Diyyat – Do the Pakistani Law and *Sharī'ah* (Islamic Law) have the Same Approach? (A Critical Comparative Lego Jurisprudential Analysis)

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Abstract

Regarding the concept of *Diyyat* (blood money), Islamic Law offers a comprehensive and extensive details; having sources from both Qur'ān and *Sunnah*. At the same time, the Holy *Qur'ān* and *hadīth* value the accepting of *Diyyat* rather than *Qiṣāṣ* (retaliation)- capital punishment for the offence of homicide. In reality, the present legal system of Pakistan, passing through different process, pursue the practice of *Diyyat* as present in the texts of classical *fiqh* (Islamic Law). Even so, there are provisions which are in compliance to Islamic Law while some others are not. The present work, predominantly, aims and contributes, at the first instance, to the concept of *Diyyat* in Islamic Legal system. It also purports for highlighting the gaps and flaws that are in the current legal system of Pakistan. Not only the flaws, the present research endeavor elaborates those rules that are in conformity with Islamic Law of *Diyyat*. The findings, herein, show that the concept of *Diyyat* in the penal legal system of Pakistan has, of course, similarities with the same concept in *Sharī'ah* (Islamic Legal system) e.g. the compounding of right of *Qiṣāṣ* in lieu of *Diyyat*, waiver of *Qiṣāṣ*, the concept of *walī*, the payment of *Diyyat*, disbursement of *Diyyat*, value of *Diyyat* in terms of silver and etc. The penal law, undeniably, has some metamorphoses too such as; payment of *Diyyat* in installments during the span of five years, value of *Diyyat* just in terms of silver, muteness in case of women *Diyyat* etc. Islamic Law, however, is more superordinate while discussing the same. Additionally, to probe into the issue, the qualitative content analysis technique has been used.

Keywords: *Diyyat*, *Qiṣāṣ*, *Sharī'ah*, Pakistani Law, Law, Punishment

Introduction:

Due to the social nature of human beings, they cannot inhabit solitarily. They must have to interact with each other in a civilized way; a way to a better life. As per the guidance of the Holy *Qur'ān*, therefore, sociability is the inherent feature of the human nature. It states, "*O mankind! We have created you male and female, and have made you nations and tribes, that you may know one another [not that on account of this you may boast of being superior to others]. Certainly, the noblest of you, in the sight of Allah, is the most God-fearing among you*"[1]. This *Qur'ānic* verse provides the philosophy of social existence according to which humans are created social, living in groups, nations and tribes. Long since, Aristotle offers the same view by saying that "*Man is essentially a social animal by nature*"[2]. Due to this peculiar nature of sociability, differences and

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[1] The verse of the Holy Qur'ān is:

يَآيُّهَا النَّاسُ اِنَّا خَلَقْنٰكُمْ مِّنْ ذَكَرٍ وَّاُنْثٰى وَجَعَلْنٰكُمْ شُعُوْبًا وَّقَبَآئِلَ لِتَعَارَفُوْا اِنَّ اَكْرَمَكُمْ عِنْدَ اللّٰهِ اَتْقٰكُمْ اِنَّ اللّٰهَ عَلِيْمٌ خَبِيْرٌ(49:13)

[2] Following Aristotle, "Man is by nature a social animal; an individual who is unsocial naturally and not accidentally is either beneath our notice or more than human" (Politika, ca. 328 BC),

disputes also fall out – for one reason or another. Moreover, a man is eristic in nature and this character, too, increase the possibility of differences. While pointing out such nature the Holy *Qur'ān* says, "*And verily we have displayed for mankind in this Qur'ān all manner of similitudes, but man is more than anything contentious*"[3].

Being a complete code of life, Islam offers a comprehensive guideline for every walk of life including, primarily, social, civil, economic, political, judicial etc.. The *Holy Qur'ān*, thus, provides, "*This day have I perfected your religion for you and completed my favor unto you, and have chosen for you as religion al-Islam*"[3]. Of course, many wickedness thinking give birth to many crimes like homicide, infidelity, larceny, imbibing etc; termed by *Sharī'ah (Islamic Law)* as *Qatl, Zinā, Sariqah, Shurb* respectively. Islam, therefore, focuses on the discussion of such crimes and their penalties with minute details: leaving other crimes to be determined and penalized by the head of the state. . The discipline, related to discussion of such crimes, is one of nonpareil field in Islamic law, known as Islamic Criminal Law- typically also called *Fiqh ul Jinayāt*. Owing to the fact of its importance, the classical *Fuqahā* (Muslim jurists) devote a separate chapter of their works to such discipline. Those jurists include, not exhaustively, Imām al-Shawkānī,[4] Burhānu Din abī al Hasan 'li Ibni Abī Bakar al Marghinānī,[5] Imām Kasānī,[6] Ibni Nujaim,[7] Muhammad 'laed Din Ibni'abidin,[8] Abū Bak'r Muhammad b. Ahmad Al-Sarakhsi[9] and many others.

In order to maintain peace and justice in the society, *Sharī'ah* set penalties on a variety crimes, like lapidation on infidelity, amputation on larceny, flagellation on imbibing and retaliation (*Qiṣāṣ*) on homicide or severe injuries to the body. Among all the crimes, the crime of homicide is, indeed, the most grievous one. In this regard, the Holy *Qur'ān* provides, "*For that cause, We decreed for the Children of Israel that whosoever kill a human being for other than manslaughter or corruption in the earth, it shall be as if he had killed all mankind*"[10]. Majority of the Muslim Jurists divide homicide in three different kinds, i-e, *Qatl e 'md, Shbh e 'md, Qatl e Khta*.[11] The primary punishment of premeditated murder is *Qiṣāṣ*.[12] However, when due to some impediments or fall off, like in the cases when *Walī* (guardian) of victim is anonymous,[13] or due to

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Vinciarelli, Alessandro. "Capturing order in social interactions [social sciences*]."* IEEE Signal Processing Magazine 26, no.5 (2009). http://www.dcs.gla.ac.uk/~vincia/papers/order.pdf.

