



An Analysis of Qisas and Diyat Laws, Inadequately Encompassed the Islamic Gist as Fused in Judicial System of Pakistan

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Abstract: The Qisas and Diyat is product of Islamic jurisprudence. The laws in Pakistan with distinct applicability of conceptual approach of Qisas and Diyat laws in trails are inadequately addressed the purposes of criminal justice along with consequences of vast judicial discretion in Qisas and Diyat cases will not serve the purpose of administering justice. The Holy Quran hasn't provided a dictionary definition of justice, but it establishes a conceptual approach to the principle of equilibrium, parity, righteousness, proper assessing, veracity, individual capacity and progress and the accepted mandate. The key form of justice is the egalitarianism of human personalities being valued as Human beings, evidently indicated in the Holy injunctions of and even stressed in the last Holy Sermon of (PBUH). The Qisas and Diyat laws, as pooled in Pakistan Penal Code, 1860, have not been argued and debated adequately and hence contain imperfections, tend to bring imbalance and introduce crimes like violence against women, vani, swara etc. The aim of the analysis is to address the shortcomings and loopholes prevailing in the criminal justice system by advancing solutions and concept clarity related to the institution of aqilah.

Introduction

Criminal law is a phenomenal datum as any uniformed policy and codified law remained unaddressed since its initiation in the sub-continent. Criminal activities are dealt with in Indian norms and cursives, while with the advent of Muslims criminal justice system has been introduced by settling down the aims and various principles of the criminal justice system without any codification. After the independence war of 1857, the same had been provided by the British colonial span in the subcontinent as a uniformed criminal judicial system; after emerging on the map of the world as two different entities, both Pakistan and India had adopted and kept following the identical pre-independence

criminal law. During the early 70s, Pakistan, with the insertion of Article 2-A in The Constitution of Pakistan, 1973 as a milestone towards Islamization of laws, has been urged that no law against the injunctions of Islam has legislated and followed seems deprecating the Islamic gist. Various steps have been taken to introduce and devise Islamization policies and laws. Qisas and Diyat law as an Islamic principle of the judicial system was devised in 1980, but the same couldn't get approved by General Zia-ul-Haq owing to political motives of that time. Later on, in 1990 and 1997, further extended laws with amendments were carried out to make them operable and practicable as misinterpretations

have been attached to the Islamic principle of Qisas and Diyat as a retributive in nature and scope. The enormity of the condition was comprehended by courts, emphasizing the restorative justice system, completely aligned with the context of the Islamic judicial system and the same has been adopted since the 7th century.

Discussion in the Light of Provisions & Judicial Cases

Crime in Islamic Jurisprudence comprises of Rights of Allah and people, respectively. Hadd, Qisas & Diyat and Tazir are categorized as crimes, causing harm to stated rights. Tanzil-ur-Rehman (2017) opines; Hadd, in formal sagacity, states Almighty restrictive regulations per distinction, the permanent penalties, ordained by the Holy Quran itself. According to Ahmed (2004), the hudood penalties are imposed upon the defilement of the moralities of the Almighty, strictly for the betterment of universal peace and human dignity. Qisas has been clearly named as life for humanity and saving of life by the Holy Quran itself. Diyat (Blood money) is legal reparation and the compensatory amount awarded to the dependent of the assassinated. The judicial system is held responsible for the implementation of Diyat in its spiritual manner according to the Injunctions and Sunnah. The objectivity of peace, compensation and saving humanity serve the Diyat to be adopted by the judicial system for intended and accidental transgressions concerning humanity. The Islamic injunctions regarding Adle-o-Ahsan well established the rulings relating to the state judicial system with exclusive guidance. Societies are regulated with core Principles carried out in the Holy verse of 5:54 of Surah Al Maida, where Qisas is declared as a matter of right. In the same footage, Diyat is permissible in the light of the Holy verses of 2:178 of Surah Al Baqrah, whereby compensation by way of demand is acceptable under the law and operative to surrender the option of Qisas. In the primaeval Arabian people, Diyat amounted to even being accepted in the

form of movable goods and cattle. Criminal Law in Pakistan provided for Diyat along in the light of guiding, i.e., to keep in consideration the financial standings of a convict and payee, in any case not less than 30630 grams of silver, it is the liability of the Government to affix the rate of silver at the start of the financial year. The court has the discretion to increase the amount of Diyat. The criminal law in Pakistan also provides that the amount has been distributed among heirs as per their due shares in inheritance. (Zahid, 2019)

