

State Guardianship in Honor Killing Cases: A Shariah Perspective

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Abstract

From history, it is a proven fact that one of the causes of fighting among people have been the disrespect or unacceptable involvement in their women. The same is still equally valid in our societies in one way or the other. Main reason of the anguish has been the purity of Progeny from any other illegal source. People, both men and women, are killed in the name of family honor, by any aggrieved person. This has neither been appreciated nor protected by any law so far including Islamic Laws. There has been a permanent issue in every respectable society to handle and control it by the administration (Government agencies) because most of the families even do not want to disclose such occurrences. This paper will discuss such situations and its solution in the light of Islamic and contemporary Laws.

Key Words: *Honor killing, Reporting issues, Islamic concept, Pakistan laws, State-guardianship*

1. Introduction

On crime, Islam takes into consideration the viewpoint of the criminal and that of the community against which aggression took place. A human life cannot be taken except in the course of justice for manslaughter or for corruption (*Fitna*) in the land. According to Prophet (PBUH), life is only taken away for life, adultery by a married Muslim and apostasy. The objectives of punishment are to prevent harm to individual or public interests. These include Din, Life, Family, Intellect and Wealth. Punishments have some prominent characteristics which should not be overlooked as they are inflicted as last resort, intended to serve as an example, reformatory, retributive and redressive. Islam has given special consideration to family life. Disruptions in the inheritance system extend beyond mere financial implications; they hold the potential to fracture human connections and sow

discord among families. The repercussions are profound, casting a shadow of doubt over lineage, marring marital bonds, and unsettling the emotional equilibrium of individuals for an enduring span of time. The Holy Qur'an and Sunnah make special provision for the protection of honor by declaring it a Public Right (*Huqooq-ul-Allah*) and enjoin the severest punishments for the offences relating to family matters of Hudood. Furthermore, Islam has permitted (Mubah) for murder in trespassing of the defense of person or property. In Surah Nisa, the Quran establishes the right to protect one's honor, extending to the point of using lethal force if necessary. This right is not only granted to the aggrieved woman but is also made available to her husband, close family members (Mahram), and individuals entrusted with her lawful guardianship.

It is reported to have said by the Holy Prophet (PBUH);

“According to Abu Huraira who told that he heard God’s Messenger say, if any one to look into your house without receiving your permission and you were to throw a pebble at him and put out his eye, you would be guilty of no offence.” (Agreed upon)¹

Shariah divides crimes into two categories: First Category, the Crimes with impact on social life.

Second Category: Other crimes where the Shariah applies unprescribed penalties.

2. Wilayat and Wali (Guardianship and Guardian)

Wali (guardian) is one who has the care of the property and rights of other person in the law.² The

Wali may be any person. For guardianship -of minors, lunatics and unmarried girls - the word

¹ Ibn Hajar al-‘Asqalānī ‘Alī, Aḥmad ibn et al., *Bulūgh Al-Marām Min Adillat al-Aḥkām* (Cairo: al-Maktab al-Islāmī li-Iḥyā’ al-Turāth, 2004).

² E. M. Kirkpatrick, *Chambers Twentieth Century Dictionary* (Larousse Kingfisher Chambers, 1986), 575.

Hidhanat has been used in Sunnah. In Islamic law, custody (*Hidhanat*) is looking after a person who is unable to look after himself, i.e., a person of unsound mind or a minor, but Pakistani statutory provisions do not define the concept.³ Guardianship is not an absolute right.

The courts are obligated to acknowledge this principle, irrespective of whether its application in a specific case would contribute to the well-being of the minor involved or not.⁴

Kinds of Waliyat include:

Wali ahd or an heir, especially to a sovereignty.

Wali ni'mat or a title of respect for a father, patron, a benefactor.

Waliyu'd -dam, a relative entitled to exact retaliation.⁵

3. Conditions for Wali of a Victim

There are certain conditions for a Wali to claim retaliation or compensation:

First condition for Wali is that he should be legal heir of the victim. Many heirs will be partners in claiming *Qisas*. All the Walis will not have to prove the accused as guilty. In cases where some Walis are minor, and others are adults, so then the claim of adults will be considered.

