

AQILAH عاقله IN ISLAM (payment of Diyat system)

By: **LIAQAT ALI KHOSO**
Additional District and Sessions Judge
Ph.D Law Scholar

ABSTRACT

Human being is ambitious by nature and he wants that his each and every ambition may be accomplished as he desired. Allah has commanded in the Holy Quran: *ام للانسان ما تمنى* "Or is there for man whatever he wishes?"¹ It is not possible for human being to receive whatever he wanted to. Allah has ordained His commandments to human beings through His prophets and particularly through his Last Messenger Hazrat Muhammad (peace be upon him) to the entire world till dooms day.

Human being is not perfect by nature so he is also not perfect in his desires and decisions. Human being has a priority in each decision in his favor. In such priorities, human being commits harm and cause loss to others to accomplish the desires and dreams to be true. By doing so, he commits such acts due to intention, negligence or unintentional acts which cause loss to others. Such acts, sometimes, amount to the loss of life of other person. The act done with full consciousness intention and preparation, then it is called *Amd* in Islamic jurisprudent and Shariah and other acts; done unintentional, are called *Khata* or *Bis-sabab* (unintentional act or by reasons of something else). In either cases; intentional or unintentional acts, the loss should be compensated. Islam has formulated such rules derived from the Holy Quran and Sunnah of the Holy Prophet (peace be upon him). In case of loss of life, limb or loss of effective activity of a limb or more (injuries to human body), the Shariah has ordained rules which include Qisas (retribution), Diyat (blood money) and AFW (forgiveness by victim or heirs of victim). These rules are exceptions to general rules and are blessings of Allah (SWT) as mentioned in the Holy Quran that : *O ye who believe! The law of equality is prescribed to you in cases of murder the free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand and compensate him with handsome gratitude, this is a concession and a mercy from your Lord. After this whoever exceeds the limits shall be in grave penalty*². It is because of the previous nations as Bani Israil (Jews) and Nasara (Christians) were not bestowed such remissions simultaneously in case of offence of injuries and murders. Bani Israil (Jews) were ordered Qisas only but no Diyat or AFW whereas Nasara (Christians) were given permission of AFW only but no Qisas or Diyat. As compared to them Muslims were given three possibilities in case of loss of others so that the enmity and grudge may be settled down between parties amicably or by way of Qisas³. These rules have been proved to be a source of stability in the Muslim society.

Qisas and Diyat laws introduced in Pakistani legal system and certain amendments were introduced in the penal and procedural laws and rules were framed for the said purpose. The Islamic concept of security to the human being is far lasting and is secured in each and every manner. Concept of Aqilahh is one of those securities provided in Islamic law. The loss of human being should not go vain in any manner whatsoever.

Key words: Qatl, Diyat, Aqilah, Ahl-e-Deewan, Jews, Christians, Arabs

¹ Al-Najam verse 24.

² Al-Baqarah vers 178

³ Al-Majmu' Part 20 page 289, Muhammad Najeeb Al-Muteei.

INTRODUCTION

Islam has settled the principles and rules regarding injuries to the human body including Qatal (murder) and all its kinds. The Islamic rules have been proved by passage of time that these rules are fruitful to stabilize the society and to maintain law and order situation in the Islamic society more better than that of other societies viz a viz Bani Israil (Jews) and Nasara (Christians), Hindu society and other religions and a theist societies. The Hadith of Holy Prophet SAW as narrated by Ibn-e- Abbas in Sahih Al Bukhari⁴ that in Bani Israil there was retribution law in case of murder and there was no law of Diyat in them so Allah ordained upon this Ummah Surah Baqarah verse-178, as quoted above. Hazrat Ibn-e-Abbas has also narrated that Afw means to accept Diyat in case of Qatl-e-Amd (intentional homicide) and *Itiba'a* means to accept compensation and to pay compensation in a reasonable, honourable manner and best way. After the above verse of Surah Al-Baqarah and other verse is there which says that: “And verily there is life for you in Qisas (retaliation), if you are Almighty fearers”, i.e to prevent waywardness in the earth. The Qisas is ordained to provide a living society. Where the concept of Qisas is abolished; the criminal minds would not have been brought in full control by the state and its functionaries. Resultantly, the society would lead to anarchy and uncontrolled. Qisas is the only means to prevent the aggression in the society. Allama Sarakhsi has said⁵ that by commission of murder there occurs waywardness in the state, which shall give a setback to the society. The waywardness will prove to be the most grievous and deep effecting mischief in the society. We know that a criminal is breed of a crime. It is hard to stop criminals by stating them about the punishments hereinafter, there would be a little to stop committing crimes so it is necessary to prevent the crime by finishing the criminals (by way of death sentence as in Qisas cases) or to award such a severe punishment to criminals so that one may not be able to commit the crime again and repeat. Thus Allah SWT has ordained severe punishments of Qisas and Diyat to prevent *Qatl* and other like serious offences in the society.