[3] The verse of the Holy Qur'ān is:

اَلْيَوْمَ أَكْمَلْتُ لَكُمْ دِينَكُمْ وَأَتْمَمْتُ عَلَيْكُمْ نِعْمَتِي وَرَضِيتُ لَكُمُ الْإِسْلَامَ دِينًا(05:03)

[4] Shawkānī, *Nayl al-Awtār*, 1st Ed. (Dār Ehiā al-Tourath al-ʿArabī, 2001).

[5] Burhānu Din abī al Hasan Ali Ibni Abī Bakar al-Marghinānī *, Al Hidāyah Sharh Bidāyat ul Mubtad*, n.d (Beriut: Dār Ihyā' al-Turath al-Arabi, n.d)

[6] Abū Bakr ibn Mas'ūd al-Kāsānī*, Bādā'i'al-Sanā'i*', 2nd Ed. (Beirut: Dār al-kutub al-ilmeya Labnan, 1986).

[7] Zainuddin Ibn Nujaim, *al-bahr-ur-Ra'iq* (Beirut: Dār Al-ma'arifah, n.d).

[8] Ibn Ābidīn, *Radd al-Muhtār* (Beirut: Dār al-Fikr, 2005).

[9] Abū Bakar Muhammad ibn Abī Sahal Sarakhsī, *Al-Mabsūt*, n.d (Beriut: Dār al-Maʿrifah, 1993).

[10] The verse of the Holy Qur'ān flows as:

مِنْ اَجْلِ ذٰلِكَ ۚ كَتَبْنَا عَلٰى بَنِيْٓ اِسْرَآءِيْلَ اَنَّهٗ مَنْ قَتَلَ نَفْسًا بِغَيْرِ نَفْسٍ اَوْ فَسَادٍ فِى الْاَرْضِ فَكَاَنَّمَا قَتَلَ النَّاسَ جَمِيْعًا (05:32)

[11] Shamsuddin Muhammad bin Ahmad al-khatīb al-sharbinī al-shafʿī, *Al-Iqnā' ī fī hal alfāz abi shaja* (Bierut: Dār al-fikar),2:494

[12] Abū Bakr ibn Mas'ūd al-Kāsānī*, Bādā'i'al-Sanā*'i', 7: 235.

[13] Ibid, 240.

ethnicity of right of *Qiṣāṣ*,[14] or in the case of *Qatl e Khta or Shbh e 'md*,[15] *Qiṣāṣ* cannot be implemented. At this very stage the option of *Diyyat* comes forth. A comprehensive details, related to the provisions of *Diyyat*, are given by *Sharī'ah,* i-e who would pay *Diyyat*, it is on the culprit (in his property) or on his relatives (*'āqila*)[16], time period for the payment, whether it could be given in installment of not etc.

Pakistan has got independence in the name of Islam. After addition of article 2-A to the constitution, the Holy *Qur'ān* and *Sunnah* become the superior law of the country,. As per this provision all courts are duty-bound to bring all laws in conformity with the principles of Islamic law.[17] In Pakistan, the concept of *Diyyat* comes forth with the introduction of *Qiṣāṣ* and *Diyyat* Ordinance 1990.[18] Following this, certain sections have been added, too, to the Pakistan Penal Code. Such sections are, predominantly, related to *Qiṣāṣ* and *Diyyat*. Few of such sections are related to the value of *Diyyat*,[19] the method of disbursement,[20] the method of payment etc.[21] Meaning thereby, efforts are made to bring these laws in compliance with the concept of *Diyyat* envisaged by *Sharī'ah*. However, such newly inducted sections do not provide the concept in an all-inclusive manner. The following discussion will clarify this fact further.

While discussing the value of *Diyyat*, the Pakistan Penal Code states that in any case the amount should not be less than thirty thousand six hundred and thirty grams of silver; meaning thereby that such law restricts the payment of *Diyyat* in silver. O *Sharī'ah*, on the other hand, offers several options to the culprit including gold, silver, cows, sheep, and garments. On the same way the Pakistan Penal Code provides, while discussing the payment of *Diyyat*, that *Diyyat* may be made in lump sum or in installments: spread over a period of five years.[22] In *Sharī'ah*, Muslim jurists have different opinion while seeing to the situation of the criminal.

The present work, like every other work, has certain objectives: firstly, to cognize the comprehensive concept of *Diyyat* in *Sharī'ah*, elaborated by the classical and contemporary *Fuqaha*. Secondly, to canvas issues related to *Diyyat*, prevailing in the present legal system of Pakistan. Thirdly, to compare the concept of *Diyyat*, envisaged by the classical Muslim jurists, with that in the Pakistani legal system. Fourthly, to provide effective and new suggestions, based on the present research endure, in the existing law of *Diyyat*, mainly, given in the Pakistan Penal Code.

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[14] Ibn Qudāma, *Al-Mughnī,* (Maktabat- ul- Qahira,1968), 8: 287.

[15]The holy Qur'ān provides: It is not (permissible) for a believer to kill a believer except by mistake; and whoever kills a believer by mistake, he should set free a believing slave and compensation payment should be given to the family of the slain, unless they remit the compensation payment as alms. (04:92).

[16] The term used for those who pay *Diyyat* in case of *Qatl e 'md and Shbh e 'md.*
Burhānu Din abī al-Hasan Ali Ibni Abī Bakar al-Marghinānī , *Al Hidāyah Sharh Bidāyat ul Mubtadī*, 4: 460.

[17] PLD 2001 SC 18, See also PLD 1988 SC 287.