³ Afrasiab Ahmed Rana, "The Right of Custody of Minor: A Comparative Study of Sharī'ah and Pakistani Legal System," *International Journal of Human Rights and Constitutional Studies* 9, no. 4 (2022): 350–68, doi:10.1504/ijhracs.2022.126182, 1.

⁴ Abdur Rahim, *The Principles of Muhammadan Jurisprudence According to the Hanfi, Maliki, Shafi'u and Hanbali Schools* (Lahore: Indus Publishers, 1968), 344.

⁵ Qadeer Alam, "The Qisas and Diyat Law in Pakistan," *Islamic Studies* 58, no. 4 (2019): 551–62, 8.

For *Wiliyu'd- dam* he must be known by the community. In case Wali is doubtful then claim of retaliation will also be doubtful and the benefit of doubt must go to the accused and *Qisas* will not be enforced.

The state becomes guardian in cases when murderer is missing, or the heirs of deceased are unknown. State also becomes guardian for when the guardians of lunatics or minors are killed.

4. Laws inferred from the Qur'an, and Ahadith

Islam has instituted complete equality in the realm of murder punishment. The fundamental principle outlined in the Quran stipulates a proportional retribution: a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, and a tooth for a tooth. While *Qisas* (retaliation) is mandated in cases of murder and physical harm, the option to opt for *Diyat* (compensation) or to grant *Afw* (pardon) is also permissible.

For accidental murder, there is no capital punishment. The murderer would, however, pay *Diyat* (blood-wit) to the heirs of the murdered and also free a believing slave. Blood-wit is the same in case of intentional or unintentional murder.

For intentional murder, *Qisas* or retaliation is allowed. In fact, for such murder, the heirs of the slain have three options, i.e. either to take *Qisas*, and slay the murderer or to take *Diyat* and accept blood-wit or to pardon and remit blood-wit as charity.

Prophet Muhammad (PBUH) fixed the blood-wit for murder at 100 camels of various age or 1000 Dinars. But the basic requirement is the consent of the aggrieved party especially in the case of intentional murder. Where the murderer cannot be found, blood-money shall be paid by the State from public money. A son will be liable *Qisas* for murder of his father. A father will not be killed

in retaliation of his son. But a murderer will not inherit from the property of the victim. This law is applicable in all kinds of murders whether intentional or unintentional (differed).⁶ If the aggrieved party takes blood-with from the murderer and then retaliates and kills him, then they shall have incurred a major sin and would also be held liable for intentional murder. Nine personal will be killed in retaliation for murder of nine victims:⁷

- a. Freeman for murder of slave and vice versa.
- b. Freeman for freeman and slave for slave.
- c. Muslim for murder of a Zimmi.
- d. Man for murder of a woman and vice versa.
- e. Brother for brother, sister for sister and opposite to each other.
- f. Healthy man for murder of sick and eyes-holder for blind.

Islam has not permitted a son to kill his father who was the source of his coming to this world. Same law is applicable for grandfather (both paternal and maternal) and above.⁸ Following nine persons will not be killed in retaliation of nine victims but they will have to pay compensation.

- i. Father and mother for murder of their son/daughter
- ii. Grandfather/grandmother for grandson/granddaughter
- iii. Master for slave, writer slave, partial slave etc.
- iv. A Muslim for murder of temporary resident non-muslim.

5. Law inferred from the Pakistan Penal Code:

⁶ ‘Alī ibn Abī Bakr Marghīnānī, *The Hedaya: Commentary on the Islamic Laws* (New Delhi: Kitab Bhavan, 1870), 563.

⁷ Mohammad Miyan Siddiqi, *Qisas-o-Diyat* (Idara Tahqiqat-e-Islami, Islamabad, 1982), 129-130.