It is evident that the punishment of Qisas shall be executed upon criminal himself/herself who has committed the offence of Qatl or as ordered by a competent court of law to award him Qisas (death sentence as Qisas). However, the punishment of Diyat, which is termed as blessing of Allah upon this Ummah, how it will be implemented, what shall be its nature and if Diyat is imposed, whether it shall be sufficient to prevent criminal from commission of same offence in future and whether it shall be beneficial to the society? are the questions and other like questions shall be explored in this article.

IMPORTANT TERMINOLOGY

Prior to going through details of the main topic, it is worth valued to explore the most important terminologies of Qisas, Diyat and Aaqilah.

QISAS (قصاص)

The word Qisas (قصاص) is derived from Qassa (قَصَّ) which literally means to follow something/someone⁶. The Holy Quran used the word (قَصِيْمٍ: سورة القصص-11) in story of prophet Moses which means to follow them on the side of river. The word Qisas technically means to take revenge from the criminal⁷. In Fiqh, it means to do with the criminal, as he has done with the victim. Allama Nasafi has defined Qisas as to cause death of one who caused death of victim and to amputate the organ of criminal who has amputated an organ of a victim. In the Mu'ajam Lughatul Fuqahaa, Qisas is defined as “to equate in between punishment and crime”⁸.

DIYAT

The word Diyat is derived from Arabic root word (و- د - ى) the literal meaning of the word is to extinguish or to go out from something, vanish. Literally it means the fine of a crime. Diyat is said to be fine/cost in the technical meaning by the jurists. In case of Diyat of organs or limbs of the body of victim, it is called ارش ARSH⁹. In view of some scholars, the Arsh is also called Diyat of a part of body other than

⁴ Sahih Al Bukhari Kitab Al-Diyaat chapter 8, No. 4881 and Sahih Al-Bukhari Kitaab Al-Tafseer, Tafseer Surah Al Baqarah.

⁵ Al-Mabsoot, part 26, page 59, Kitab Al-Diyaat by Shamsuddin Sarakhsi (d.480AH).

⁶ Asaas ul Balaghah, Az-Zamakhshari page 513, Lisan Ul-Arab, Part 11, page 190, Al-Sihah Al Jauhari Part 3, page 1051, Al-Mu'jam Al-waseet.

⁷ Al Sihah Al Jauhari part 3 page 1052, Lisan Ul Arab Part 11 Page 192, Al Mu'ajam Al Waseet.

⁸ Tulbatu Al-tulbah, An-Nasafi Kitab al Diyat, Page 295, Mu'ajam Lughatul Fuqahah page 364, Al-Taareefat al fiqhiyah by Allah Barkati page 174, Mustalahat Usool Al Fiqah.

⁹ Al Bahru Ar-Raiq part 9, page 75 Kitab Al-Diyaat

murder (qatl)¹⁰. However generally diyat is known as compensation in case of qatl and Arsh is compensation of injuries caused other than qatl. It is pertinent to mention here that the law set forth by the Holy Prophet SAW regarding Qatl, injuries, dismembering the organ or destroying an organ, were named as Diyat. Later on the scholars have given name of Diyat to compensation in murder offence and Arsh in other offences except murder i.e. organs loss or impairing an organ etc.

