



The Retributive Proportionality and Islamic Punishment of Diyyah.

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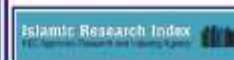
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Abstract

Western Penal theory of 'Retribution' is based upon the philosophy of proportional punishment for a crime. The research focuses on the practical application of a philosophical idea in the Islamic punishment of diyyah. The main findings are the perfect application of the element of retributive 'proportionality' in all diyyah laws. The proportionality proved to be the basic rule of diyyah punishment where the homicide along with the bodily harms are proportionally compensated with the principle amount of hundred camels, ten thousand silver dirhams or one thousand gold dinars keeping in view the utility or the number of body parts of that organ. The damage to entire body in the shape of death, complete damage to a sense, to an organ or its utility, is proportionally compensated with full diyyah however the organs having more than one part are compensated with the proportional amount to the number of that body part in human body which results in half diyyah for damage to one hand, leg, eye or eyebrow and quarter for each eyelid. In this way each organ, its utility or each sense is proportionally compensated with adequate and proportional diyyah amount.

Keywords:

Retribution, Proportional Punishment, Diyyah, Philosophy of diyyah. Theories of Punishment



1. Introduction:

“The theory of Retribution, a famous theory in western penal philosophy, argues for the strict equality of punishment for a crime, relying upon the two basic penal goals of “desert” and “proportionality”, which are best applied by the Islamic penology in the punishment of Diyyah for both the homicide as well as assault, resulting in injury to a body part or its utility thereof, by proportionally compensating that particular damage with the principle amount of one hundred camels.”

2. Retribution:

The theory of retribution is the most ancient and universally applied theory on the philosophy of the punishments⁽¹⁾. The philosophical presentation of this theory can be found in the writings of the great Greek philosopher, Aristotle⁽²⁾.

The retribution demands the strict equality among the crime and its punishment. The equality must be in both the kind and degree of the punishment and crime. The standard view of retribution demands to reply the crime in the same way as to that of the crime. This equality among the offence and its response in the shape of penalty is considered the best way to achieve the high degree of justice where the punishment fits the crime⁽³⁾. The retribution argue that the punishment which is unequal to the wrong done is nothing but injustice, no matter whether that punishment exceeds the intensity of the wrong or falls below the intensity of that offence. Eventually the injustice caused by this unequal punishment will result in the destabilization of the social order and peace that is why retribution excludes the concept of pardon even the punishment (justice) results in a bloody revolution⁽⁴⁾. This is called the standard view of retribution, which is based upon the two vital concepts of ‘desert’ and ‘proportionality’.

2.1. Desert:

Desert means the deserved reward or punishment. In penal discourse it means the guiltiness of the wrong doer, the illegal act of a person, the infringement of societal or individual fellow citizen’s right by someone, which turns him from an innocent being into an offender, wrong doer, guilty and criminal. This offence, wrong done, guilty act and crime puts a debt into the neck of that criminal. This abstract debt makes the offender in a position where he ultimately deserves a response in order to redress the wrong and damage created by him⁽⁵⁾. This is called desert.

In simple words the person who deserves punishment is said to have fulfilled the *desert*. This *desert* arose because of a wicked act⁽⁶⁾ which was disapproved and negated by the community and further legally banned by the political authority, representing the community. Violating the right of all these stake holders in the shape of community, victim and political authority fulfils the *desert* to respond that act in the shape of punishment. This further means that the illegal act might be responded with punishment only if *desert* is there. Also the punishment might be inflicted only against the *deserted* act. The very compulsion of *desert* in the retribution wipes out any chance of punishing innocent for which the utilitarian theories are often criticized⁽⁷⁾.

Proportionality:

The second and the more popular attribute of the retribution is the ‘proportionality’ among the crime and its punishment. The retributive proportionality asserts for the punishment, exactly same in kind and degree to that of crime. The murder must be replied with proportional punishment of death penalty whereas the injury to a body part must be recompensed with the exact injury to that of offender. Immanuel Kant, a leading retributive proponent, strongly denies any punishment which may not be proportionate to the crime. He says;

“Whatever undeserved evil you inflict upon another within the people, you inflict upon yourself. If you insult him, you insult yourself; if you steal from him, you steal from yourself; if you strike him, you strike yourself; if you kill him, you kill yourself.”⁽⁸⁾

