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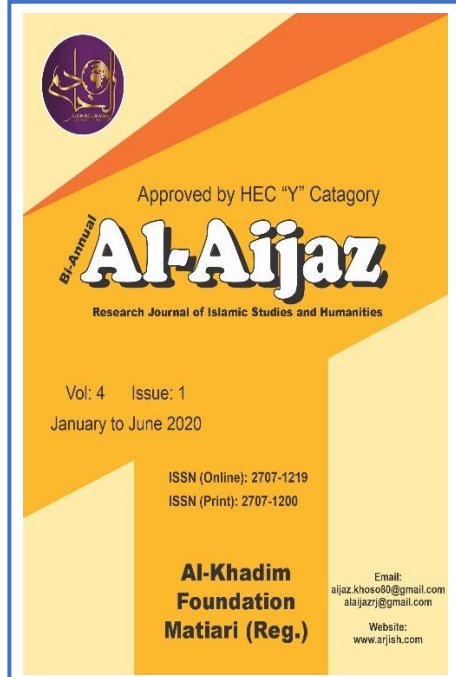
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### TOPIC:

Compatibility of The Islamized Law of Murder of Pakistan with Modern Jurisprudence

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## Compatibility of The Islamized Law of Murder of Pakistan with Modern Jurisprudence

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### Abstract

The Islamized law of murder, known as the *qisas* and *diyat* law of Pakistan, has been under severe criticism since its enforcement. This paper discusses the main features of Islamized law of murder, i.e. *qatl-i-amd*, of Pakistan. The paper also encompasses the meaning of law under contemporary jurisprudence and theories of law. The paper further discusses the compatibility of the Islamized law with the latest jurisprudential developments in modern societies. In the end, the paper suggests some further modifications into the existing criminal law of Pakistan about heinous offence of murder as Islamized in the year 1990 and amended many times, subsequently. Finally, it holds that Islamic law of *qisas* and *diyat* is compatible with the latest jurisprudence and standards of modern world; hence is, practically, viable.

**Keywords:** *Afw* (forgiveness), *aqilah* (close men), *badl-i sulh* (compensation), *diyat* (blood money), *fasad-fil-arz* (mischief on the Earth), *qasamah* (oath taking), *qatl-i-amd* (pre-meditated murder), *qisas* (just retribution), *sulh* (composition) and *tazkiyah-al-shahood* (purgation of witnesses)

### Introduction

'*Qisas*' is an Arabic word derived from '*qass*' which is used in different senses; for instance, relating, cutting or telling something.<sup>1</sup> Nonetheless, in *Shari'ah* law the expression is used for equality, just retribution and retaliation. Islamic *qisas* and *diyat* law is also known as *al-jinayat*. The law is applied when an offence is committed against human body, i.e. when either a person is deprived of his life unjustly or he receives an injury on his body. In *Shari'ah* law, punishment of *qisas* is awarded to culprits either by inflicting death or injury, as the case may be, as inflicted by him upon the person of some other human. Hence, two basic ingredients of *qisas* punishment are equality and similarity. On the other hand, *diyat* is a punishment wherein aggrieved party is offered compensation or monetary equivalent when *qisas* punishment is not applicable.

The erstwhile, common law based, law of Pakistan relating to the offence of homicide was severely criticised by clerics, scholars, lawyers and judges, after promulgation of the Constitution of Pakistan 1973, for being derogatory to the injunctions of Islam. After toppling the elected government in the year of 1977, General Muhammad Zia-ul-Haq took charge of the government and prioritized the task of Islamization of laws. Under this process first draft of law of murder, based on *Shari'ah* principles, was prepared in 1980 but the then president of Pakistan refused its promulgation because it might cause the acquittal of Bhutto, the sacked Prime Minister, from a murder trial pending against him.<sup>2</sup> However, in 1980s Pakistan judiciary through three successive verdicts held various provisions of the

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Pakistan Penal Code, 1860 (PPC) and the Code of Criminal Procedure, 1898 (Cr.PC), relating to the offence of homicide and bodily hurts, to be un-Islamic and void.<sup>3</sup> Ultimately, in compliance with the order of the Supreme Court, the Central Government finally enforced an Islamized or *Shari'ah* compliant murder law, either by inserting new provisions or by amending the provisions of existing law, through the Criminal Law (Second Amendment) Ordinance, (VII of 1990). However, the Government had to extend the Ordinance many times until the enforcement of the Criminal Law (Amendment) Act, (II of 1997). The Act was further amended few time to time by the Parliament for eliminating loopholes of the law.