[18] Tahir Wasti, *The application of Islamic criminal law in Pakistan: Sharia in practice* (Brill, 2008), 173.

[19] *Pakistan Penal Code 1860*, section 323.

[20] *Pakistan Penal Code 1860*, section 330.

[21] *Pakistan Penal Code 1860*, section 331.

[22] *Pakistan Penal Code 1860*, section 331.

Methodology:

A qualitative research methodology, extensively used by many researchers in social sciences, has been followed in the present work; where one of its famous technique i.e. discourse analysis. At the same time, the research is based, too, on comparative and descriptive techniques. Comparative methodology of the available secondary data is made to examine the present penal legal system of Pakistan with that of Islamic Law. The concept of *Diyyat* in Islamic Law has been critically analyzed evidently, from the work of classical and contemporary Muslim Jurists. Moreover, the opinions of classical jurists are confined to the four schools of thoughts, i.e, *Hanafī* (80/699), *Mālikī* (164/H), *Shāf'ī* (204/820), and *Hanbalī* (428/H). However, the work of classical Muslim Jurists is favored more relatively to the work of contemporary Muslim Jurists: owing to the fact that the previous one is more comprehensive and it holds more renditions. In addition, various references have been made from the Holy *Qur'ān* and *Sunnah*; as the issue under investigation is wholly a religious one in nature. Different typical and online libraries have been used too. The statutes, predominantly related to the topic like Pakistan Penal Code, 1860 and Criminal Procedure Code, 1898 and etc. have been utilized. In addition to this, different Acts, Ordinances and case laws are studied, to set strong arguments on the issue under investigation. Besides this, various citations have been made from several journals, above all, those which are veritable and more authentic and related to the issue under probe. Furthermore, different websites, magazines, newspapers etc. have been used, too.

The Concept of *Diyyat* - An Overview of Classical and Contemporary Muslim Jurists:

The basic sources of *Sharī'ah* are, indeed, *Qur'ān* and *Sunnah*. The former either provide panoptic, short or detailed descriptions of an issue and the latter its further elaboration. This issue may be related to *Fiqh ul usrah* (family law), *M'āmilāt* (transactions), *Murafiāt* (Islamic Procedural Law), *'laqāt u Dawliah* (International Relations) and *Jenayāt* etc. The present work discussing an issue related to the last one.

Sharī'ah has set three types of punishments; *Hadd*,[23] *Qiṣāṣ* and *Ta'zir*[24]. Standards has been determined by *Sharī'ah*, under which these punishments are implemented. *Qiṣāṣ*, for instance, is enforced in case of murder and severe injuries to the body. However, but other alternatives are also offered by *Sharī'ah* to the victim or to the legal heirs of the victim, such as, *Diyyat*. A detailed literature is available in *Sharī'ah* in connection to the issues of *Diyyat*. The *fuqahā* has immense discussion related to various facets of such concept i.e.the quantum of each *jins*, kinds of *Diyyat*, who shall have to pay *Diyyat*? time of payment, whether male and female are equal while paying *Diyya*? etc.

The concept of *Diyyat* is pre Islamic in nature, however, Islam has added a highly appreciated literature. Following this, it is legalized by the Holy *Qur'ān* and *Sunnah*. The Holy *Qur'ān* states:

> "*It is not (permissible) for a believer to kill a believer except by mistake; and whoever kills a believer by mistake, he should set free a believing slave and compensation payment should be given to the*

[23] Hadd is the determined punishment that is obligatory as a right of Allah. Abū-Bakr Mas'ūd Al-Kāsānī, *Bādā'i'al-Sanā'i'*, 7:33.

[24] A form of discretionary punishment that was to be delivered for transgression against God, or against individual for which neither fixed punishment nor penance was prescribed.

> *family of the slain, unless they remit the compensation payment as alms*."[25]

It is also supported by the *Sunnah* of Prophet (SAW) i.e. when the prophet wrote a letter to 'mru Ibn Hazam, the governor of Yemen at that time, where various principles, related to *Diyyat*, were elaborated[26]

Regarding to the definition of *Diyyat*, Imām Sarakhsī, the well-known Hanafī school jurist, says that,*Diyyat* is derived from *ada*, as it is the property paid in exchange of destructive soul. He adds further that it is a special name given to the property as an alternate of the destructive soul like an obligatory price in all other damaged things.[27] *Fuqahā* has difference of opinion while discussing the *ajnās* in which *Diyyat* can be paid. According to Imām Abū Hanīfa and Imām Malik, *Diyyat* is required in three *ajnās*, i.e., camels, gold and silver. They support their argument by *hadīth* of Prophet (SAW), "And for a life, *Diyyat* is hundred camels".[28] They also cite practice of Umar (RA). In gold the quantum is thousand Dinars and in silver it is ten thousand Dirhams.[29] The distinction is there in the quantity of silver: Imām Abū Hanīfa makes it equal to ten thousand Dirhams, while according to *Shaf'ī*, it is equal to twelve thousand Dirhams. The reason to this securement is that the former makes one Dinar equal to twelve Dirham while the latter makes it equal to twelve Dirhams.[30] In view of Imām Ahmad opinion *Diyyat* may be paid in six *ajnās*, i.e, camel, gold, silver, cow, sheep and garments.[31] 'mr bin Shu'aib, on his father's authority, narrates that the value of blood-money at the time of the Messenger of Allah was eight hundred dinars or eight thousand dirhams and the blood-money for the people of the Book was half of that of Muslims. He adds further that this verdict has remained intact till Umar (RA). His famous statement can be cited, herein, too where he said ,

