

available to the wife... their according to their respective shares in inheritance.

338. **Isqat-i-Haml.**-- Whoever causes a woman with child whose organs have not been formed, to miscarry, if such miscarriage is not caused in good faith for the purpose of saving the life of the woman or providing necessary treatment to her, is said to cause Isqat-i-Haml.

*Explanation:* A woman who causes herself to miscarry is within the meaning of this section.

### COMMENT

*Qatl committed on account of Ghairat. PLD 1994 Lah. 392*

338-A. **Punishment for Isqat-i-Haml:** Whoever causes Isqat-i-Haml shall be liable to punishment as Ta'zir.

(a) with imprisonment or either description for a term which may extend to [three] years, if Isqat-i-Haml is caused with the consent of the woman; or

(b) with imprisonment of either description for a term which may extend to [ten] years if Isqat-i-Haml is caused without the consent of the woman:

Provided that, if as a result of Isqat-i-Haml any hurt is caused to the woman or she dies, the convict shall also be liable to the punishment provided for such hurt or death, as the case may be.

338-B. **Isqat-i-Janin.**-- Whoever, causes a woman with child some of whose limbs or organs have been formed, to miscarry, if such miscarriage is not caused in good faith for the purpose of saving the life of the woman is said to cause Isqat-i-Janin

*Explanation:* A woman who causes herself to miscarry is within the meaning of this section.

### COMMENT

*Bail and further inquiry. It could not be relied upon that the victim woman might have aborted*

142  
143  
(2) Inserted by the Pakistan Penal Code (Amendment) Act, 2010.  
Sub-section (2) subs. by the Pakistan Penal Code (Amendment) Act, 2010. Subs. uub-section (2) read under.  
144. In case of non-payment of Daman, it shall be recovered from the convict and until Daman is paid in full to the extent of his liability, the convict may be kept in jail and dealt with in the same manner as if sentenced to simple imprisonment or may be released on bail if he furnishes security equal to the amount of Daman to the satisfaction of the Court.  
145. Act II of 1997.  
Act II of 1997.

after eight weeks. Bail allowed. 2008 P.Cr.R. (Lah) 983

**338-C. Punishment for `Isqat-i-Janin.--** Whoever causes Isqat-i-Janin shall be liable to:--

- (a) One twentieth of the Diyat if the child is born dead;
- (b) Full Diyat if the child is born alive but dies as a result of any act of the offender; or
- (c) imprisonment of either description for a term which may extend to seven years as ta'zir:

Provided that, if there are more than one child in the womb of the woman, the offender shall be liable to separate diyat or ta'zir, as the case may be, for every such child:

Provided further that if, as a result of isqat-i-janin, any hurt is caused to the woman or she dies, the offender shall also be liable to the punishment provided for such hurt or death, as the case may be.

**338-D. Confirmation of sentence of death by way of Qisas or Ta'zir, etc:** A sentence of death awarded by way of Qisas or Ta'zir or a sentence of Qisas awarded for causing hurt, shall not be executed, unless it is confirmed by the High Court

or compounded without person of the Court and subject to such conditions as the Court may deem fit having regard to the facts and circumstances of the case.]

### COMMENTS

*Criminal petition for leave to appeal in Supreme Court against impugned conviction/sentence. Validity. As far as the said Convict/petitioner was concerned with whom legal heirs of said deceased had entered into compromise, he may approach the Trial Court for acceptance of the same. Leave to appeal declined. 2005 PSC (Crl.) (Pak) 97 (c)*

*Writ petition as well as Cr. Misc. in High Court seeking acquittal on the basis of alleged compromise with said legal heirs of deceased victims after having denied of relief from Court below in the said murder cases. Validity. All the heirs of deceased victims had not waived and compounded the said offence of death awarded to convicts. Petitions dismissed. 2005 P.Cr.R. (Lah) 1191(a)*

**Waive or compounding the offence.**-- Under S. 338-E(1), PPC subject to the provisions of Chapter XLV and S. 345 of the Code of Criminal Procedure, all offences under Chapter XLV, PPC relating to homicide and hurt may be waived or compounded and the provisions of Ss. 309 and 310, PPC shall, *mutatis mutandis*, apply to the waiver or compounding of such offences. So, if any offence under Chapter XLV affecting the human body is waived or compounded after the decision by the Trial Court or the decision of appeal, if any, an application for permission to waive or compound the offence shall lie before the Trial Court which shall determine all questions relating to the waive or compounding of an offence or awarding of punishment under S. 310, PPC and if the Trial Court is convicted that the waiver of right of Qisas or compounding of an offence punishable under Chapter XLV is genuine and in order, it shall acquit the accused. **2000 P.Cr.L.J. 553.** Sentence of qisas or other sentence may be waived off or compounded by appellate Court during pendency of appeal. **PLJ 2005 Cr.C. (Pesh.)169**

Offence under Ss. 338-E, 338-H, 309, 310, PPC compoundable with permission of Court. **NLR 1991 SCJ 595**

**Compounding of offence.** Offences committed before the commencement of Criminal Law (Second Amendment) Ordinance, 1990 could be compounded in view of Ss. 338-E & 338-H, PPC. **2000 SCMR 1839**