2.2. Code of Hammurabi:

Hammurabi (1792-1750 BC), the ancient Babylonian king, enacted and decreed a codified law for his kingdom named after him as the ‘code of Hammurabi’ in 1760 BC which contains the, *lex-talionis*, the proportional retributive philosophy in few of its penal laws which is believed to be the first known use of these retributive laws even before Mosaic laws as narrated in old testament⁽⁹⁾. The laws numbering 196 and 200⁽¹⁰⁾ describe the proportional punishment of knocking out the teeth for a teeth and eye against eye. However in other cases of homicide where the offender is male and the victim is either female or the act was unintentional, the code prescribes the financial compensatory punishment instead of standard retributive proportionate punishment⁽¹¹⁾.

2.3. Bible:

The second chapter of the Old Testament, ‘Exodus’, talks about the famous law of retaliation, usually known by its Latin name ‘*lex-talionis*’. It says;

‘And if any mischief follow, then thou shalt give life for life, Eye for eye, tooth for tooth, hand for hand, foot for foot, Burning for burning, wound for wound, stripe for stripe.’⁽¹²⁾

The Leviticus⁽¹³⁾ and the Deuteronomy reproduces the same rules of proportionate punishment;

‘And thine eye shall not pity; but life shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot.’⁽¹⁴⁾

The principle of ‘*lex-talionis*’ was affirmed by the Jesus Christ, however in Biblical terms he suggested an alternative in the shape of conferring pardon to the guilty instead of ‘*lex-talionis*’. The Bible says;

Ye have heard that it hath been said, An eye for an eye, and a tooth for a tooth: But I say unto you, That ye resist not evil: but whosoever shall smite thee on thy right cheek, turn to him the other also⁽¹⁵⁾.

Bible further narrates the statement of Jesus Christ to the Rabbis who argue with mala fide intent to punish a women with death penalty by casting stones at her (practicing the law of ‘*lex-talionis*) who was accused of adultery, saying;

‘He that is without sin among you, let him first cast a stone at her’⁽¹⁶⁾,

The Christians started avoiding acting upon the proportionate punishment of '*lex-talionis*' considering the above-mentioned statements of Jesus Christ as the abrogation of it. That is why this law has never been in practice in Christian states after Jesus.

2.4. The Quran:

The *Holy Quran* is very clear on the issue of punishment and its philosophy. The primary and basic rule in the *Quranic* penal philosophy is the proportionality among the wrong done and its remedy. The *Holy Quran* says;

'(17)The recompense of evil is evil the like of it.'⁽¹⁸⁾

This verse provides the basic and fundamental principle in the Islamic penology where the punishment for the offence must not exceed what was received by the victim⁽¹⁹⁾. The same fundamental principle is quoted one after another in several chapters of the *Holy Quran*. The *Quran* says;

'If you take retribution, then do so in proportion to the wrong done to you.'⁽²⁰⁾

'... and whoever will come to Allah with an evil deed shall be requited with no more than the like of it.'⁽²¹⁾

'Thus, if someone has attacked you, attack him just as he attacked you.'⁽²²⁾

The rule laid down in the aforementioned verses of the *Quran* is not limited to any specific kind of punishment⁽²³⁾ or offence rather as an umbrella term it covers the entire corpus of penal laws in Islam whether those are pecuniary punishments or physical punishments in the shape of flogging, execution, imprisonment, amputation of body parts or the punitive restorative punishment of *Diyyah*. As a matter of fact, the strict retributive proportionate punishment may not be applicable in each case. The difference in the nature of crimes negates the application of standard retributive proportionality. That is why the Islamic law applies the rule in letter and spirit wherever possible (in intentional bodily assault only) and applies its philosophy only where the like proportionate punishment ceases its applicability. Same happens with unintentional murder and bodily injuries where the original punishment of death penalty and infliction of same injury ceases its applicability because of the lacking 'mens rea' which rules out the proportionality⁽²⁴⁾. In such cases, the needed remedy is provided with the alternate nature of pecuniary punishments. *Diyyah* is a perfect example of that.