> "*Take note! Camels have become dear. So Umar fixed the value for those who possessed gold at one thousand dinars, for those who possessed silver at twelve thousand (dirhams), for those who possessed cattle at two hundred cows, for those who possessed sheep at two thousand sheep, and for those who possessed suits of clothing at two hundred suits. He left the blood-money for dhimmis (protected people)*

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[25] *Al-Qur'ān, Al-Nisa,* 4:92.
The original text runs as:
وَمَا كَانَ لِمُؤْمِنٍ أَن يَقْتُلَ مُؤْمِنًا إِلَّا خَطَأً وَمَن قَتَلَ مُؤْمِنًا خَطَأً فَتَحْرِيرُ رَقَبَةٍ مُّؤْمِنَةٍ وَدِيَةٌ مُّسَلَّمَةٌ إِلَىٰ أَهْلِهِ إِلَّا أَن يَصَّدَّقُوا فَإِن كَانَ مِن قَوْمٍ عَدُوٍّ لَّكُمْ وَهُوَ مُؤْمِنٌ فَتَحْرِيرُ رَقَبَةٍ مُّؤْمِنَةٍ وَإِن كَانَ مِن قَوْمٍ بَيْنَكُمْ وَبَيْنَهُم مِّيثَاقٌ فَدِيَةٌ مُّسَلَّمَةٌ إِلَىٰ أَهْلِهِ وَتَحْرِيرُ رَقَبَةٍ مُّؤْمِنَةٍ فَمَن لَّمْ يَجِدْ فَصِيَامُ شَهْرَيْنِ مُتَتَابِعَيْنِ تَوْبَةً مِّنَ اللَّهِ وَكَانَ اللَّهُ عَلِيمًا حَكِيمًا

[26] Narrated by Nisāī in Al Qasāmah under the topic of al-'uqul, cited from Al-San'anī, *Subul al-Salam sharh Bulugh al- Maram* (Bierut, Dar al-Kutub al-'Arabi, 1987), 3: 497,498.
[27] Abū Bakar Muhammad ibn Abī Sahal Sarakhsī, *Al-Mabsūt,* 26: 59
[28] Abū Abdur Rehman Ahmad bin Shu'yb bin Alī al khurāsānī, *Sunan al Nisā'ī,* (Halb: Maktab al Matbū'āt al Islamiah), Hadith No. 4853, 8:57.
Abū Dawood Sulymān Bin Al-Ash'th, *Sunan Abī Dawood*(BIierūt: Al-Maktabatul al-asariyyah), Hadith no. 4543, 4: 184.
[29] Abū Bakr ibn Mas'ūd al-Kāsānī, *Bādā'i'al-Sanā'i',* 7: 254.
[30] Abdul Qadir Audah, *Al Tashrī' al-Jinā'ī al-Islamī Muqārenan bil-Qanoon al-waḍ'ī* , n.d (Peshawar: Maktabah Haqqaniyyah, n.d), 2: 565.
[31] Ibn Qudāma, *Al Mug*hnī, 8:367.

> *as it was, not raising it in proportion to the increase he made in the blood-wit.*"[32]

Indeed, camels have different types and categories. The classical *fuqahā* has described the description of camels with minute details in *Diyyat*. As per view of Imām Abū Hanīfa and Imām Yusuf, it has four categories in *Shbh 'md*, i-e. twenty five *Bint Makhās* (she camels in their second year), twenty five *Bint Labūn* (she camel in their third year), twenty five *Hiqqah* (she camels in their fourth year, twenty five *Jiz'h* (she camel in their fifth year). Imām Shaf'ī and Imām Muhammad, on the other hand, divide it into three classes, i-e, thirty *Hiqqah*, thirty *Jiz'h*, fourty *Khilfah* (Pregnant camels).[33] The contention for their opinion is based on *Hadīth* of the Prophet (SAW) "*Beware! The blood-wit for unintentional murder, such as is done with a whip and stick, is one hundred camels, forty of which are pregnant*".[34] In *Qatl e Khta*, all *fuqahā* are unanimous regarding to the kind of camels; dividing them in five categories, i-e, twenty *Bint Makhās*, twenty *Bint Labūn*, twenty *ibn Makhās*, twenty *Hiqqah*, twenty *Jiz'h*. They support their view on *Hadīth*, Narrated by Abdullah ibn Masud:

> "*The blood-wit for a accidental killing should be twenty she-camels which had entered their fourth year, twenty she-camels which had entered their fifth year, twenty she-camels which had entered their second year, twenty she-camels which had entered their third year, and twenty male camels which had entered their second year*". It does not beyond Ibn Masud.[35]

Moreover, Imām Shaf'ī has placed *Ibn labūn* instead of *Ibn Makhās*.[36]

Diyyat may be *Mughallaẓa* (harder *Diyyat*) or *Mukhaffafa* (light *Diyyat*). This concept comes forth when *Diyyat* is paid in camels. This *Taghlīẓ* is not in quantity but in the variety of camels.[37] After studying the former concept profoundly it reveals that *Diyyat* is considered *Mughallaẓa* when the camels have the features, i-e, thirty *Hiqqah*, thirty *Jiz'h*, fourty *Khilfah* (Pregnant camels), giving it at once, by the perpetrator or from his property. It is *Mukhaffafa* when *Diyyat* is paid by the *'āqila* in the duration of three

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[32] Abū Dawood Sulymān Bin Al-Ash'th, *Sunan Abī Dawood*, Hadith no. 4542, 4:184.
The hadith originally runs as:

