court was of the opinion that there were “certain inherent obscurities and some downright absurdities” in the scheme provided in PPC. The Court further asserted that the laws which are unreasonable in nature and used as a catalyst of unjustifiable oppression cannot hold the field even such laws are governing crimes and punishment and dealing with the lives and liberties of the people. One significant shortcoming highlighted by the Court in this context was that Sections 331 and 337-X prescribe a maximum period of 3 years for the payment of *diyat* and *arsh*, respectively, but Section 337-Y does not prescribe any such period for the payment of *daman*. It is important to note here that the Court, adopting the position of *Syed Shabbar Raza Rizvi*, amicus, held that the period of 3 years provided by Sections 331 and 337 X was ‘grace period.’ The position of *Mr. Rizvi* has been summarized by the Court in the following words: “The provisions of sections 331 and 337-X of P.P.C., contemplate a grace period of three years to be allowed to a convict to pay up his liability in that regard failing which he is either to be kept in jail or he is to be admitted to bail till he pays up or dies in which case the requisite amount is to be recovered from his estate.”

At this point, the Court turns to Section 338-F, PPC, which obligates the Courts to interpret the provisions of this chapter and matters ancillary to it in the light of Islamic injunctions. However, instead of interpreting these provisions in light of Islamic injunctions in order to fill the gaps in these provisions and remove the “ambiguities, unexplainable obscurities and sometimes downright absurdities”, which the Court found therein, it preferred to declare these provisions were not adjusting well with the principles of Islamic dispensation of criminal justice system. It further concluded that these provisions were void on account of their inconsistency with the fundamental rights. Resultantly, it declared that “the provisions of Sections 331, 337-X and 337-Y of P.P.C. insofar as they stipulate method of payment and recovery thereof in cases of *Diyat, Arsh, and Daman* and treatment of the convicts for the same shall forthwith cease to exist.

Will this not create a vacuum in the scheme of the law regarding payment of *Diyat, Arsh* and *Daman*? This question leads the Court to adopt the view presented by *Khwaja Saeed-uz-Zafar*, the learned Deputy Attorney-General at that time, declaring that the provisions of Section 544-A, CrPC, which prescribe the mode of payment of compensation to victims of an offence, could fill this vacuum. As per Section 544-A (2) of CrPC, the Court of Sessions can award a maximum of 6 months imprisonment to a person who fails to pay compensation to the heirs of the victim. The Court also found second manner of payment of compensation to be “just, fair and reasonable besides being in accord with the remaining body of laws dealing with similar matters.”

As Section 544-A of CrPC, prescribe a maximum of 6 months of imprisonment in case of failure to pay compensation, the Court directed that All those convicts who are at present being detained in prisons in the Province of the Punjab only on account of their failure to pay *Diyat, Arsh* and *Daman* shall be immediately released from prisons if they have already undergone imprisonment for a period of six months for its non-payment.

State as Modern Manifestation of ‘Aqilah

If the convict is unable to Pay *Diyat, Arsh* or *Daman*, as the case may be, what is the way out? The Court noted that all the learned counsel had a consensus on considering the state as “modern manifestation of ‘*Aqilah*’ and that destitute prisoner can seek assistance from the *Zakat* Fund or *Bait-ul-Mal* for the

purposes of payment of these payments. An important question arises here: does directing the state to pay one's liability in form of *Diyat*, *Arsh* or *Daman* for the convict amounts to penalize the State for an offence committed by an individual living in the state. The Court mentioned the following grounds for putting responsibility on state in such situations: firstly, the requisite compensation is meant to satisfy vengeance of the victim or his heirs and such a payment by the State obviates a likelihood of reprisal or vendetta and thereby achieves peace in the society, which is one of the primary responsibilities of the State. Secondly, the state had failed to protect the victim's life or physical safety and it, thus, cannot avoid sharing the blame for the harm coming to him and therefore, chipping in by the state towards payment of compensation to the victim or his heirs is the least that the State can do in such a situation. Thirdly, being a welfare State, an Islamic State is even otherwise expected to reach out and come to the rescue and assistance of a helpless citizen in need, be he a convict who has substantially cleaned himself of the crime by undergoing the entire substantive sentence of imprisonment passed against him.