⁸ *Ibid*, 132

All the definitions given in the Pakistan Penal Code for Qatl-i-Amd and related terms are according to the derivations of the Qur'an and Sunnah by different Imams. The words have been given the shape of codification. The punishments other than imprisonment have been described corroborating to the Islamic Law and Shariah and mode of execution has also been established in accordance with Islamic legal system. Punishments of imprisonment for longer duration have been added as Ta'zir, which are not given in cases of Qisas for Qatl in Islam. In Islamic legal system there has hardly been imposed the penalty of restriction on movement or deprivation of links from normal society and business. Value of Diyat has been fixed nearest to that prescribed in the Islamic Law. Silver that was in vogue in the form of Dinars has been made standard for yearly evaluation of the cost, which is declared by the Government annually. The rights of Qisas, Compounding and waiver have been vested to the (Wali) heirs of the victim and Government shall be the wali where other wali is not available. There is no indication of Qasam, payment of Diyat by the Government or Aqila for collective payment on behalf of perpetrator. Blood-wit has also been kept the same in case of intentional or unintentional murder. The right of taking cognizance and execution of punishment has been maintained as right of Government only.

6. Court Decisions on various aspects of Qatl-i-Amd cases

After enforcement of Qisas and Diyat Laws since 1991 the superior Courts have given their verdicts on every aspect of the current laws. In the case of "Family Honor" the court has held that

"but if a person has doubts or clues against the immoral activities of his wife, then Islam has its own laws and rules to meet with such situations which have to be followed by every believer if he/she has faith in Allah and his Apostles. Islam does not support effervescence of vengeance by taking the lives of persons but promotes tolerance full of senses. In all

*such cases law of Lian has been introduced which has to be applied by the Court and not by the individuals”.*⁹

Similarly, in ‘Compounding of Offences’ two legal heirs of the deceased who forgave the accused, but the legal heirs of the other deceased were not present and thus a compromise could not be reached regarding this second deceased individual. An application to consider the possibility of accepting a compromise in the matter and subsequently acquitting the accused was rejected.¹⁰ Court is competent to entertain and give effect to the compromise not being functus officio.¹¹

Qatl-i-Amd committed by the husband of his wife leaving behind child/children was not liable to Qisas. Conviction of accused under Section 302 (a) Pakistan Penal Code being not sustainable in law, was altered to one under Section 308 Pakistan Penal Code as the accused being husband of the deceased was her Wali and he was sentenced to undergo 14 years R.I. and to pay Diyat amounting to Rs 170,000.¹² Adult sane Walis of deceased waived their right of Qisas without any compensation. Walis of minor heirs of deceased compounded right of Qisas on their behalf against the value of Badl-i-Sulh, which was not less than the value of Diyat. Waiver and compounding of Qisas was accepted in the public as well as interest of adult and minor Walis.¹³

If a victim has more than one wali and if any one of them waives his right, the right of Qisas cannot be enforced. Wali who has not waived or has not entered into Bad-i-Sulh will be entitled to receive his share of Diyat subject to Section 311, P.P.C. Where, however, accused person has been awarded sentence for murder as Ta’zir and not Qisas, the legal heirs cannot Waive or accept Badl-

⁹ PLD 1999 Peshawar 24

¹⁰ PLD 1992 SC 246 see also 1993 SCMR 1574

¹¹ 1994 MLD 1

¹² 1995 P Cr L J 110

¹³ 1991 MLD 1875

i-Sulh. Sentence awarded for murder as Ta'zir can be compounded by all the legal heirs of the deceased with permission of the Court concerned.¹⁴ Father of the deceased being alone competent to compound the offence, therefore direction of the trial court for procuring confirmation from brother and sisters of the deceased was devoid of lawful authority.

6.1. Decision given by lower Court against injunctions of Islam.

Qatl-i-Amd committed by the husband of his wife leaving behind child/children was not liable to Qisas. Courts have no lawful authority, to convict the accused under section 302 Pakistan Penal Code or to impose death penalty on him. Both Special Court for Speedy Trial and Supreme Appellate Court had ordered death sentence for the accused although he was liable to death in law for the offence allegedly committed by him. Relevant law had not provided any remedy by way of appeal/petition for leave to appeal, review or revision against the said order of the supreme appellate court. Case, thus was fit and proper for interference in exercise of original jurisdiction of Supreme Court under Art 184 (3) of the Constitution of Pakistan, for Fundamental Rights with respect to public importance were concerned. Supreme Court accepted the petition, set aside the judgment and remitted the case to the relevant Court. Supreme Court while quoting Ahadith of Holy Prophet (PBUH), cautioned all the Courts in the country to exercise utmost care while dealing with the life and liberty of the citizens, for carelessness on their part could deprive someone of their life and may cause irreparable hardship and damage to their family.¹⁵