AAQILAH (عاقله)

The word AAqilah is derived from the root word Aqala (ع-ق-ل) which means to tie with or the people who bound the accused by payment of blood money. Technically AAqilah in Islamic Fiqh means that the people (kinsfolk) of criminal who used to bring the animals (camels) of blood money and tie them with page near the house of heirs of the victim(s). However, some scholars have taken the meaning of *Aaqilah* as to restraining thing or act (in the meaning of a tie). The payment, of Diyat Amount, restrains legal heirs of the deceased/victim from taking revenge or retribution of murder of victim¹¹. The word *Aaqilah* and its concept encompass both meanings in it; as given above.

LEGALITY OF DIYAT IN ISLAM

As we know the sources of Islamic Law/sharia are based on Holy Quran, Sunna, Ijma of Ummah, Ijtihad, Qiyas and Istehsan. These sources are further divided into primary and secondary sources but such distinction is not out aim in this article. Hence we will discuss in short the legality of Diyat (مشروعیت دیت) in view of these sources of Shariah. Diyat is ordained from the basic principles of the Holy Quran, Hadith and Ijma of Ummah اجماع امت, the three basic sources of Islamic Law (Shariah).

Holy Quran

Allah SWT has commanded in the Holy Quran¹²: *“And never is it for a believer to kill a believer except by mistake. And whoever kills a believer by mistake-then the freeing of a believing slave and a compensation payment presented to the deceased’s family (is required) unless they give (up their right as) charity. But if the deceased was from a people at war with you and he was a believer- then only the freeing of a believing slave and if he was from a people with whom you have a treaty then a compensation payment presented to his family and the freeing of a believing slave. And who does not find one or cannot afford to by one, then instead a fast for two months consecutively, seeking acceptance of repentance from Allah and Allah is ever Knowing and Wise.”*

We have discussed the Hadith of Ibn-e-Abbas¹³ in context with explanation of verse 187 of Surah Al-Baqarah that if one brother shows his leniency thereby means to accept Diyat in case of Qatl e Amd.

SUNNAH/HADITH

It is proved in the Sunnah that the Holy prophet (peace be upon him) has been pleased to issue rules of diyat and also made the companions to act upon such rules. It is reported that two women of Bani Huzail fought each other and one of them hit a stone to the other and thus caused her death alongwith her child in her womb (Janin). The matter was brought to the Holy prophet (peace be upon him). The prophet (Peace be upon him) has been pleased to order for the Janin, diyat is to give a white slave man or a white slave woman and for the woman’s diyat, the offenders family (aAqilah) shall bay the amount of diyat.¹⁴

¹⁰ Qamoos Al-Ferozabadi.

¹¹ Al Mughni by Ibn-e-Qudama, Part 9 page 515 problem No:6815, Kitab Al-Furoo’ part 10, page 5 chapter Al-Aqilah. Al-Mabsoot by Imam Sarakhsi Part 26 page 59, Kitab Al-Diyaat. Al Baharul Raiq part 5 page 203 Kitab Al Muaaqil. Al Majmoo’ Sharah Al Muhazzab part 20 page 386. Talabatu Al-Talaba Annasafi page 204 Kitab Al-Diyaat, Tareekh ul Arab Qabal Al-Islam by Dr. Jawwad Ali, part 5 page 488, Al-Fiqh Al-Islami wa Addillatuhu Dr. Wahba Zuhaili Part 6 page 322.

¹² Al-Nisaa verse 92

¹³ Reference 4 ibid

¹⁴ Sahih Al Bukhari, Kitab Al-Diyaat chapter 26 hadith 6910.

Since the stone was not a weapon for commission of murder in normal course of nature and normally no one is murdered with a stone, hence the said murder was treated as Qatl-e-Khata and Diyat was ordered to be paid to the victim party.

In the cases other than murder, the Holy Prophet (peace be upon him) has once said regarding fine that, “thumb and little fingers are equal to each other in fines.” The Holy Prophet has been please to write to Hazrat Amar bin Hazm that diyat in case of qatl is 100 camels, if nose is cut from the root then 100 camels are given in diyat. The injury reaches to the brain, then 1/3rd of the diyat of qatal is paid and same is diyat for injuries which reaches inside belly. Diyat for an eye, arm, leg is 50 camels each above organ. 10 camels for each finger. Diyat for a tooth is five camels and diyat for an injury which exposes bones, is also five camels.¹⁵

From these Hadith we came to know that Qatl-e-Khata and injuries to organs, the Holy Prophet (peace be upon him) has fixed diyat amount. Such acts of the holy prophet has prove that diyat is also proved by Sunnah and is legal in shariah.