Compulsory Community Service

The Court also tried to balance this burden on the state by recommending some kinds of 'community service' on such convict, as suggested by *Syed Afzal Haider*, the learned amicus. Thus, the Court declared: The requisite compensation on behalf of the culprit on account of his financial inability in that regard then after the said culprit's release the state should make him undergo a compulsory service on a project of public welfare so that he is gainfully employed therein and, thus, the amount of money spent by the state for his benefit in the matter of payment of compensation is ultimately recovered from him by the state in form of services rendered to the state.

Competing Rights of the Poor Convict and the Aggrieved Victim

One reason for the complexity of the issue at hand is that the law has to ensure that while helping the poor convict, the rights of the victims should not go waste. This question of balancing the competing rights of the poor convict and the aggrieved victim(s) was highlighted by Justice *Khosa* in the following words: at different stages of the hearing of these petitions, I had felt myself torn between images of the culprits mercilessly inflicting injuries on the persons of their innocent victims and the resulting pain and anguish suffered by those victims and images of those very culprits now helplessly rotting in iron cages after serving out their substantive sentences of imprisonment merely because of their abject poverty and hoping against hope that someday the society may look upon their unfortunate predicament with mercy and compassion.

Diyat where 'Aqilah is not Responsible

It is worth-noting here that in the cases argued before the Court one person was liable to pay *Diyat* for *Shibh Amd* under Section 316, PPC, while the other had committed *Amd*, but it was not liable to pay *Diyat* under Section 306, PPC, and he was supposed to pay *Diyat* under Section 308. It is a well-established rule of Islamic law that *Diyat* in case of *Qatl-i-Amd* is imposed on the convict only, while in cases of *Shibh-i-Amd* and *Khata* it is imposed on the convict and his 'Aqilah. However, the Court did not address the question and simply presumed that *Diyat* is imposed on the convict and that state being the modern manifestation of 'Aqilah should come forward to his support as and when he needs it.

Verdict of the Supreme Court in Appeal

Government of Punjab went on appeal to the Supreme Court against this judgment. Larger bench of the Supreme Court heard this case along with appeal against the judgment of the Peshawar High Court in a similar case and gave its short order [*Government of Punjab v Abid Hussain and Others, 2007*]. Detailed judgment was never delivered and, therefore, the reasons could never be recorded. The short order was pronounced on 14th December 2006. Three months later, in March 2007, *Chief Justice Iftikhar Muhammad Chaudhary* was made dysfunctional. He was restored and then again made dysfunctional along with many other judges of the Superior Judiciary in November 2007. *Chief Justice Iftikhar Muhammad Chaudhary* re-entered his office in March 2009, but even afterwards the detailed judgment could not be pronounced.

Short Order of the Supreme Court

The larger bench of the Supreme Court held that the provisions of Sections 331, 337-X and 337-Y, PPPC, were "intra vires of the Constitution." As reasons for the short order were never recorded, the present bench may see if it is bound by the conclusion reached at by the larger bench or not. We will,

however, proceed with the presumption that it is so. It, then, directed the Federal Government to frame Rules under Section 338-G, PPC, to give effect to these provisions of law, providing mechanism for creating funds for those convicts who are languishing in prison and cannot afford payment of *Diyat*, *Arsh* and *Daman* whatsoever the case maybe. The Court recommended to the Government that while making these rules, it may examine the possibilities of giving “soft loans” to the needy convicts and to find the possibilities of providing them job in non-governmental sectors “through social organization or philanthropists.” It also advised the Government to explore the possibilities of release of such convicts on parole by the trial court. It further recommended to the Government to see of the period of 3 years prescribed in Sections 331 and 337-X, which can be extended to 7 years and that the same period may be added in Section 337-Y. A significant directive of the Court in this judgment related to the protection of the rights of the victims. Thus, it directed the Federal Government to devise a mechanism by making specific provision in the Rule to draw a fair balance and rational compromise so as to protect rights of the victims or legal heirs of deceased.