3. Diyyah:

Diyyah is the blood money⁽²⁵⁾. It is considered the abstract⁽²⁶⁾ form of retaliation (*Qisas*). *Diyyah* is the financial compensation paid by the offender⁽²⁷⁾ to the victim or his legal heir against the homicide or battery resulted in bodily injuries⁽²⁸⁾. It is the secondary and alternate punishment in case of intentional homicide after the death penalty being the primary and original punishment however in cases of unintentional and quasi intentional homicide, *Diyyah* is the primary punishment⁽²⁹⁾. Even for intentional murder as a secondary punishment, it is the encouraged form of punishment in place of death penalty if not compulsory. *Diyyah* is the unique feature of Islamic punishments. The penal systems other than Islam are unaware of a compensatory punishment like *Diyyah*. The ancient penal laws in the shape of

code of Hammurabi, twelve tables, Bible and torah along with the present day modern penal systems have no perfect and logical concept of pecuniary compensation like *Diyyah*. The legality of *Diyyah* punishment is derived from the following verses of the Holy Quran;

“It is not for a believer to slay another believer unless by mistake. And he who has slain a believer by mistake, his atonement is to set free from bondage a believing person and to pay blood-money to his heirs, unless they forgo it by way of charity.⁽³⁰⁾”

“But if something of a murderer’s guilt is remitted by his brother this should be adhered to in fairness and payment be made in a goodly manner.⁽³¹⁾”

It is made secondary punishment in intentional homicide in order to keep the door of restorative justice open which may result in agreement of both parties on *Diyyah*, saving a human being from execution. In cases of unintentional and quasi intentional murder, *Diyyah* is made the primary punishment⁽³²⁾ excluding the death penalty for offender, giving him the due favour of him being innocent and lacking the mala fide intention or mens rea. However the sacredness of human blood demands to not leave it worthless even if that was by mistake. Thus, *Diyyah* punishment was formulated to keep the divinity of human being intact, by redressing it with the highest amount of financial compensation along with helping the kinship of the victim to fulfil their financial needs. The *Diyyah* punishment is imposed in unintentional and quasi intentional murder along with few situations of intentional murder, such as the situation where the offender is a juvenile, insane, father or grandfather of victim, compounded against *diyyah*⁽³³⁾ or in case of bodily injuries where the strict proportional *Qisas* becomes impossible⁽³⁴⁾.

3.1 Proportionality of *Diyyah*:

The philosophy of *Diyyah* is strictly based upon the rule of proportionate punishment. The blood money for the murder of a human being is categorically fixed by the Prophet Muhammad (*Peace Be Upon Him*) which is further divided in the offences of bodily injuries with proportional ratio. The amount of *Diyyah* for murder, as fixed by the Prophet Muhammad (*Peace Be Upon Him*) is 100 camels. He said;

ان في النفس (الدية) مائة من الابل⁽³⁵⁾.

Diyyah (blood money) for life is 100 camels.

This figure serves as a fundamental principle for the entire body of *diyyah* laws. It specifies one hundred camels as blood money (*diyyah*) for the murder of one human being. This principle figure of 100 camels helps us to allocate the proportional *diyyah* for the bodily injuries resulting in the loss of any body part or its utility thereof.

Later on the second caliph Umar (*May Allah be pleased with him*) fixed the amount of two more commodities to be used as the principle value for the *diyyah* after the camels became too expensive. These were gold (1000 dinars) and silver (12000 dirham) keeping in view that these two additional commodities were pre-mentioned by the Holy Prophet (PBUH)⁽³⁶⁾. These additional commodities of gold and silver

are the alternatives for the primary commodity of camel which may also preferably be used in areas where the camels are hard to find. That is why Imam *Malik* mentioned in his *Mo'ata* that the principle commodity for Egypt and Syria would be gold where as it will be silver for the people of Iraq⁽³⁷⁾. Later, the second caliph *Umar* (*May Allah be pleased with him*) specified the value of gold and silver. The *diyyah* in gold was fixed to one thousand gold dinars where as for silver it was fixed as ten thousand dirham⁽³⁸⁾. The amount of *diyyah* as fixed in all above mentioned primary commodities is to be paid for the loss of life i.e, murder. The bodily injuries are compensated with the proportional value of these primary commodities with that of the effect of the loss incurred to any organ of the body. The Islamic criminal law applies the strict retributive proportionality in the division of *diyyah* amount, as abstract *Qisas*, for each and every part of the body.