The scheme of Islamized law of murder, however, is very interesting. For instance, the legislature provided two types punishment for *qatl-i-amd*, i.e. *qisas* and *ta'zir*, under three clauses of section 302 PPC. Under clause (a) of section 302 PPC, offence of *qatl-i-amd* is punishable with death as *qisas*; under clause (b) the same offence is punishable with either death or life imprisonment but as *ta'zir* and clause (c) is also about *ta'zir* punishment of imprisonment up to twenty five years when *qisas* is not applicable. Though, under the new law, two different standards of evidence are required for awarding sentence as *qisas* and *ta'zir* under section 304 PPC and under article 17 of the *Qanun-e Shahadat* Order, 1984 but only one mode of execution of death is kept intact under section 368 Cr.PC and jail laws.<sup>4</sup> Under the law, courts are empowered to award death sentence as *qisas* when there was a true confession of murderer or deposition of witnesses qualifying the credentials of test of purgation, i.e. *tazkiyah-al shahood*.

Despite amending many times, the Islamized law of murder of Pakistan could not be made impeccable. One of its ambiguities is that no-where under the statutory law expression '*tazkiyah-al-shahood*' is defined. In order to clarify the same though the higher as well as the superior judiciary of Pakistan, in a few cases, tried to give some pre-requisites of the test<sup>5</sup> but under such decisions no procedure for the observance of purgation of witnesses is provided. This is the reason that the test was rarely undergone by trial courts in murder cases. The case law analysis of Pakistan judiciary also reveals that not a single conviction recorded under section 302(a) PPC on the basis of depositions of eye witnesses qualifying the test of '*tazkiyah-al-shahood*' could gain finality.

The murder law of Pakistan, based on *Shari'ah* principles, is not considered a balanced law rather it is perceived to be a pro-accused legislation. The sentence of murderer, under the law, lacks stability and permanence because accused even if convicted and sentenced for a pre-meditated murder can seek acquittal of charge subsequently due to waiver of *qisas* under section 309 PPC; compounding of *qisas* under section 310 PPC and composition of offence of murder under sections 338-E PPC and 345 Cr.PC.<sup>6</sup> Interestingly, as per the apex court's verdicts acquittal of a killer, irrespective of the way it is gained, under the law of Pakistan leaves no blemish or scar on the character of a culprit.<sup>7</sup> The Islamized law of Pakistan is also criticised because it failed in controlling the occurrence of offence of murder.<sup>8</sup> Secondly, unrestricted acquittal of murderers due to patching up the matter outside courts in heinous offences of *qatl* is not acceptable to society. For instance, public recorded protest when a *qatl* was compounded by the family of the victim with heavy hearts and it was accepted in the case of *Shahrugh Jatoi*.<sup>9</sup> Similarly, *Ramond Davis* was acquitted of a double murder case due to seemingly a forced compromise.<sup>10</sup> Thirdly, the interpretation of Pakistan judiciary that concessions under the provisions of sections 306, 307 and 308

PPC are confined only to the offenders convicted and punished as *qisas* under section 302 (a) PPC is also considered discriminatory.<sup>11</sup> Due to these lacunae of the murder law of Pakistan critics get an overall impression that Islamic *qisas* and *diyat* law is anachronistic; it does not work hence is not compatible with the law developed by modern society.<sup>12</sup> Therefore, this paper discusses as to whether or not Islamized murder law of Pakistan is compatible with the latest social trends, modern jurisprudence and standards of today's society?

### **Vibrant Society and Modern Jurisprudence**

Political and social developments in every civilized society cause the evolution of law. This process can also be termed as modernization of laws. As it has been discussed above, the criminal law of Pakistan has also gone through evolutionary process when it was Islamized. In modern era, laws are enacted by a political society in order to meet social needs.<sup>13</sup> When society accepts changes in all aspects of life the law also requires up-gradation and modernization, accordingly.