عَنْ عَمْرِو بْنِ شُعَيْبٍ، عَنْ أَبِيهِ، عَنْ جَدِّهِ، قَالَ: " كَانَتْ قِيمَةُ الدِّيَةِ عَلَى عَهْدِ رَسُولِ اللَّهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ: ثَمَانَ مِائَةِ دِينَارٍ أَوْ ثَمَانِيَةَ آلَافِ دِرْهَمٍ، وَدِيَةُ أَهْلِ الْكِتَابِ يَوْمَئِذٍ النِّصْفُ مِنْ دِيَةِ الْمُسْلِمِينَ "، قَالَ: فَكَانَ ذَلِكَ كَذَلِكَ حَتَّى اسْتُخْلِفَ عُمَرُ رَحِمَهُ اللَّهُ، فَقَامَ خَطِيبًا فَقَالَ: أَلَا إِنَّ الْإِبِلَ قَدْ غَلَتْ، قَالَ: فَفَرَضَهَا عُمَرُ عَلَى أَهْلِ الذَّهَبِ أَلْفَ دِينَارٍ، وَعَلَى أَهْلِ الْوَرِقِ اثْنَيْ عَشَرَ أَلْفًا، وَعَلَى أَهْلِ الْبَقَرِ مِائَتَيْ بَقَرَةٍ، وَعَلَى أَهْلِ الشَّاءِ أَلْفَيْ شَاةٍ، وَعَلَى أَهْلِ الْحُلَلِ مِائَتَيْ حُلَّةٍ، قَالَ: وَتَرَكَ دِيَةَ أَهْلِ الذِّمَّةِ لَمْ يَرْفَعْهَا فِيمَا رَفَعَ مِنَ الدِّيَةِ

[33] Burhānu Din abī al-Hasan Ali Ibni Abī Bakar al-Marghinānī , *Al Hidāyah Sharh Bidāyat ul Mubtadī*, 4:460.

[34] Abū Dawood Sulymān Bin Al-Ash'th, *Sunan Abī Dawood*, Hadith no. 4588, 4:195.
The original text runs as follows:

أَلَا إِنَّ دِيَةَ الْخَطَإِ شِبْهِ الْعَمْدِ مَا كَانَ بِالسَّوْطِ وَالْعَصَا مِائَةٌ مِنَ الْإِبِلِ: مِنْهَا أَرْبَعُونَ فِي بُطُونِهَا أَوْلَادُهَا

[35] Ibid, Hadith no. 4545, 4:184.
The flow of the hadith originally runs as:

عَنْ عَبْدِ اللَّهِ بْنِ مَسْعُودٍ، قَالَ: قَالَ رَسُولُ اللَّهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ: «فِي دِيَةِ الْخَطَإِ عِشْرُونَ حِقَّةً، وَعِشْرُونَ جَذَعَةً، وَعِشْرُونَ بِنْتَ مَخَاضٍ، وَعِشْرُونَ بِنْتَ لَبُونٍ، وَعِشْرُونَ بَنِي مَخَاضٍ ذُكُرٍ» وَهُوَ قَوْلُ عَبْدِ اللَّهِ

[36] Al Mawardi, *Al Hawi al Kabir*, 1st Ed. (Beirut: Dār al-kutub al-ilmeya Labnan, 1999), 12:223

[37] Abū Bakar Muhammad ibn Abī Sahal Sarakhsī, *Al-Mabsūt*, 26:77.

years.[38] Additionally, Imām Abū Hanīfa considers it *Mughallaẓa* when the camels have four varieties of *Bint Makhās, Bint Labūn*, *Hiqqah*, *Jiz'h*. Furthermore, in his view the punishment of *shbh 'md* is *Diyyat Mughallaẓa* paid by the *'āqila*[39]; which is originally the secondary punishment for *Qatl 'md* when *Qiṣāṣ* cannot be implemented.

The Concept of *Diyyat* in Pakistani Law - A Critical Analysis:

Pakistan had acquired in the name of Islam.[40] After achieving this holy purpose, it was obligatory to bring all the laws in conformity with the principles of Islamic law. The process of Islamisation, thus, was first initiated through the introduction of Islamic Advisory Council in 1962. A constitutional protection was given to it in the Constitution of 1962. One of the main functions of the Council was to advise parliament, the President or a Governor on any question referred to the Council as to whether a proposed law wasor was not repugnant to the injunction of Islamic law. General Zia ul Haq reconstituted the Council; containing renowned scholars from different schools of thought. 1n 1978, later on, the Council drafted *Hudūd* Laws,[41] which were later on enforced on 10th February,1979 through an ordinance by the then General Zia ul Haq.[42] Subsequently, getting along in the process of Islamization, *Qiṣāṣ* and *Diyyat* Ordinance were also enforced in Pakistan. The fact behind the introduction of such laws was the constitutional petition of Gul Hassan filed in the Shari'āt Bench of High Court; claiming that that the provisions of Pakistan Penal Code 1860 and Criminal Procedure Code 1898 were not in accordance with the principles of Islam. It was pointed in the petition that criminal laws in Pakistan do not spot the choice of *Diyyat* (Blood Money) and pardon for the inheritors of the victim. The court held that the law of murder needs amendment.[43]

Because of the reasons mentioned above, *Diyyat*, a well-known term, is hash out by the law makers and laid down it in the Pakistan Penal Code 1860. Section 299(e), for instance, discuss it as, "*Diyyat* means the compensation specified in section 323 payable to the heirs of the victim".[44] While section 323 of the same code flows as:

> *The Court shall, subject to the Injunctions of Islam as laid down in the Holy Qur'ān and Sunnah and keeping in view the financial position of the convict and the heirs of the victim, fix the value of Diyyat which shall not be less than the value of thirty thousand six hundred and thirty grams of silver.*[45]

The cited text unveil that the concept, herein, is abridged and curtailed in spite of its comprehensiveness in the field of *Sharī'ah*. The section, aforementioned, elaborates three different views. Firstly, it gives authority to the court to fix and determine the value of *Diyyat* in accordance with the manners prescribed in the Holy *Qur'ān* and *Sunnah*.