*It was a case of two version and which one was correct would be seen after recording of evidence by Trial Court. Petition was a parda-nashin lady and student of 3rd year. Case of petitioner fell with first proviso. Interim pre-arrest bail continued. 2006 P.Cr.R. (Lah) 1707(b) = 2006 LN (Lah) 982(b)*

*Appellate Court below while maintaining conviction as recorded by Trial Court, further imposed sentence of Arsh upon petitioner in the said case. Petitioner challenged the same by way of Criminal Misc. in High Court. Validity. No discretion had been left with the Court to reduce the quantum of amount of "Arsh" or not to impose the Arsh. Impugned judgment passed by Appellate Court below was not liable to be upset or reversed. Criminal Misc. dismissed. 2005 P.Cr.R. (B.Pur) 1581(b)*

**Provision of. Intent and scope.** Liability to pay Arsh and the amount are mandatory conditions, for which the Court passing the sentence has not been granted any discretion to remit the imposition "Arsh" or to direct the payment of amount less than 1/3rd of Diyat. In case of passing of sentence of punishment of imprisonment the Court has got discretionary powers to impose imprisonment or not to pass the sentence or the award the sentence upto the extent of ten years. **2005 P.Cr.R. (B.Pur) 1581(a)**

**338-F. Interpretation.**-- In the interpretation and application of the provisions of this Chapter, and in respect of matters ancillary or akin thereto, the Court shall be guided by the Injunctions of Islam as laid down in the Holy Quran and Sunnah.

### COMMENTS

**Scope.**-- Provisions make the Islamic Law on the subject applicable not only to cases relating to the offences enumerated in Chapter XVI of Penal Code but also to all matters ancillary or akin thereto. **PLD 2001 Lah. 105.**

**Interpretation.**-- Court is to be guided by Injunctions of Islam as laid down in Quran and Sunnah. **PLD 2003 Quetta 122.**

Court, in the matter of interpretation and application of provisions of Chap. XVI, PPC in respect of the offences mentioned therein or the matters ancillary or akin thereto, can seek guidance from the Holy Qur'an and sunnah as provided in S. 338-F, PPC but it cannot bring a non-compoundable offence within the purview of S. 345, Cr.P.C. by virtue of S. 338-F, PPC for the purpose of compounding it on the basis of compromise. **PLD 2006 SC 53 (d)**

Compounding an offence by Court which is non-compoundable is statutory law in the light of concept of forgiveness in Islam, on the basis of compromise. Feasibility. Accused had been sentenced to death under S. 396, P.P.C. and to ten years' R.I. under S. 412, P.P.C. by the Trial Court and he had lost his case on merits upto Supreme Court in regular proceedings. Accused moved an application to the Court of first instance for his acquittal on the basis of his compromise with the legal heirs of the deceased wherein he also made an alternate prayer of reduction in sentence. **2006 PSC (Cri.) 152**

**338-G. Rules.--** <sup>149</sup>[(1)] The Government may, in consultation with the Council of Islamic Ideology, by notification in the official Gazette, make such rules as it may consider necessary for carrying out the purposes of this Chapter.

<sup>150</sup>[(2) Notwithstanding anything contained in sub-section (1), the Federal Government may, by notification in the official Gazette, make rules regarding the following matters, namely:--

(i) providing mechanism for creation of a fund, which shall be non-lapsable and exempt from taxes, for the purpose of making payment of *diyat*, *arsh* and *daman* of the convicts, who on account of poverty and weak financial position are confined in jails for want of making the said payment;

(ii) facility of extending soft loans out of the said fund to the convicts, enabling them to satisfy the claim of legal-heirs of the deceased or victims in respect of *diyat*, *arsh* and *daman*;

(iii) in appropriate cases release of such prisoners on parole by the Court who after having served out the substantive sentence of imprisonment, if any, are confined in jails on account of non-payment of *diyat*, *arsh* or *daman*;

(iv) providing jobs to the said convicts, other than the Government department in the work places attached with the jails or through the social organizations or philanthropists, enabling the convicts to disburse the amount paid out of the fund or extended through loans;

(v) mechanism, protecting rights of the victims for the purpose of *diyat*, *arsh* and *daman*; and

(vi) any other matter for which the rules may be necessary to carry out the aforesaid purposes.]

**338-H. Saving.--** Nothing in this Chapter, except sections 309, 310 and 338E, shall apply to cases pending before any Court immediately before the commencement of the Criminal Law (Second Amendment) Ordinance, 1990 (VII of 1990), or to the offences committed before such commencement.

## COMMENTS

The apparent meaning of the proviso is that despite composition of the offence by way of waiver of *Sulah-i-Badl* the Court may award punishment of imprisonment by way of *tazir*, keeping in view the circumstances of the case. Neither the quantum of imprisonment has been provided nor the

149. Numbered as sub-section (1) by the Pakistan Penal Code (Amendment) Act, 2010.

150. Sub-section (2) added by the Pakistan Penal Code (Amendment) Act, 2010.