Law in its current political and legal paradigm is understood in social context and human rights perspectives. Today, law which protects social rights, safeguards social interests and projects welfare of humanity is considered modernized. After two world-wars, in the modernization process of civil and continental laws human rights movements played a pivotal role. Resultantly, due to this modernization campaign the concept of law under English jurisprudence, which at times had influenced many common wealth States of the world, today, has not same content as it had in the seventeenth and the eighteenth centuries. Jurisprudence can be termed as studying law systematically. Word 'jurisprudence' came into English from its Latin counterpart '*jurisprudentia*' which is a product of two Latin words- *juris*, i.e. law, and *prudencia*, i.e. knowledge; so jurisprudence is a subject which is about the 'knowledge of law'.<sup>14</sup> The scope of jurisprudence is elucidated by G.W. Paton in his book as "jurisprudence is a particular method of study, not of the law of one country but of the general notion of law itself."<sup>15</sup> A similar but clearer picture of jurisprudence has been drawn by Professor Nyazee when he discussed the meaning of law in its modern perspectives: He reiterates:

In modern studies, jurisprudence is (1) the branch of humanist sciences that studies the law and (2) the entire edifice of legal principles that are based upon actual cases. In this meaning, jurisprudence refers to the philosophy of law, or legal theory, which studies not what the law is in particular jurisdiction (say, Pakistan or the United States) but law in general - that is, those attributes common to all legal systems.<sup>16</sup>

About the nature of jurisprudence Sir John Salmond says that it grows as the people grow and develops with the people.<sup>17</sup> It is not out of place to mention here that the process of reconstruction in Europe, after world war-II, had influenced too the growth of western jurisprudence when unlimited powers of monarch were discouraged and monarchical system was replaced with democracy and constitutionalism. Hence, role of society gradually increased and people started electing their representatives in the legislature and the governments on the basis of 'one man one vote' principle. Through constitution, the State powers were distributed amongst different organs and these powers were balanced by creating a check of each organ over the others. This era of constitutionalism developed the concepts of supremacy of parliament, independence of judiciary and judicial review. In

other words, in the second half of the twentieth century judiciary emerged with a power to determine the constitutionality of every legislative and administrative action. When we look at these legal developments in jurisprudential point of view, we cannot ignore legal theories including 'realism' and 'sociological school of law' which are, in fact, the post phenomenon of the two world wars.<sup>18</sup>

Legal realism, as a phenomenon or theory, flourished against legal formalism. Formalists, including Bentham, Austin, Hart, Hume and Kelsen believe in formal legal rules. According to Dworkin, a critic of positivism but a formalist, law as a system contains rules, non-rule standards, principles and policies which have capability to answer every legal question.<sup>19</sup> According to him, law is like literature and judges interpret it in response to their own convictions and instincts.<sup>20</sup> Therefore, according to the formalists, judges do not legislate or create law during adjudication but they just discover the law or find correct answer. The formalists, moreover, argue that while having constitutions and having adopted principle of separation of powers; making law through judiciary is, in fact, negation of the principle of supremacy of legislative body and an act of counter-majoritarianism. The realists, on the other hand, allege that in reality law is not what is conceptualised by the formalists but law is what is being practiced in courts. Another contributing factor, in this regard, is industrialisation of the nineteenth century and twentieth century which affected the balance of population of the world as well. In this era, people migrated not only across continents but within a jurisdiction they started shifting from rural areas towards big cities. So it is not incorrect to say that the expansion of metropolitans in the world and existing of new heterogeneous societies are coincidental. The vibrant societies endeavoured for social rights and these developments gave birth to sociological school of thought. The proponents of this school judge laws in relation to social interests, social aspects and social response.