Starting from the retributive proportionality of *diyyah* for life, i.e, murder, the Islamic criminal law distinguishes among the intentional unintentional and quasi intentional murder⁽³⁹⁾. The proportionality demands difference in the intensity of punishment for difference in the intensity of crime. Though the basic value of *diyyah* is same for all three kinds of murder however the kind differs. The *diyyah* is made primary punishment for unintentional or quasi-intentional murder keeping in view the absence of *mens rea* which at one end provides the favour to offender by saving him from death penalty and regarding the loss of a human being by paying the blood money. While *diyyah* for intentional murder has never been the first option rather it is the death penalty as *Qisas*. It is made a secondary and alternate punishment in unintentional murder provided the proportionality demands to do so⁽⁴⁰⁾.

Furthermore, the proportionality demands to differ among the time span for *diyyah* payment in intentional and unintentional homicide. That is why, being the substitute of original punishment of *Qisas*, it is paid immediately with no delay in the case of intentional homicide. However in the cases of unintentional as well as quasi-intentional murder it is due in three years, one third to be paid each year⁽⁴¹⁾. Likewise the application of retributive proportionality further differentiates among the kind of camels for each intentional and unintentional homicide. The amount is abstractly raised by making it into expensive camels for intentional and quasi-intentional murder, calling it the *raised diyyah* which is 30 she camels of four years, 30 she camels of five years and 40 pregnant she camels⁽⁴²⁾. In the case of unintentional murder the required 100 camels are sub-divided into 20 camels each of two years, three years, four years and five years⁽⁴³⁾.

Moreover the *diyyah* in any of the abovementioned three situations is demanded from different people based upon the doctrine of proportional punishment. In case of intentional murder, the offender alone is under the obligation to pay the full *diyyah*⁽⁴⁴⁾. The willfulness in this wicked act requires making the offender feel the pain and no one else because the presence of *mens rea* increases the wickedness of this act and so responded with the proportional punishment of *diyyah* from the offender alone. However in cases of unintentional and quasi-intentional homicide, the *diyyah* is imposed upon the relatives of the offender, called '*Aqilah*'⁽⁴⁵⁾. According to *Jamhoor*, the '*Aqilah* are the family members, more specifically the

'*Asabah*, (male heirs) of the offender, whereas according to *Hanafi* jurists these are the people who usually support one another in everyday life⁽⁴⁶⁾.

The imposition of *diyyah* for unintentional and quasi-intentional murder upon the '*Aqilah*, unlike intentional homicide, is another application of the retributive proportionality. The lacking *mens rea* requires to decrease the burden from the shoulders of the offender and to distribute it upon the people who usually get benefited from him in everyday life, i.e, his family or the state⁽⁴⁷⁾, because the one who gets benefit in usual circumstances should share the hardship in unusual circumstances. It is absolute proportional and just to distribute the *diyyah* upon the family members or state because these are the institutions which inherit the wealth of that person upon his death. Likewise the internal structure of family in Islamic law imposes an obligation upon the wealthy family members to help the needy and poor family members other than the mandatory *Zakat* money. Same is the case of state which is bound to help its citizens for their basic financial needs. The same logic was presented by the *Holy Prophet (peace be upon him)* when he said;

وأنا وارث من لا وارث له، أعقل له وأرثه^(٤٨)

I am heir of the one who has no heir, I inherit him and pay his A'ql (diyyah).

The other reason which justifies the proportionality in imposing the *diyyah* upon the '*Aqilah* is that it is the responsibility of the family to educate their kids. The grave misconduct of murder, though unintentional, shows the immaturity and lacking the proper education of the person, which shows the negligence of the family in proper education of their child, that is why the family is also made responsible by imposing a proportional amount of *diyyah* upon every family member.

The imposition of *diyyah* on family does not mean its distribution equally rather proportionally. The female family members are saved from any kind of payment⁽⁴⁹⁾ based upon the fact that they are free from any kind of financial responsibilities. Every family member is not supposed to pay the same amount of money but the rich family members are supposed to pay 1.5 gold dinars (6.375 gm), the one from middle class has to pay 0.75 (3.18 gm) gold dinar and the poor is supposed to pay nothing⁽⁵⁰⁾. This epic proportional distribution of *diyyah* further proportionalises it with the time span by making it to be paid in three years which means that the rich has to pay 0.5 (2.125 gm) gold dinars per year and the middle class family member will pay 0.25 (1.06 gm) gold dinars per year⁽⁵¹⁾. There can't be more perfect division and example of proportional compensatory punishment ever than *diyyah*.