Post Judgment Scenario

This judgment led the Government to come up with some amendments in the relevant provisions of Chapter XVI of PPC, and also to frame Rules under Section 338-G for the purpose of creating a Fund. An overview of these changes is given below: in October 2007, the President of Pakistan promulgated [Pakistan Penal Code \(Amendment\) Ordinance, 2007 \(Ordinance VI of 2007\)](#), enhancing the period for payment of *Diyat* and *Arsh* to five years and prescribing the same period for the payment of *Daman*. This Ordinance by amending Section 338-G of PPC also empowered the Federal Government to make Rules for creating Fund for the purpose of providing soft loans to convicts who could not pay *Diyat*, *Arsh* or *Daman* ([Pakistan Penal Code \(Amendment\) Ordinance, 2007 \(Ordinance VI of 2007\)](#)). This Ordinance was re-promulgated several times till the enactment of the [Pakistan Penal Code \(Amendment\) Act, 2010 \(Act XV of 2010\) on June 21st, 2010](#). In pursuance of the decision of the Supreme Court and exercising the authority vested in it by sub-section 2 of Section 338-G of PPC, the Federal Government made the *Diyat*, *Arsh* and *Daman* Rules, 2007, on November 13th, 2007. The framers of the Rules focused on the short order of the Honorable Supreme Court and ignored the larger issues involved in this case. Thus, the Rules revolve around the idea of creating a Fund for the purpose of granting ‘soft loans’ to such convicts. There are a total of 12 Rules, including the Rules about title and definitions. In the remaining 10 Rules, 5 Rules are about one or the other aspect of ‘soft loans.’ As for the direction of the Supreme Court, the drafters of the Rules presumed that creating of Fund for the grant of soft loans to the convicts would suffice, although the Supreme Court had directed that this objective was to be achieved “by making specific provision in the Rules.”

These Rules, in fact, provide wrong answer to the wrong question. Thus, they are based on the presumption that the ‘convict’ is solely liable for the payment of *Diyat*, *Arsh* or *Daman*, and that the government’s responsibility is only to provide him ‘soft loan,’ which will be recoverable from him as arrears of land revenue and for the non-payment of which he may be again imprisoned - back to square one. It is unfortunate that neither the larger bench of the Supreme Court nor the drafters of the Rules addressed the question of interest on such loans, although the law makes it obligatory that the provisions of this particular Chapter and matters related thereto were to be interpreted in accordance with the Islamic injunctions and as such the same should apply to the Rules made under Section 338-G of this Chapter. The same concern was shown by the Council of Islamic Ideology when it examined these Rules in June, 2010 ([Annual Report of CII, 2009-2010, pp. 210-211](#)). However, the drafters of the Rules may have an excuse because the Lahore High Court, which based its decision on the presumption that state was the modern manifestation of *‘Aqilah*, did not elaborate the extent to which the convict and his *‘Aqilah* are liable, under the principles of Islamic law, for the payment of *Diyat*, *Arsh* or *Daman*.

Conclusion

To conclude with, *Abid Hussain* case regarding payment of *Diyat* is an important case in the judicial history of Pakistan, which have been contested both at Lahore High Court and the Supreme Court of Pakistan. In this case, the issues regarding payment of convicts in form of *Diyat*, *Arsh*, and *Daman* have been discussed. The matter regarding inability of payment of compensation due to poverty and conviction in default of payment has been considered at length. The Court also considered the existing laws whereby a person has to be kept in jail for indefinite period for nonpayment of compensation and its compatibility with the Constitution and Islamic injunctions. The Lahore High Court, instead of making the law compatible with the Islamic injunctions, declared relevant provisions inconsistent with the fundamental rights guaranteed by the Constitution. Liability regarding payment was declared intact,

which has to be recovered as arrears of land revenue. The Court declared state as modern manifestation of *Aqila* and urged those who cannot pay such compensation can seek assistance from *Zakat* fund or Bait-ul-Mal. On appeal, the case was referred to the Supreme Court, which issued short order wherein the Court declared certain provision *intra vires* of the Constitution and directed the government for drafting the Rules for creating funds for the payment of such compensation. The Court also recommended to the government to offer soft loan to such convicts who cannot afford payment of compensation, make possibilities of their employment after their release so that they may pay back to the government the amount lend by the letter. Consequently, the government amended some of the relevant provisions and framed Rules for creating Fund. The government, instead of making proper arrangements for the payment of the destitute convicts in light of Islamic injunctions for discharging their liability, focused on providing *soft loans*, which would be recoverable as arrears of land revenue and default of its return could lead to their re-imprisonment.

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