### **Legal Realism and 'Law in Action'**

The realists see law in action rather in books as a lifeless phenomenon. They study law as it is in its actual working and effects.<sup>21</sup> In other words, realism is based on the premise that only general rules of law do not decide the cases of individuals through courts rather courts give decisions of cases relying on the facts of the matter, extra-legal hidden considerations and prevailing practices. So according to the realists a law made by legislature is not considered a valid law until interpreted by courts.<sup>22</sup> The realists further claim that when courts interpret law numerous factors, other than formal legal rules, affect the legal process and outcome of cases; for instance, personality of a judge, his beliefs, political affiliation, family traits, State policies, response of public and the background of the parties of cases. The founders of American legal realism are mostly judges and they have described law in different but interesting ways. For instance, Oliver Wendell Holmes, a member of realists' movement, believes that law is the prophecies of what the courts will do in fact. In order to explain his belief Holmes, in his book 'The Path of the Law', introduced a 'bad man theory'. According to this theory a bad man while doing something wrong does not care the law but only foresees the response of courts on his act.<sup>23</sup> Similarly, Karl Nickerson Llewellyn also believes in 'law in action'. According to him what the officials of law including judges, sheriffs, jailers and lawyers do about justice is the law itself.<sup>24</sup> Llewellyn contributed to the development of legal realism by his approach called 'functionalism'.<sup>25</sup> As per his approach of

'functionalism', law serves some fundamental functions or law jobs. Llewellyn identified six law jobs, including adjustment of hard cases, channelling conducts and expectations, determination of procedures for authorities, providing directions, giving incentives and providing juristic method. In his book, i.e. 'Some Realism about Realism', Llewellyn identified a nine-points' manifesto of realism.<sup>26</sup> The manifesto reveals few features of conception of law; that is, law in *flux* (law keeps on changing), law as a means to social ends, society in *flux*, law is what courts or people actually do, evaluation of law in terms of its effects and attack on the problems of law.

Jerome Frank, another famous realist, discussed legal realism in his books –'Law and Modern Mind' and 'Courts on Trial'. In his writings, he wrote on judging process and the personality of a judge. He says that in practice a judge does not follow the written law which binds him to apply a legal rule on a case while deciding a case; rather in practice a judge first reaches to the conclusion of the case, like an ordinary man does, and then in his judgment he justifies the conclusion reached by him with reasoning.<sup>27</sup> About the decision of judges Frank believes that decisions of judges are based on their hunches and being a witness of record and evidence, like other witnesses, a judge may err. Similarly, regarding judicial process Benjamin Nathan Cardozo, an American realist, in his famous book, i.e. 'The Nature of the Judicial Process', wrote that courts' decisions must be based on the mores of a particular community of that time. He also said that judges sometimes act as legislators when they fill in the gaps of the laws and while doing so their decisions are influenced by their inherited instincts, traditional beliefs, convictions and social needs.<sup>28</sup>

### **Sociological School and Concept of Law**

Sociological School of Law has three claims; that law is a social phenomenon, that law can be observed partially in action and that law is one form of social control.<sup>29</sup> In other words, sociologists consider law as a feature of society. Roscoe Pound, an exponent of Sociological School, in his book, i.e. 'Jurisprudence', has criticised the English legal positivism and distinguished the 'law in books' from 'law in action'. Pound also expounded the theory of 'social engineering'. According to him, law protects certain interests of human beings and ensure social cohesion.<sup>30</sup> Through social engineering Pound wanted to construct an efficient society which could ensure satisfaction of maximum interests. In his theory Pound gave a detail of interests of three main categories; individual interests, public interests, social interests.<sup>31</sup> Similarly, Ludwig Gumplowicz sees law as one the most important instruments in the hand of government for attaining its objectives.<sup>32</sup> Another sociologist namely Emile Durkheim expounded theory of social solidarity and he holds that it is the law which holds society together. He also correlates the law and social solidarity.<sup>33</sup>

The above survey, of the latest legal theories, transpires that basic purpose of law, in its modern discourse, is to protect society and humanity. The survey further reveals that today courts have vast powers to fill in the gaps of law through interpretation keeping in view the social demands and needs. So, it goes without saying that a law that cannot protect the interests of humanity; becomes fail in safeguarding the rights of people and cannot affectively control the crime, cannot exist today.