IJMA

After the period of Holy Prophet (peace be upon him), the four righteous caliphs, companions, Tabieen and then entire Ummah are consistent upon legality of diyat. There is no one who has refused the legality of diyat. Allama ibn al Munzir has also mentioned Ijma on legality of diyat.¹⁶

OFFENCES WHERE DIYAT IS APPLICABLE

As per shariah the following offence may attract diyat as payment compensation against the crime to be paid by offender to the victim party:

- a. Qatl (including all kinds)
- b. Amputation of any organ of body of human being (Itlaaf-e-Udw)
- c. Destruction, permanent impair of functioning of any organ of the body (Itlaaf-e-Salahiyat-e-udw).
- d. Injuries (any kind) to human body.

In a Hadith it is report that Diyat of Qatl, amputation of nose from its root, amputation of the tongue, both lips (upper and lower), genital organ of male, impairing back-bone, both eyes, entails full diyat which is one hundred camels. Half of Diyat (50 camels) is imposed in amputation of one leg. The injury, which reaches the brain membrane, injury in abdomen entails 1/3 diyat. In case of fracture of bone of head or face 15 camels. Toes, thumbs and fingers of foot and hand each one bears 10 camels as diyat. Each teeth constitutes five camels as diyat. In case of exposing bones due to injury/hurt, five camels as diyat. In case a man murders a woman, then the man shall be executed in Qisas. Those who possess cash then they shall pay one thousand denars¹⁷.

From above discussion we came to the conclusion that Diyat is applicable in case of Qatl-e-Khata, Qatl Shibh-e-Amd, those injuries of organs where Qisas is not enforceable, Qatl-e-Amd where victim agrees to accept Diyat due to compromise, those injuries where qisas is possible but the victim agrees to accept Diyat due to compromise.

¹⁵ Mu'ta Imam Malik, Kitab al-uqool chapter 1 Hadith 1647, sunan abu Dawood Kitab al Diyaat chapter 21 Hadith 4564, Sunan Darmi Kitab al-Diyaat chapter 12 Hadith 2366.

¹⁶ Kitab al Ijma, ibn almunzir, Kitab Al-Hudood diyat qatl-al Khata, al Zakhirah al Qarafi part 12, Page 553, Kitab al jinayaat, al diyah, al Mughni ibn e Qudamah, part 9 page 482.

¹⁷ Sunan Al-Nasaee kitab al Qasamah chapter 47 H 4868

KINDS OF MURDER (QATL قتل)

There are different kinds of Qatl which entails different types of punishments. Most of the school of thought in Islamic law are of the view that there are three kinds of Qatl ie. Qatl-e-Amd, Qatl Shihb-e-Amd and Qatl-e-Khata. Some scholars in Hanafi School of Thought also mentions two more kinds of Qatl which are: Qatl Jari majra al-Khata (جاری مجرى الخطاء) and Qatl Bissabab (قتل بالسبب). In Maliki school there are only two kinds of qatl which are mentioned in the Holy Quran viz: Qatl-e-Amd and Qatl-e-Khata.

WHY AQILAH IS BURDENED WITH PAYMENT OF DIYAT?

The basic principle in the law is that one person shall be responsible for an act/offence of another person. This principle is also laid down in Holy Quran: That whoever does any act, he shall be responsible for his act, no one takes load of (sins) of another¹⁸. In another verse the Holy Quran ordains, that every person is responsible for his own acts¹⁹. The common sense also demands such facts that one should be responsible for his acts and no other person shall be responsible for acts of others. Here the question arises that offence committed by someone and the burden is put on others (community/Aqilah)? These question may be briefly replies as:

1- The murders/offender have not taken due diligence and caution in commission of such act, therefore, he is burdened with such punishment.

2- Qisas is not ordained by Allah in such offences, then what about murder of the victim. Whether his blood gone vain? The answer to this question is No. The blood shall not go in vain as Allah has ordained Diyat for murder of victim. As the murder is heinous offence, hence its punishment is also severe in nature, viz. one hundred camels in diyat.