Notwithstanding the proportionality of *diyyah* punishment in homicide, the *diyyah* amount prescribed for bodily injuries looks way more advanced and unmatched in human legal history. The Islamic criminal law imposes compensatory punishment of *diyyah* on the loss of body part as well as on the loss of its utility with the apparent body part being intact. The very practicality of Islamic criminal law and its epic feature of proportional punishment, divides the organs based upon the numbers of parts of that organ in the human body. The singular organs in the human body are considered equivalent to the entire body and so there *diyyah* is made 100 camels or 1000 gold dinars⁽⁵²⁾. These organs are nose, tongue, penis or

its head, hairs of head, beard, heart, liver, pancreas, gallbladder, stomach, urinary bladder, spleen, uterus, skin, vagina, back bone and bone marrow, small and large intestine, the anal canal and the urinary tract. If the assault results in the damage to any of these organs or there utility thereof, the offence will be compensated with full *diyyah*. Likewise if the part of any of these parts or the partial utility is damaged thereof, the *diyyah* will be paid in proportion to that damage, e.g, the *diyyah* for one nostril is one third of the full *diyyah* as nose is composed of two nostrils and one bone dividing these two nostrils and resulting in making the parts of nose into three⁽⁵³⁾. Similarly if the tongue losses its partial utility and the person can utter few words and not few others, the *diyyah* will be paid to the proportion of words the person is unable to utter⁽⁵⁴⁾. It means that if he could speak 10 out of 26 English alphabets, he will be paid the proportional *diyyah* of 38.46% or 384.6 gold dinars or 1634.6 gm of gold which is equivalent to 92730.9 US dollars. The same philosophy of retributive proportionality is applied to all above mentioned organs to compensate the offence in proportion to the damage done.

The second category contains those organs which have two parts in human body. These paired organs are hands, legs, eyes, ears, lips, eyebrows, testis, vaginal labia, breasts, nipples, hips and mandibles, kidneys and lungs. The principle for all these organs is that if both pairs of any of these organs gets damaged or cut or lost their utility, full *diyyah* will be paid and in case of damage to one part of the organ, half of *diyyah* will be paid⁽⁵⁵⁾. Like for one hand, one eye, one leg and one nipple the *diyyah* will be 50 camels or 500 gold dinars (2125 gm).

The third category includes those organs which are having four parts in the body and these organs are eyelids and eyelashes. For the loss of all four eyelids the compensation is complete *diyyah* where as the proportional rule makes it one fourth or 25% of *diyyah* against one eye lid or eye lash⁽⁵⁶⁾.

The proportional *diyyah* laws constitute the fourth category of those organs which posses ten parts and these are the fingers of hands and feet. The proportionality itself necessitates one tenth of *diyyah* for one finger if the body part is tenth in a body. Same is ruled by *Shariah*, full *diyyah* for all ten fingers and proportional 10% for each finger⁽⁵⁷⁾.

Notwithstanding the laws of *diyyah* for the loss or damage of any body part, the *Shariah* has regarded the different senses and utilities of different organs. So it has imposed *diyyah* against the loss to any senses of taste, sanity, listening, speaking, smelling, seeing, touching along with the abilities of walking, chewing, copulating and impregnation, child birth (labor), gripping or catching etc. In these cases the organ may be intact but the utility vanishes. In case of loss of any of these abilities or senses the offender is liable to pay full *diyyah* of one thousand gold dinars. Losing the utility of one ears, eye or hand the *diyyah* will be half as per the ruling principle of proportionality. However in case of partial damage the court has to impose proportional amount as to the loss incurred. In such situations the compensatory amount will be prescribed on case to case basis provided the difference in the damage in each different case⁽⁵⁸⁾.

The proportional nature of *diyyah* has fixed the least amount of one twentieth ratio (1:20) as a punishment. This makes the least amount of *diyyah* for any part as 5

camels⁽⁵⁹⁾ or 50 gold dinars (212.5 gm). This amount is allotted to one tooth which makes the *diyyah* for all teeth equal to full *diyyah* of one hundred camels or 1000 gold dinars. The proportional philosophy could not allow more than. That that is why the *diyyah* for teeth may vary till twenty teeth but remains same afterwards. In this regard the *diyyah* for 19 teeth will be 95 camels or 950 gold dinars (4037.5 gm) and for 20 and onwards even if those are 30 teeth, it will be 100 camels or 1000 gold dinars (4250 gm). The proportionality does not allow more than one full *diyyah* for one type of body parts which might mean that these parts are more valuable than the life itself.