### **Comparison of the *Qisas* and *Diyat* Law of Islam with the Latest Jurisprudence**

Islamic law of *qisas* and *diyat* is based on the principles of *qisas*, *diyat*, *afw*, *sulh*, *badl-e sulh*, *qasamah*, *aqilah*, *tazkiyah-al shahood* and *fasad-fil-arz*. Although, the Federal Shariat Court of Pakistan had discussed the importance of principles of *qasamah* and *aqilah* even then these principles were not made part of Pakistani law.<sup>34</sup> These principles of *Shari'ah*, in fact, involve society into the justice system and assure justice for accused as well as for victim party. Islamic law in cases of *qatl* and hurts, in fact, localised the criminal justice system by involving society in it and by creating three alternative options for the aggrieved, i.e. retaliation (*qisas*), forgiveness (*afw*) and composition (*sulh*). The participation of public in criminal justice system of Islam can be envisioned in the matters of ocular evidence, process of *qasamah*, payment of *diyat* by *aqilah* and options for the victim party. In some cases of *qatl-i-amd* victim party does not prefer composition rather claims retaliation. In such cases, for seeking justice for the aggrieved party, giving evidence before court, as per *Shari'ah* law, is the duty of members of society who are aware of the facts of *qatl* or hurt cases. Since in Islam *aqilah* is a group of persons who are considered very close to the accused so in cases of murder *aqilah* of accused is bound to contribute a share in *diyat* on behalf of accused.<sup>35</sup> On the other hand, *qasamah* in Islamic law is a mode of taking oath by at least fifty persons of the locality wherein dead body of the deceased is found but his killer cannot be traced. The persons, suspected or nominated by the victim party, depose before the judge that they neither committed murder nor they have any information about the offenders. Unfortunately, the drafters of the *qisas* and *diyat* law of Pakistan did not insert the concepts of *aqilah* and *qasamah* into the statutory law. The utility of these two Islamic concepts, i.e. *aqilah* and *qasamah*, cannot be ruled out even today. Since the *aqilah* of accused is a section of society which is considered very close to the accused so every member of society, under the fear of losing the life of murderer in *qisas* or the payment of *diyat*, may have a check on all related persons even before the occurrence of any of the offences of *qatl* and hurts. The Islamized law of Pakistan under Chapter XVI of the Pakistan Penal Code, 1860 and under few provisions of the Code of Criminal Procedure, 1898 is not sacrosanct and is amenable to be amended by simple majority of the *Majlis-e Shura* so the law should further be modernised in accordance with *Shari'ah* principles. In Pakistan majority of the population is *Hanafi* followers and under *Hanafi's* jurisprudence, doctrine of *siyasa* empowers the ruler to lay down law for eradicating any flaw or avoiding any misuse of a *Sharia'h* law.<sup>36</sup> Hence, on the touchstone of this doctrine too, the concerns of modern society regarding the ineffectiveness of the *qisas* and *diyat* law of Pakistan can be addressed. The Islamized law of Pakistan relating to *qatl* could be brought in harmony with the resent jurisprudence and modern social standards by amending further as per principles of *Shari'ah*.

### Recommendations

The solution to remove flaws from the existing Islamized murder law of Pakistan and addressing the concerns of modern society lies in *Shari'ah* principles and *siyasa*. Since Islamic law is viable today so for doing the needful some suggestions are given which are advantageous for all concerned stakeholders. There is a dichotomy in the law of Pakistan regarding the punishment of death as *qisas* and its mode of execution. This flaw can be removed by amending the provisions of section 368 Cr.PC as well as jail laws and by