3- Since the nature of punishment in Qatl-e-Khata is severe and one offender may not be able to pay such huge amount of one hundred camels, hence the same is divided upon Aqilah²⁰. One of the most important aspect in this issue for involving Aqilah for payment of Diyat, is that on one hand a severe punishment is imposed on offender of Qatal-e-Khata, which amounts to heavy fine, which he would not bear to pay and on the other hand it is only Qatl-e-Khata which otherewise is not an offence like Qatl-e-Amd.

4- Criminal negligence is such an act, which sometimes may cause a huge loss, hence, the community shall observe such acts of negligent activities of the members of the society to avoid such heavy loss and may also prevent disturbance in the society. In the old societies, the elders would have deep eye on the activities of members of community and to resolve such issues amicably to avoid disturbance. In cases where heavy costs/fines were imposed upon an individual, they would collectively fulfilled the obligation on behalf of the offenders to save the society. By doing so, they could achieve two fold benefits viz: the evil was done away with on one hand and two parties would avoid further quarrels between them and further damage would be avoided and on the other hand the offender party would be lessened in burden to pay huge amount of Diyat and the paying party would keep vigilant eye on the delinquent persons' irresponsible and negligent activities so that they may not repeat such acts²¹.

5- This type of act, Aqilah, was continued in Arab Society even prior to Islam. The Arab Tribes used to protect their tribesmen in such situations by payment of Diyat collectively. The amount of diyat used to change in the tribes prior to Islam base on the strength of tribe and its weakness. Arab used to recover Diyat from offender's family in general. In some situations, if the family of offender were unable to pay diyat then the circle was expended from family to tribe and to major tribal tree so that the payment of diyat is made easy.

¹⁸ Al-Quran, Al-Anaam:164

¹⁹ Al-Quran, Al-mudasir:38

²⁰ Al-mabsoot Sarahsi part 26 page 125 Kitab Al Muaqil.

²¹ Al-Mufasal fi tareekh al-arab qabal al-Islam Dr. Jawad Ali pat 5 page 592-3.

6- There are different narrations regarding fixing of 100 camels as diyat amount during Arab period prior to Islam. A. Some say that in Arab tribes there was 100 camels fixed for payment of diyat. B. some others say that it was fixed by Abu Sayyarah. C. many people say that it was fixed at the time of Abdul Mutalif, the grandfather of prophet Muhammad (Peace be upon him).

When Islamic law was being implemented in Arab Society by Holy Prophet Muhammad (Peace be upon him), he has affirmed the same amount of payment of diyat as that was existing in Arab Society. We came to know from above development on payment of diyat in case of Qatl-e-Khata and may conclude as under:-

- a. The offender in qatl-e-Khata is not murderer, as he had no intention to murder the victim.
- b. The offender of Qatl-e-Khata is responsible to the negligent act only.
- c. The life of the victim was protected and not required to be killed, hence amount of diyat was heavily fixed.
- d. To ease the offender for payment of heavy diyat, the same was distributed among Aaqilah.
- e. To watch the negligent acts of individuals in a community, the Aaqilah was made responsible.
- f. The good principle of payment of Diyat before Islam, is adopted by Islam, which shows the justice system of Islam to be so fair and impartial.

WHO MAY INCLUDE IN AAQILAH?

This is most important question while discussing the liability of the persons as to who may be included in Aaqilah to pay diyat amount to the victim of the offence. All the School of Thoughts have different views on this question. A brief of the each school of thought regarding inclusion of persons in Aaqilah is given in this part.

FIQH HANAFI

Arab community usually included all the persons of same clan in the Aaqilah. It also included those tribes who were in agreement or settlement with each other. This tradition was continued during the prophet Muhammad (Peace be upon him) till initial era of second Caliph Hazrat Umar Farooq. During the period of Umar Farooq, registers of armed forces were prepared. These registers were known as DEEWAN. The persons named in the registers were called (Ahle-e-Deewan) اهل ديوان. Thus the Aaqilah of Ahl-e-Deewan was created separately. Such extension of Aaqilah was not available prior to development of registers. Hanafi School of thought has considered Ahl-e-Deewan as member of Aaqilah. If there were no registers of such pattern in or for any area, then the clan of the offender shall be Aaqilah, as the case may be, as per Hanafi School. Upon such analogy, the persons of same trade and unions who are in aid of each other in the trade or union, shall be considered as members of Aaqilah for payment of diyat, as per hanafi school.²² Women, minors, poor and lunatic persons are not included in Aaqilah. However Hanafi School of thought has difference of views as to whether father, grandfather and decedents of offender would be included in Aaqilah or otherwise.