Khalid Zafar (2012) opines that under Chapter XVI of Pakistan Penal Code, 1860, Qisas and Diyat laws ensure that Qisas and Diyat are permissible for inflicting the same hurt to the convict, the right has been extended to Wali and can be compounded by way of taking compensation in lieu of inflicting same hurt to the convict. In this relevancy, Diyat, Arsh and Daman are coined as mediums of taking compensation, but elaboration has been carried in terms of Diyat only by the Holy Quran, i.e. “diyatun mussalamatun ila ahlihi”. The concept of punishment in the form of Qisas and Diyat stated in Sections 302,304,306,307,309,310,313, and the concept of wali under sections 299 & 305 of the Pakistan Penal Code, 1860 are contradictory to the Injunctions of the Islamic justice system. Qisas as a punishment is recognized in section 302 of the Pakistan Penal Code, 1860 for qalt-i-amd and honour killing, but it is hardly awarded in cases of honour killing in contexts with pre-dominance of socio-economic aspects. Siddique opines that as far as a voluntary confession of commission of an offence under section 304(1) of the Pakistan Penal Code, 1860 contains an Islamic gist, the judiciary, while interpreting the same left no room left for conviction on this ground same,, had been practised in case of Shamoon Alia VS The State(1995SCMR 1377). Section 304(1)(b) enumerates the number and competence of witnesses with reference to Article 17 of Qanun e Shahadat Ordinance 1984 resolute per Injunctions of primary sources of Islamic law. It goes against the essence of Injunctions clearly

mentioned in Hudood Ordinances, 1979, as said Laws deliver diverse numbers of ocular testimony for different respective crimes (Section 9(b) of Ordinances, 1979). As far as competency on the basis of the concept of Tazikya al Shuhood is not sustained by the Holy Injunctions. Criteria of competency of witnesses were the outcome of the consensus of jurists of Ages when populations were lesser in number and personal affairs character of a witness can easily trace, but this is not possible in the contemporary world of globalization. Further, this is unrealistic as judges can't adjudge the creditability of a witness where a witness has not committed a major sin. This criterion is required to be evolving with true Injunctions of the Holy Quran and Sunnah. Although Pakistan Penal Code, 1980 has not specified aforesaid criteria yet, in order to meet the evidential aspects same norms are required to be adopted as decided in landmark rulings of the Supreme of Pakistan whereby reversing the impugned judgment by recording the remarks "that witnesses weren't subjected or satisfied the assessment under provisions of Qanoon E Shahadat Ordinance, 1984" (2000 SCMR 1758). Further same had been held by remarking that "Where accurate Taziyah al Shahood was not carried out, the verdict under Islamic criminal system could not be persistent" (PLD 1986 SC 741). Sections 306 & 307 of the Pakistan Penal Code, 1860 enumerate exemption of certain classes of persons from Qisas and Diyat, which is against the Islamic Injunctions. Rehman (1980) opines that there is also little exclusion from the common canon of revenge. i.e., if the ascendant murders his own descendants, such as if the father kills his son, there will be no reprisal, relying upon the summary of tradition that retribution must not be implemented upon the parents, owing to respect to parentage. Upon the same notion, judicial outcomes in Khalil ur Zaman's case (1994) and Faqirullah's case (2000) carried on by exempting from liability of Qisas, respectively. On the other hand, as per the core notion of Islam as a religion of accountability, every person has to pay for his action regardless

of affiliation, status, faith or sex. No clear Quranic verse or an authentic Ahdith supported the exemption laid provided in the criminal laws of Pakistan.