introducing a standard that the killer shall be killed by the same manner as he killed the deceased and if not possible so then through sword. Secondly, the test of purgation of witnesses in Pakistan is seldom observed by trial courts. Obviously, when neither any fixed procedure of the test is available under law nor witnesses qualifying the test of *tazkiyah-al-shahood* are available then the provisions relating to the test or the courts' decisions are mere an Islamic colour of the law sans any practical importance. Hence, the legislature should provide a standard of purgation, i.e. *tazkiyah*, credential of witnesses and its procedure under the statutory law. It should also be made mandatory for the ocular witnesses to depose in courts honestly and fairly failing which they should be penalised. In order to determine the veracity and credentials of a witness there should be a mechanism of inquiry and in this process local police and local government, where *qatl* is committed, can be engaged. Thirdly, for the appointment of judges in Pakistan just formal legal education is required while skills of understanding *Shari'ah* law are not a pre-requisite for candidates. Even, after induction into the judiciary judges are not trained or taught *Shari'ah* law in detail so while exercising power of interpretation as reposed to them under section 338-F, PPC they feel difficulties. Therefore, proper assistance of experts in Islamic law should be provided to judges during trial and hearing of the cases of the offences of *qatl-i-amd* and hurts. Moreover, written opinions of such experts or jurist consults should be made part of the judicial record so that it could be considered by the higher forum in cases of appeal or revision. Fourthly, controversy emerging from different interpretations of section 306 and section 307(c) PPC by higher and superior judiciary of Pakistan should be removed by the legislature. Actually, depriving the accused of *qatl-i-amd*, convicted and sentenced as *ta'zir* under section 302 (b) PPC, from the benefits available under sections 306 and 307 (c) PPC is not only violation of section 338-E PPC but it amounts to discrimination as well. The legislature, therefore, should do away with the discriminatory treatment towards the accused persons of *ta'zir* cases by over-riding the majority view of the bench in the case of *Zahid Rehman vs. The State* through adding a provision under section 307 PPC. The question of preferential treatment with one category of accused persons under these sections was discussed by a larger bench in *Zahid Rehman's* case but the majority view (with 3:2) was that provisions of sections 306 and 307 (c) do not attract in cases of *ta'zir*. However, in the minority view of the bench it was called an anomaly. Fifthly, in Pakistan the offence of murder, a non-compoundable offence in the erstwhile law, was made compoundable under the process of Islamization. Under Islamised law, the legal heirs of the deceased were given option to enter into compromise and the State was left with no power to seek conviction of accused when parties compound murder. Hence, the new law created a situation of insecurity and vulnerability for modern society and people stopped trusting on law and the State. Politically influential and financially well-off people got compromises from the legal heirs of the deceased by any hook or crook. Consequently, the law of murder lost its deterrence and effectiveness. The response of civil society in cases of Shahruxh Jatoti and Raymond Davis is the back drop of this law. It is, therefore, suggested that law should be amended and in cases of *qatl-i-amd* when parties patch up the matter outside the courts, there should be a compulsory sentence of seven years' imprisonment for the accused. Lastly, since Islamic concepts of *aqilah* and *qasamah* involve society in the administration of criminal justice so provisions should be inserted under the Code of Criminal Procedure,



1898 and these principle should be added. The result of such amendment and insertion might be that the society or the *aqilah* will keep a check on its members and murder offences will be prevented.

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- <sup>33</sup> Wacks, Raymond, '*Jurisprudence*'; Blackstone Press Limited, 5<sup>th</sup> Edition (1999), p. 158.
- <sup>34</sup> *Muhammad Riaz vs. Federal Government* (PLD 1980 FSC 1) at pp. 39, 40.
- <sup>35</sup> *Al-Sunan Ibne Ma'jah*, Volume II, Chapter 'Blood-money'; It was narrated by *Mughirah bin Shau'bah* (Allah be pleased with him) that the Prophet (pbuh) ruled that *diyat* must be paid by the *aqilah* of the murderer. At another occasion as reported in *Al-Sunan an-Nasai*, Chapter 'Oaths, Retaliation and Blood-money', and narrated by *Mughirah bin Shau'bah* (Allah be pleased with him) as well as by *Abu Hurairah* (Allah be pleased with him) when an inadvertent act of a woman, wife of *Hudhail*, caused miscarriage to her husband's another wife, the Prophet of Allah (pbuh) gave verdict that *aqilah* of the woman would give a slave as *diyat*. Similarly, regarding *qasama* it is reported in *Al-Sunan an-Nasai*, Chapter 'Oaths, Retaliation and Blood-money' and narrated by *Ibn-e Al-Musayyab* (Allah be pleased with him) that *qasamah* existed during *jahaliah* and the Prophet of Allah (pbuh) approved it in the case of an *Ansari* who was found dead in a well of the Jews. Same narration is reported in *Al-Sunan Abi Daud*, Vol. 4 with an addition that the Prophet of Allah (pbuh) preferred *qasamah* from fifty persons of that vicinity.
- <sup>36</sup> Ahmad, Muhammad Mushtaq, Unpublished Ph.D Dissertation, (2015), Faculty of *Shari'ah* and Law, IIU, Islamabad.