Likewise the head injury is also compensated with same proportional rule where the minimum punishment is fixed to 5 camels⁽⁶⁰⁾ (1:20) or 50 gold dinars and it varies with change in the nature and kind of head injury which is divided into eleven different types by the Muslim jurists.

The other types of loss or damage to any other body part will be compensated with the proportional amount which must not exceed the principle amount of that principle part and in no case shall increase the full amount of *diyyah*⁽⁶¹⁾. For example in case of damage to the nail of a finger for which there is no fixed amount, it will be prescribed with the retributive proportional rule which demands that the compensatory amount must not exceed the *diyyah* of one finger which is one tenth of full *diyyah*. In such case the compensation for one nail must be less than 10 camels or 100 gold dinars (425 gm) which may be imposed after examining the damage to the nail. The same principle is applied for all other body parts. This best applies the retributive proportional philosophy.

The proportional philosophy of *diyyah* imposes more than one punishment for the assault which resulted in damage to more than one body parts⁽⁶²⁾. In case a punch results in complete damage to tongue and nose along with one eye, the offender has to pay two and half *diyyah*, which means he has to pay either 250 camels or 2500 gold dinars equivalent to 10625 gm of pure gold, 100 camels or 1000 gold dinars for tongue, 100 camels or 1000 gold dinars for nose and 50 camels or 500 gold dinars for one eye. This proportional rule will be applied in all other cases where the assault results in damage to more than one body part.

The *Shariah* never neglects the human life in any situation. It has prescribed the *diyyah* for foetus too. The assault on a pregnant woman if resulted in loss or death of her foetus must be compensated with the *diyyah*, called '*gharrah*'⁽⁶³⁾, the amount of which is 5 camels or 50 gold dinars (212.5 gm). The proportional nature of *diyyah* has prescribed the least amount for it because of its having not complete human nature. That is why if because of that assault, the foetus comes out of the body of mother alive and then dies, the offender has to pay full *diyyah* of 100 camels.

The proportional nature of *diyyah* allocates half of the *diyyah* for the homicide of female⁽⁶⁴⁾. The Islamic law looks at every single law in its totality that is why the philosophy behind this law is same to the philosophy of laws of inheritance of female. The woman is given half of the share of the male based upon the fact that she has no financial responsibilities to fulfil. It is the male who has to fulfil the entire financial needs of his family, of which female who gets half share, is a part.

For same philosophy, the *diyyah* of female is made half because her demise has relatively much less financial effect on the family as compared to that of male family member. That is why the proportional nature of *diyyah* differentiates between male and female based upon the financial value of a man and woman which is the financial effect of their death on the family reminding the fact that *diyyah* is nothing but a financial compensation for the family of the deceased.

4. Conclusion:

Diyyah is a financial punishment in Islamic penal law, the amount of which needs to be paid against homicide or bodily injuries. *Diyyah* is an epic example of retributive proportionality. It provides extremely just proportional punishment which befits and suffices the severity and intensity of that offence. Though it provides an unchangeable basic unit of 100 camels for homicide however to proportionate the crime, it makes it optional in intentional and compulsory for unintentional murder. Likewise it differentiates between the value of camels in *diyyah* for intentional and unintentional murder. As for as the bodily injuries are concerned the *diyyah* ensures the extreme limits of proportionality by dividing the principle amount for each organ based on the number of parts of that very organ. That is why the *diyyah* for the tongue for its being a singular part organ, is equal to full *diyyah* where as for finger it is 1/10th of full *diyyah* remembering the fact that one finger is tenth part of the organ in human body.