Provisions contained in PPC under Section 338E, 309 and 310 regarding relinquishment of crime are not in accordance with the injunctions contained in Islamic Jurisprudence ((Niazmi, Fazal e Haq, 1969). Empowerment of the judiciary under section 338F, with flexible power to construe crimes regarding the human body and life. Although vast powers are entrusted to the judicial system, the same has been taken into consideration that no clear instructions and limitations are provided by the Holy Quran and Sunnah. Further judicial officials lack the criteria to be fully trained to operatively deals cases according to Shariah laws. It would be rightly concluded that this trend leading towards the non-provision of justice as observed by a number of decisions of the apex court in cases endorse the provisions of the General Exceptions of Pakistan Penal Code, i.e., Ghulam Hussain alias Hussain Bakhsh's case (PLD 1994 SC 31), Muhammad Hanif's case (1992 SCMR 2047), Ali Muhammad case (PLD 1996 SC274) & Muhammad Saleem case (PLD 2002 SC558),

Wali in Islam

Further, the Concept of Wali ruled under Pakistan Penal Code, 1860 is not comprehensive in the true sense (Section 299 PPC). The Holy Quran has made Wali a "Sultan", i.e., the frontrunner, sovereign, source of power, and capacity to finalize matters. The Holy Quran has urged the same as "Protector" in different approaches:

- Allah as wali "But Allah hath full knowledge of your enemies: Allah is enough for a Protector, And Allah is enough for a Helper."
- The administrator of the State/Justice as Wali, The scholars, hold the view that the wali (the Administrator of State/justice) is a sultan in the matters of Qisas as Allah, while

addressing the Prophet(PBUH) ordains that:

- “And why should ye not fight in the cause of Allah And of those who, being weak, are ill-treated (and oppressed)–Men, women, and children, whose cry is: “Our Lord! Rescue us from this town, whose people are oppressors; and raise from us from Thee one who will protect; and raise for us Thee one who will help!” By virtue of Section 305 of the Pakistan Penal Code, 1860 states role of wali is kept at a secondary stage in the absence of the heir of the victim.
- According to Islamic law, persons entitled to the rights of Qisas and Diyat are wali, Akhi(Brother), Ahl(family, relative, inhabitant, people) and faman (victim).

In the light of the Islamic injunction relating to Qisas and Diyat, the right is extended to anyone keeping in view the nature of the offence, and the wrong, further stated as a concept of Protector, is held liable towards its subjects. By virtue of 310 of the Pakistan Penal Code, 1860, competent wali has the option to accept Diyat instead of exercising the right of Qisas((Niazmi, Fazal e Haq,1969). The scope of wali in the light of Islamic injunctions is very extensive even if the state is qualified as a wali if a chain from family, relatives, and the general public is not available; question relating to women as a wali is not prohibited under any Holy injunctions. The divergent clause has been shaped in the form of provision 313 of the Pakistan Penal Code, 1860, where women have been expressly excluded as a wali for the insane or minor wali of the victim. Analysis of provision 310 of PPC, 1860 serves the purpose of declaring the plea forwarded by the relative of the assassinated or injured for giving a girl in marriage as compensation as illegal, but the very idea is defeated because no penal provisions are attached thereto. In order to address the manner for payment of Diyat, there is not even a sole direction for the payment of Diyat via inheritance has been carried out (Niazmi, Fazal e Haq, 1969). Analysis of provision 330 of the Criminal Code, 1860, doesn't fulfil the

criteria for the conceptual, financial justice behind the principle of claiming blood money as it advocates the utilization of legacy as a manner for the payment of compensatory money in the form of Diyat.