7. CONCLUSION

¹⁴ 1997 SCMR 1307

¹⁵ PLD 1994 SC 885 (a)(b)

Islamic Shariah law distinguishes between Hudood offenses and those involving Qisas and Diyat, considering them as crimes that impact the foundation of society. However, there's a significant difference in how these two categories are treated. In cases involving Qisas and Diyat, the victim is granted the option to waive punishment, which isn't extended to Hudood offenses. This contrast arises from the understanding that Hudood offenses directly endanger the societal structure, exerting a more pronounced negative influence on the community than on individuals. Conversely, offenses falling under Qisas and Diyat, while still harmful to society, predominantly inflict greater harm upon the individual. Acts like theft, violence, defamation, alcohol consumption, apostasy, and rebellion are viewed as threats to societal security and peace, eliciting a substantially more severe reaction from the community than from individual victims. For instance, if theft occurs within someone's home, the loss of possessions may distress the owner. Yet, the prevailing concern is often the potential recurrence of theft, permeating fear throughout the neighborhood and eventually affecting the entire community.

Unlike Hudood offenses, crimes like homicide and causing injury can be categorized as personal crimes. In the case of murder, the perpetrator targets a specific individual for death. If they're unable to locate that intended victim, they won't seek out other targets. On the other hand, a thief's intent is centered around acquiring goods wherever they can be found. Their primary objective is the acquisition of valuables. Similarly, an adulterer's intent isn't fixated on a particular individual. If engaging with one person becomes challenging, they'll pursue another.

Occurrence of all Qisas and Diyat crimes is to be reported to the relevant Government department. Individual is not authorized to take cognizance of the offence. The State takes cognizance in either of two conditions i.e. the confession- when the accused himself accepts his guilt without any fear (except that of Allah), coercion or compulsion. The other form is evidence called "Bayyenah".

Here the number of witnesses, their personality and evidence are assessed in the light of other available proofs. Even if all the conditions of evidence (Bayannah) are fulfilled, then however there are other conditions in whose existence the punishments are not enforced. Although in cases of murder and hurt the right has been vested to the heirs of the victim(s) or victim himself to opt the mode of execution but it must be within prescribed limits. The criterion of taking the revenge or amount of compensation have been defined for safeguard of equality and equity, therefore, it has been made compulsory that execution of the retaliation or compensation shall be conducted through State (Courts).

In absence of victim or his heirs after the matter has been reported, the state becomes the guardian (wali) and may take the retaliation or compensation from the accused. In case the victim or his heir were ready for taking compensation will deposit the amount in the state treasury (Bait-ul-mal) when no other legal heir is/are available. Hence it can be said that the State and victim or his heirs are equally guardians (Walis) in Qisas and Diyat cases. Killing of women in the name of ghairat, family honor under any pretext is strictly prohibited in Islam. It is recommended that proposed amendment in the Qisas and Diyat law may be given due deliberation so that no Masoom ud Dam be killed.

Usul_al-Fiqh (jurisprudence of Islam) explains the Islamic concepts of laws, rights, and crime. s whilst keeping in view the basic sources (Nusoos), and the different schools of thought (Masalik and Madhabib). Law (Hukm) from Allah commands man to act or to abstain and can also be explanatory. Law is split into the Rights of Allah (Haqooq-ul-Allah) which are pertaining to community are called Public Rights (enforced by state), and Rights of men (Huqooq-ul-Ibad) which are concerned with individuals (enforced per their discretion). Muslim Jurists make the following classifications:

- A. Matters purely the right of Allah.
- B. Matters entirely the right of individuals, such as right to enforcement of contracts, protection of property etc.
- C. Matters in which both right of public and individual are infringed but those of the former preponderate. E.g. Punishment of a slanderer.
- D. Matters in which public rights and private rights are combined but the latter preponderate. E.g. Qisas or retaliation, in cases of murder.

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