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References:

- (1) Rob Canton, *Why Punish*, (London: Palgrave, 2017), 14.
- (2) Aristotle, *Ethics* (London: Encyclopedia Britannica, Inc, 1952), Book-V. Note 1131a, 379.
- (3) Michael Davis, "How to make the Punishment Fit the Crime", *Ethics*, Vol 93, 1983, P-727.
- (4) Immanuel Kant, *The Metaphysics of Morals*, (Cambridge: Cambridge University Press, 1996), 105.
- (5) Shikha Mishra, 'Theories of Punishment; A Philosophical aspect', *Imperial Journal of Interdisciplinary Research*, Vol 2, Issue 8, 2016, 74.
- (6) Thom Brooks, *Punishment*, (New York, Routledge, 2012), 21.
- (7) Kent Greenawalt, 'Punishment', *The Journal of Criminal Law and Criminology*, Vol. 74, No. 2 (Summer, 1983), 353.
- (8) Immanuel Kant, *The Metaphysics of Morals*, (Cambridge: Cambridge University Press, 1996), 106.
- (9) Morris J. Fish, 'An Eye for an Eye: Proportionality as a Moral Principle of Punishment', *Oxford Journal of Legal Studies*, Vol. 28, No. 1, (Spring 2008), P-58.
- (10) Code of Hammurabi, Tranlated by L.W. King, section 196 -200.

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- (11) Ibid, section 200 – 204.
- (12) Exodus 21: 23-25.
- (13) Leviticus 24: 17-21.
- (14) Deuteronomy 19: 21.
- (15) Mathews 5: 38-39.
- (16) John 8: 7.
- (17) The translations of the verses of the Holy Quran are taken from the work done by ‘Zafar Ishaq Ansari’, a former Emeritus Professor and President of the International Islamic University, Islamabad. In his early career he served as Director General of Islamic Research Institute, Islamabad and the editor of the world renowned research journal ‘Islamic Studies’. Zafar Ishaq Ansari, *Towards Understanding Al-Quran*. (London: The Islamic Foundation, 2014), 715.
- (18) Al-Shura 42:40.
- (19) Syed Abul A’la Maududi, *Tafheem ul- Quran*. 4(Lahore: idara Tarjuman ul-Quran, 2000), 511.
- (20) Ansari, 412. Al-Nahl 16:126.
- (21) Ibid, 216. Al-An’am 6:160.
- (22) Ibid, 40. Al-Baraqah 2:194.
- (23) Though to some scholars like Imam Abu-Hanifa, Imam Shafi and Sufyan suri confine the application of this rule to the bodily injuries only. See Muhammad Bin Ali Al-Shukani, *Fath-ul-Qadir*, (Beirut: Dar al-Ma’rifa, 2007), 1331.
- (24) Muhammad Bin Abdullah Al-Zahim, *A’sar tatbiq al-Shariah*, (Dar al manar, 1992), 137.
- (25) Mustafa Ahmad Al-Zarqa, *Al-Madkhal Al-Fiqhi al-A’am*, 2(Damascus: Dar al-Qalam, 2004), 683.
- (26) Abu Zahra, 498.
- (27) The financial compensation in the shape of *diyyah* is levied from the offender and none else in the case of intentional homicide or assault. However in the cases of unintentional or quasi-intentional murder the Islamic law does not put the burden of entire *diyyah* amount on offender alone. It includes the family or tribe members of the offender to distribute the entire amount upon each family member who contributes according to his financial capacity to help his family member to pay an amount which he has to pay for an unintentional crime. This doctrine is called *A’aqila*. According to *Shafi*, *Maliki* and *Hanbali* schools of thought, *A’aqila* includes only the family members whereas the *Hanafi* school of thought is of the opinion that *A’aqila* is not confined to family members rather it includes every that community whose members strengthens each other in everyday life. In this regard this may include the working community, political parties etc.
- (28) Dr Ahmad Fathi Bhanassi, *Al-Diyah fi al-shariah al-Islamia*, (Bairut: Dar al-Shurooq, 1988), 9.
- (29) Abu Zahra, 499.
- (30) Ansari, 127. Al-Nisa 4:92.
- (31) Ibid, 35. Al-Baqarah 2:178.