Principle of Aqilah and the Criminal Justice System

The important Islamic principle of Aqilah is also not addressed in the current Criminal justice system. The word Akilah is a derivative of aqal, which is an Arabic origin. With the reference of Diyat amount, it ensures equality in payment of the amount by all males relatives of a convict from the paternal side. According to jurists, Aqilah talks about collective responsibility. The aqilah is a product of pre-Islamic Arabian society, where there was tribes' culture, and people used to take revenge, keeping in view the theory of kinship. The norm of aqilah was also practised by The Holy Prophet (PBUH) and the Companions of The Holy Prophet (PBUH). The institution of aqilah as per Islamic injunctions needs to be revised as family structure, tribe culture and setup in recent eras are altogether changed. Humanity is the core subject of Islam; Islam is a complete code of life that emphasizes protecting the human dignity, human lives and interests of all humans. It is a need of time that the principle of aqilah should be incorporated into the Pakistan Penal Code along with other desired amendments via proper legislation. A few suggestions are extended by The International Islamic Fiqh School of thought, whereby the role of good governance is expected to play its role in ensuring a proper scheme of provision of a list of members, Islamic insurance schemes, and various public charitable accounts (Asad, 2020).

Conclusion and Recommendations

Criminal litigation introduced the new protagonist of the state after the insertion of qisas and diyat laws in the Pakistan Penal Code 1860. The purpose of the criminal justice system haven't been achieved even after the insertion of

qisas and diyat in the traditional criminal justice system. The Islamic gist has been detached and misinterpreted by courts as judicial training in the sphere of Islamic Shariah laws is also one of the reasons for lacking behind. In this context, recommendations are extended for the effective carrying out of the Diyat laws. New provisions relating to compounding offences have been incorporated with the help of relevant evidence placed before the court in the light of Rulings of the Supreme Court advanced in 1969. Confession or another medium of evidence should be properly appreciated by the judicial system. As far as compounding of offence is concerned unanimous decision has to be taken by all legatees of the victim; wali should have been honoured with the right to finally decide the matter if there is conflict among legal heirs. For the true implementation of Qisas and Diyat Laws, it has been recommended that if the criminal remained convicted previously, shall not be allowed for any compounding or pardoned.

It is recommended that Section 304(1) (b), 306(b) &(c) and subsection 313(20), P.P.C ought to be amended for the betterment of the public and serving the purpose of Qisas and Diyat laws in its true sense., The further recommendation has been extended regarding the titling-state as “wali” allowed to claim Qisas and Diyat under Section 299(m) and Section 305, P.P.C, in the best interests of the victim, on behalf of legal heirs of the victim, the deceased victim, having no wali and on behalf of the victim whose only wali is minor or insane or alike situations. In addition to Qisas, the legal heirs must have been made entitled to claim for Diyat expressly. The amount of Diyat should be dispersed among the legal heirs by exercising the discretion of the court. An amendment should be carried out for the sharing of arsh and daman if the death of the victim happens. Further, it has been recommended that financial assistance in the supervision of the court has to be complied with if Qisas under Section 338E (1) has been waived. This has been suggested that strict compliance should be carried out by the legal heirs for non-

compounding of offences under sections 309,310,313,338E (1) of P.P.C if vested interest by both legal heirs and offender shares and convict has committed the offence of such nature with is a detriment to the public at large.

For consolidation and to ensure an inclusive justice system, the prolonged policy is essential to be applied after being role-played by the legislature, law administering organizations & multitudes through regular seminars, social media and other advocacy policies. Access to justice should be approached easily and effectively. Formal training of the judges in Shariah law is recommended to enable them to construe Quran and Sunnah spiritually. The investigation process and methods should be improved with quality standards for the aim of ensuring the veracity of facts. Social norms and cultural customs should observe under strict compliance with civil law, and the Jirga system should be discouraged. Educational institutes can play a role by inculcating personal laws in curriculums to create awareness among students in particular. Legislature and Executive can play a role by making laws with a practical approach and implementing the policies at the root level, as Qisas and Diyat Laws were the addition to statutes compulsory and not put to any table discussion or not filter to any legislative process. The status of the victim's family must take into consideration while determining the amount of Diyat. The concept of aqilah will prove momentous to realize the actual recovery of Diyat amount. Sometimes, it has happened that convict is not in a financial position to pay the amount of Diyat which is remained unpaid to the victim. Proper inclusion of aqilah will facilitate in full realization of diyat amount.

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