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[38] Shamsuddin Muhammad bin Ahmad al-khatīb al-sharbinī al-shaf'ī, , *Al-Iqnā' ī fī hal alfāz abi shaja*, 2:503

[39] Abū Bakr ibn Mas'ūd al-Kāsānī, *Bādā'i'al-Sanā'i*', 7: 254, 255.

[40] Constitution of Pakistan, 1973, Article 2.

[41] These were five ordinances of 1979; The offence against property (Enforcement Of Hudood),The offence of Zina (Enforcement Of Hudood), The offence of Qazf (Enforcement Of Hudood), The prohibition (Enforcement Of Hudood), Execution Of punishment of whipping.

[42] Muhammad Khalid Masud, *Hudood Ordinance 1979* (Pakistan, 2006): *An Interim Brief Report, Government of Pakistan*, 8-13. http://cii.gov.pk/publications/h.report.pdf

[43] Gul Hasan khan VS Government of Pakistan, PLD 1980, FSC 187.

[44] *The Pakistan Penal Code*, 1860, section 299.

[45] *The Pakistan Penal Code*, 1860, section 323.

Secondly, it reveals that the financial position of the convict and the heirs of the victim shall be determined by the court. Thirdly, it restricts the courts that in any case, the amount shall not be less than thirty thousand six hundred and thirty grams of silver. Concerning with the former issue, the code has not put up, for the court, the prescribed principles of Islamic law for *Diyyat*, i.e, method of its payment, amount and species in which *Diyyat* may be given. Here a discretion of determination of various facets *Diyyat* is given to the court; instead of the fact that a comprehensive and detailed substantive law is available in the skeleton of Islamic law. As a standard principle of Islamic law no discretion can be given to the court in matters which are settled in the legal spectrum? A possible argument can also be derived from the Holy *Qur'ān* where Allah says, "*So judge (O Muhammad) between them by what God has revealed and do not follow their vain desires, but beware of them lest they turn you away from some of what God has sent down to you*."[46] This verse clarifies that Islamic procedural law has a set a criteria for judges, i.e. to settle a dispute amongst humans and dispense justice as has according to the law prescribed in the Holy *Qur'ān*. In addition, every judge, sitting in the court, may not be familiar with the profoundness of Islamic Law and, therefore, may face many problems while interpreting the laws related to *Sharī'ah*. The situation may be worst in a case where a judge has no academic qualification in the field of Islamic law. The lack of background in Arabic language may multiply the problem herein. As for as other laws of land are concerned, judges are well qualified and competent; but in case of Islamic laws in general and Islamic criminal law in particular the situation is not so much satisfactory. As a result, they are dependent, not in each case, on Islamic law scholars and other non-judicial experts. They may sometime also depend on judicial experts like amicus curiae (latin word). Owing to the fact that most of them are graduated from such institutions which are not offering mentionable subjects of *Sharī'ah*; fairly they cannot be blamed for non-acquaintance with Islamic law.

In addition to the above, Islamic law has laid many options for the perpetrator to pay Diyyat in various forms. The Pakistan penal code, on the other hand, limits it to silver as;

> *The Federal Government shall, by notification in the official Gazette, declare the value of silver, on the first day of July each year or on such date as it may deem fit, which shall be the value payable during a financial year.*[47]

While imposing *Diyyat* many questions may come to the spot in front of the learned judges. For instance, whether *Diyyat* in silver should be paid as per its rate at the time of commission of the crime or at the time of final disposal of the case; whether to determine the value of *Diyyat* in silver with regard to the prescribed rate of Federal Government in the official notification or according to the rate of silver at the time of disposal of the case - owing to the fact that silver's rate may decreases or increases on daily basis.[48] All these questions are not answered in the existing penal laws of the country. All these questions are minutely discussed in *Sharī'ah*. Ironically, all these verdicts of Islamic law are not inculcated in Pakistani legal spectrum.

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[46] *Al-Qur'ān, Al-Maidah,5:*49
The original text runs as follows:
وَأَنِ احْكُم بَيْنَهُم بِمَا أَنزَلَ اللَّهُ وَلَا تَتَّبِعْ أَهْوَاءَهُمْ وَاحْذَرْهُمْ أَن يَفْتِنُوكَ عَن بَعْضِ مَا أَنزَلَ اللَّهُ إِلَيْكَ

[47] *Pakistan Penal Code,*1860 section 323.

[48] Abdul Ghafoor vs State PLJ 2010. Cr.c (Lahore) 170.

The Islamic Laws of *Diyyat* versus the Law of *Diyyat* in Pakistan:

Drastic changes, in the last few decades, are made to harmonize the law of *Qiṣāṣ* and *Diyyat* with the injunctions of Islamic law. Having said that, many amendments have been made in the penal laws i.e. the Pakistan Penal Code, 1860 and The Code of Criminal Procedure, 1898. Following this, many provisions related to crimes against a human body, are added. In other words *Qiṣāṣ* and *Diyyat* provisions are included to the existing body of penal laws. It can be, thus, said that the criminal in Pakistan, primarily, has its basic origin from *Sharī'ah*. However, profound study reveals that *Sharī'ah'*s criminal law is not taken in totality. Because of this reasons many loophole are therein. The following lines will clarify the ongoing discussion further.