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- (32) Muhammad Bin Abdullah Al-Zahim, *A'sar tatbiq al-Shariah*, (Dar al manar, 1992), 135.
- (33) Dr Ahmad Fathi Bhanassi, *Al-Uqooba fil Fiqh al-Islami*. (Beirut: Dar al-Sharooq, 1983), 151.
- (34) Abu Zahra, 499.
- (35) Imam Malik Bin Anas, *Al-Moa'ta, Kitab al-Uqool, Bab- Zikr al-Uqool*, Vol: 2, p. 849, Dar Ihya al-yuras al-Arabi, Beirut, 1406h.
- (36) Bhanassi, *Al-Diyyah*, 88.
- (37) Imam Malik, *Bab Zikr al-Diyyah*, 2, 850.
- (38) The Muslim Jurists have consensus upon the amount of *diyyah* if paid in camels or gold. The amount of *diyyah* is 100 camels where as 1000 dinars in gold. However there is a difference of opinion among Muslim jurists with regard to *diyyah* in silver. In *Hanafi & Hanbali* school it is 10000 silver dirhams where as in *Shafi* it is 12000 silver dirhams. Likewise The *Sha'fi* school extends the principle commodities of *diyyah* to cows, goats and cloths where as *Hanafi & Hanbali* school confine the principle commodities to camel, gold and silver only. *Imam Yousuf & Imam Shibani*, the two famous students of *Imam Abu-Hanifa* agree with *Shafi* opinion on the number of principle commodities. For more detail see Abdurrehman Al-Juzairi, *Kitab-ul-Fiqh ala al-Mazahib al-arba'*, 5(Beirut: Dar al-kiyub al-Ilmia, 2003), 323-324.
- (39) Leaving apart the detailed discussion on the types of murder in the different schools of Islamic law, the murder has simply three main kinds. Intentional murder is the one where the offender attacks the victim with the intention to kill him, using a weapon which is usually used for killing. Quasi-Intentional murder contains the intention to strike the victim but with no intention of killing him, usually done by an object which may not be used for killing usually. The unintentional murder is the act where the offender has no intention of even striking the victim but unknowingly a legal act of a person results in death of the victim. For more details see the book *Al-Qisas fil Fiqh al-Islami* by Dr Ahmad Fathi Bhanassi.
- (40) Abdurrehman Al-Juzairi, *Kitab-ul-Fiqh ala al-Mazahib al-arba'*, 5(Beirut: Dar al-kiyub al-Ilmia, 2003), 322.
- (41) Dr Wahba Zuhaili, *Fiqh al-Islami wa Adillatuhu*, 6 (Damascus: Dar Al-Fikr, 1985), 307.
- (42) Abdul Qadir Aoda, *Al-Tashri' al-Jinai al-Islami*, 2(Bairut: Dar al-kutub al-Arabi, 2000), 180.
- (43) AL-Kasani, Alauddin Abu Bakar Bin Masood, *Bida'i Al-Sanai' fi Tartib al-Sharai'*, Vol: 7, p. 254, Dar al-kutub Al-Ilmia, Beirut, 1986.
- (44) Al-Sarakhsi, Muhammad Bin Ahmad, *Al-Mabsoot*, Vol: 26, p. 60, Dar alma'arifa, Beirut, 1993.
- (45) Al-Marghinani, Ali Bin Abu Bakar, *Al-Hidayah*, Vol: 4, p. 506, Dar Ihya al-Turas al-Arabi, Beirut , 1986.
- (46) Al-Juzairi, 331-337.
- (47) Aoda, 2, 199.
- (48) Abu-Dawood, Sulaiman Bin Ash'as Al-sajistani, *Sunan Abu Dawood, Kitab-ul-Faraid, Bab fi meeras zawil Arham*, Vol: 3, p. 123, Al-Maktaba Al-Asriya, Beirut.

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- (49) Bhanassi, *Al-Diyyah*, 64.
- (50) Abu Zahra, 520.
- (51) Zuhaili, *Al-Fiqh Al-Islami*, 6, 321.
- (52) Dr Wahba Zuhaili, *Nazriya al-Daman*, (Damascus: Dar al-Fikr, 1998), 293-294.
- (53) Bhanassi, *Al-Diyyah*, 124.
- (54) *Ibid*, 126.
- (55) Al-Kasani, 7, 311.
- (56) Zuhaili, *Al-Fiqh Al-Islami*, 6, 347.
- (57) Aoda, 2, 266-267.
- (58) Al-Kasani, 7, 311.
- (59) Aoda, 2, 272.
- (60) Abu Zahra, 524.
- (61) Aoda, 2, 280.
- (62) Al-Juzairi, 309.
- (63) Al-Nisai, Ahmad Bin Shuaib, *Sunan Al-Nisai*, Vol: 8, p. 47, Maktab al-Matbo'at al-Islamia, Aleppo, 1406h.
- (64) Bhanassi, *Al-Uqooba*, 161.