FIQH MALIKI

Maliki school of thought are of the view that in case of Qatl-e-Khata (unintentional murder) Aaqilah shall pay diyat amount. The relatives from paternal side and Ahl-e-Deewan shall include Aaqilah. If there is no Deewan system then Asaba (relatives) shall pay diyat amount. If there is neither Deewan nor any Asaba of offender, then diyat shall be paid by Bait-ul-Maal, if offender is Muslim.

²² (a) mabsoot Sarkhasi part 27, page 125 kitab al maaqil, takmilah Fateh Al Qadeer part 10, page 424 Kitab al Maaqil (b) Al-Bahar al-raiq ibid, (c) Takmilah Fateh Al Qadeer ibid.

FIQH SHA'FI

The Sha'fi school of thought are of the view that only paternal relatives are responsible as aaqilah for payment of diyat in cases of Qatl-e-Khata but no others, irrespective of inclusion of names of persons in Deewan or otherwise. The Sha'fi School excludes the father, grandfather and offspring of offender from Aaqilah.²³

FIQH HANBALI

Only Asabaat are considered as member of Aaqilah under Hanbali Fiqh.²⁴ As per some scholars in Hanbali School of thought where there is no Aaqilah of offender or where there is no source to accused to seek diyat from Baitul Maal then no diyat is to be paid at all.²⁵

REASONS FOR EXTENSION OF AAQILAH FROM BEYOND RELATIVES

Since it is clear that the payment of diyat is not for offence of Qatal rather it is imposed upon accused due to his criminal negligence in both Qatl so also in injury cases. Since there is no punishment for Qatl-e-Khata or Jurh-e-Khata then whether the offence could go unchecked and offender could go clean. No. absolutely not. The payment of Diyat amount should be made by offender party to victim party. The concept of Aaqilah means the payment of Diyat amount should be made by relatives who support the offender in his acts and actions. Since the aaqilah persons usually defend the offender in his hard times thus to avoid further mishaps these people are burdened to pay diyat amount as aaqilah. Another concept of imposition of diyat on Aaqilah is that as to why the relatives or Ahl-e-Deewan have not checked the actions of the offender despite of the fact that they support him in different causes. The payment of huge amount of diyat is sometimes not possible to be paid by the offender himself out of his limited resources, hence aaqilah is burdened to make payment. The concept was extended for the first time in the era of Caliphate of Hazrat Umar Farooq when Ahl-e-Deewan were burdened to make payment of diyat in Qatl-e-Khata. It is pertinent to mention here that such payment was to be made from Bonus amount but not from capital amount of Ahl-e-Deewan. Where the offender has no aaqilah then Bait-ul-maal shall be responsible to make payment of diyat amount to the victim party.

CONCLUSION

In the modern society the strength of family system, tribal system has weakened a lot. Almost all the persons are taking responsibilities individually. No effective tribal system to defend each other existed in the world, particularly in muslim world. The system of payment of diyat through Aaqilah is possible if the government imposes certain taxes on masses or certain conditions at the time of registration of associations, societies etc to maintain an account for payment of diyat in qatl-e-Khata and Qatl-e-Shibh-e-Amd etc. hower it is a broad discussing question for the law makers and legislative bodies of the state governments so that the rights of the victim party may be safeguarded on one hand and on the other hand a check and balance be put on all responsible. The main purpose of this piece of writing and research was to provide a gateway to the researchers to explore more and more to find out ways for making Aaqilah system practicable in a Muslim society in general and in Islamic Republic of Pakistan in special.

²³ Takmilah tul Majmoo' Sharah Al Muhazzab ba ma-Al Muhazzab part 20 page 393.

²⁴ Al-Mughni ibn-e-Qudama Part 9 page 515.

²⁵ Al-Mughni ibn-e-Qudama part 9 page 525.