As per *Sharī'ah* , the option to retaliate remains, with the legal heirs of the victim in case of intentional murder or with the victim himself in case of bodily harm. The same provisions are adopted by the Pakistan Penal Code, 1860. For example, the right of waiver of *Qiṣāṣ* in *Qatl 'md*, an adult sane walī may forego his right to *Qiṣāṣ*, at any time, with or without any compensation[49]. On the same way it says that where a *walī* is nonage or harebrained then such person may compound the right to retaliate but cannot waive without compensation. It further elaborates that if the government is *walī* then the right of *Qiṣāṣ* may be compounded but should not be waived up.[50] Although the law is based on *Sharī'ah*, however, it has been frequently misused by making compromises. Such compromises are, many times, against the true spirit of a compromise envisaged by Islamic law. The study of cases, conducted in ten districts of the province Panjab, show surprisingly that between the period of 1990 and 2010, not even a single liquidator has convicted under the law of *Qiṣāṣ*. The research also shows that during the same time period the number of death prosecution unusually dropped off while the ratio of out of court settlements leaped to thirty (30) percent. Between 1984 and 2000, the acquittal in the trial of death cases has increased to the ratio of sixty seven (67) percent from twenty eight (28) percent. Concurrently, the conviction rate lessened to thirty (35) percent from seventy nine (79) percent.[51] Some of the critics opine that such law provides an escape for the rich culprits who pressurize the poor victim for compromise. The court, though, has the right to reject such coerced settlement but still it does not invoke the extensive number of cases to be investigated. The law, as apparently, does not contradicts and conflicts to *Sharī'ah* because the fault is not in the law making but in its practicing.

According to the established principle of *Sharī'ah ṣulah* should be made with some compensation while *Afw* without any compensation.[52] The classical Muslim jurists minutely discuss such rules in their classical work. They permit *ṣulah* with an amount greater, equal or less than the original amount of *Diyyat*.[53] They stick to their opinion by citing *Hadīth* of the Prophet (SAW) which flows as,

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[49] *Pakistan Penal Code,*1860 section 309.
[50] *Pakistan Penal Code,*1860 section 310.
[51] Shahidullah Shahid M, *Comparative criminal justice systems: Global and local perspectives* (Jones & Bartlett Publishers, 2012), 509.
[52] Some classical jurists like Imām Shāf'i and Imām Ahmad opined that *afw* is the free waiver of retribution or in return of *Diyyat*. Both fall in the category of *Afw.* While according to Imam Abū Hanīfa and Imām Malik *afw* is without any consideration, if the there is something in return then this is not Afw but Sulh. Abdul Qadir Audah, *Al Tashrī' al Jinā̄t al Islamī Muqārenan bil Qanoon al-waḍ'ī,* 2:553.
[53] Abdul Qādir 'Audah, *Al Tashrī' al-Jinā̄t al-Islamī Muqārenan bil-Qanoon al-waḍ'ī*, 2:559.

> "*Whoever intentionally kills a believer shall be handed to the guardians of the killed person: if they will, they may kill him, and if they will, they may accept the blood money". [The blood money] is thirty Hiqqah, thirty Jidh'h, and forty Khilfah. And whatever they agree upon shall be given to them".*[54]

While for *Afw*, on the other hand, they cite a verse of the Holy Qur'ān and *Hadīth*. The previous flows as, "*But whoever overlooks from his brother anything, then there should be a suitable follow-up and payment to him with good conduct*"[55]; while the later runs as, "*Narrated Anas ibn Mālik: I never saw the Messenger of Allah SAW that some dispute which involved retaliation was brought to him but he commanded regarding it for remission.*[56] When the right to retaliate, waiver or compounding is to be exercised, it is as the sole authority of *walī*. The Pakistan Penal Code, 1860 follows the same principle in its ambit.[57] In case when there is no *walī*, the government will play this role as per hadīth of Holy Prophet SAW.[58] However, the penal law does not offer answers to many questions that may arise herein. For instance, who will be the *walī*? how it would be determined? in case of dispute over the role of *walī*, who would decide?, what are the legal limitations on *walī*? etc. It is, therefore, incumbent to bring some changes in the existing penal codes.

Contrastive, in *Sharī'ah*, the word *walī al-dam* is used for the person who can claim *Qiṣāṣ* or enter in to compromise with the offender. In *Sharī'ah*, there is difference of opinion among the jurists with regard to the person who can claim *Qiṣāṣ*. All school of thoughts, except the Mālikī School, opine that the prosecutors are the deceased heirs without any consideration of sex. The Mālikī school of thought, on the other hand, asserts that *Qiṣāṣ* must be demanded by the male relatives of the victim's family.[59] The relatives, who have the right to pardon the culprit, are divided into five categories i.e. the posterity, the antecedent, the posterity of the first antecedent (i-e, brothers and nephews etc.), the posterity of the second antecedent, (i-e, paternal uncles and cousins etc.) and the posterity of the third antecedent. In addition, the close relatives have the legal capability to exclude those who are not nearer like in case of son a grandson is excluded or in the presence of father a grandfather is excluded. Moreover, women have no role in *Qiṣāṣ* except in a case where there is no patrilineal male in the closest degree and the victim has female relatives of closest degree like daughters. The legal complexity comes, herein, when there is a minor in the legal heirs of the deceased. In such circumstances, the judge cannot

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[54] Ibn Mājah Abū Abdullah Muhammad Bin Yazīd Al-Qazwainī, *Sunan Ibn Mājah* (Dār ihyā' ār al-Kutub al-'arabiyyah), Hadith No.2626, 2:877.
The original text flows as:

عن عمرو بن شعيب، عن أبيه، عن جده، أن رسول الله صلى الله عليه وسلم قال: «مَنْ قُتِلَ مؤمِنا متعمِّدًا دُفِعَ إلى أولياء المَقْتول، فإنْ شاءوا قَتَلوا، وإنْ شاءوا أَخَذوا الدِّيَة، وهي ثلاثون حِقَّة، وثلاثون جَذَعَة، وأَربعون خَلِفَة، وما صالحوا عليه فهو لهم، وذلك لتَشْدِيد العَقْل

[55] *Al-Qur'ān, Al-Baqarah,*2:178

The original text is: مَنْ عُفِيَ لَهٗ مِنْ اَخِيْهِ شَيْءٌ فَاتِّبَاعٌۢ بِالْمَعْرُوْفِ وَاَدَآءٌ اِلَيْهِ بِاِحْسَانٍ

[56] Abū Dawood Sulymān Bin Al-Ash'th, *Sunan Abī Dawoo,* Ḥadith no. 4497, 4:169.
The wording of hadith originally flows as:

عَنْ أَنَسِ بْنِ مَالِكٍ، قَالَ: مَا رَأَيْتُ النَّبِيَّ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ رُفِعَ إِلَيْهِ شَيْءٌ فِيهِ قِصَاصٌ، إِلَّا أَمَرَ فِيهِ بِالْعَفْوِ

[57] *Pakistan Penal Code,*1860 section 305

[58] Abū Dawood Sulymān Bin Al-Ash'th, *Sunan Abī Dawood,* Ḥadith no. 2083, 2: 229

[59] Al-Zuhailī, Wahbah, *Al-fiqh-ul-islamī wa Adillatuhū* (Karachi: Dar al-isha'at Pakistan), 4:283.

impose the retaliation against the culprit until the minor attained the age of puberty. The Mālikī School is flexible in such type of situation, as according to them, the decision of adult's heir will be taken into account.[60]

The other important issue lies in the penal laws of Pakistan is the time line for the payment of *Diyyat*. As per the Pakistan Penal Code, it may be made payable in lump sum or in installments; spread over a period of five years from the date of final judgment.[61] This option is provided by the code without any distinction of payment of *Diyyat* in case of *Qatl 'md* or in any other form of homicide, i.e, *Qatl khta*, *Shbh 'md* etc. *Sharī'ah*, contrary to this, provide a comprehensive mechanism for the payment of *Diyyat*

As per the Ḥanafī school of thought *Diyyat* of '*md*, *Shbh'md* or *khatā* shall be spread over a period of three years. In their view, the second Caliph Hazrat Umar (RA) has followed the same mechanism while deciding the matters related to *Diyyat* .[62] The Mālikī , Shaf'ī, and Hanbalī have the same opinion that *Diyyat* of *'md* shall be paid to the heirs of the victim on instant basis; but if the victim's family consented for long term payment then, in such case, what has been agreed upon, shall be considered. They argue that as *Diyyat* in *'md* is the reciprocation of *Qiṣāṣ*, imposed on instantaneous basis; therefore, on the same analogy, *Diyyat* shall also be paid promptly. They add that if *Diyyat* is allowed to be paid in long term in *'md*, it is a relief to the perpetrator which he doesn't deserve.[63] In *Qatl khta*, the jurists, however, have no conflict; having the persuasion that it shall be paid within the period of three years.[64]

The Penal law of Pakistan, on the same way, lay down the payment of *Diyyat* without any discrimination of male and female victim. After being critically scrutinized, it has been discovered that the law does not recognized the payment of *Diyyat* when the victim is a female individual. In Islamic law, on the other hand, *Diyyat* of a woman is fixed as one-half of that of male *Diyyat*.[65]

Conclusion:

Diyyat is considered as a blood money, having its legality from many of verses of the Holy *Qur'ān* and *Sunnah*. Such concept is discussed as alternate punishment in case of '*md*, while as original punishment in case of *Shbh'md* or *khatā* In Pakistan, with the process of Islamisation, new amendments have been made in the penal provisions of the Pakistan Penal code. Such provisions include the laws related to the manslaughter, bodily injuries and etc. This step is taken for the purpose to bring such penal laws in conformity with the concept of *Qiṣāṣ* and *Diyyat* envisaged by Islamic law. As a first step, sections 299 to 338 of Pakistan Penal Code, 1862 have made in compliance with the principles of Islamic law. However, such provisions, with the passage of time, have been criticized, primarily, by the scholars familiar with the skeleton of Islamic criminal law. The penal law gets criticism, specifically, in cases

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[60] Peters Rudolph, *Crime and punishment in Islamic law: theory and practice from the sixteenth to the twenty-first century* (Cambridge University Press, 2005), 46.
[61] *Pakistan Penal Code*,1860 section 331.
[62] Abū Bakr ibn Mas'ūd al-Kāsānī, *Bādā'i'al-Sanā'i'*, 7:256.
[63] Audah, Abdul Qādir, *Al- Tashrī' al-Jinā'ī al-Islamī Muqārenan bil-Qanoon al-waḍ'ī,* 2:567.
[64] Abū Bakr ibn Mas'ūd al-Kāsānī, *Bādā'i'al-Sanā'i'*, 7:256.
[65] Abū al-Barakāt Abdullah bin Ahmad bin Mahmood Hafiz al-dīn Al-Nasafī, *Kanz al- Daqai'q* (Dār al-Bashāi'r al-Islāmiyyah, 2011), 646. See also al- Abū Bakar Muhammad ibn Abī Sahal Sarakhsī, *Al-Mabsūt*, 26: 79. ibn Rushd, Abū al-Walīd Muhammad ibn Ahmad, *Bidāyt al-Mujtahid wa Nihāyat al-Muqtasid* (Qāhirah: Dār al-hadith, 2004), 4:196.

where families enter into compromises or waive their right to *Qiṣāṣ*; pardoning the culprit against some particular amounts or without any consideration. Pardoning the culprit or compromising him is appreciated by Islamic law. However, in cases where the culprit has an extensive criminal forgiveness may insecure the peaceful society. The court, according to Islamic law, must have to keep this fact while dispensing the cases. Such Supporting adjustment is not made in the penal laws of Pakistan. On the same way, the law, related to the genus in which *Diyyat* should be paid, is not clear in nature. Moreover, the timeline for the payment of *Diyyat* is also not as per principles of Islamic criminal law. Owing to these facts, some amendments must be brought to the existing penal laws to make more them compliance with Islamic law.