

## The Notion of ‘Daman’ in Islamic Law and Its Application in Pakistani Criminal Law: An Analytical Study

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### Abstract

*Pakistan inherited its legal system from the colonial British India, however, Islamization of laws brought a great body of rules of the Pakistani legal system in compliance with the principles of Islamic law. Similarly, the Chapter related to offences against the human body in Pakistan Penal Code is claimed to be based on the principles of Islamic law. The Islamic law of torts (Daman), which has roots in classical Islamic law, has been widely applied in numerous provisions in the said Chapter and a bulk of case law has evolved consequently upon them. In Pakistan Penal Code, diyat, arsh and daman all are treated as punishments while the position in classical Islamic law is presumed to be different. The approach taken in section 53 of the Pakistan Penal Code regarding Daman is that it has been considered a form of punishment and later on in Section 299 (d) of PPC, Daman is defined as the compensation determined by the Court to be paid by the offender to the victim. This creates doubts in the minds of the jurists that whether or not this approach is valid, requiring analysis in light of the principles of Islamic law as enunciated in the literature of classical Muslim jurists. This paper expounds the notion of ‘Daman’ in Islamic law and its application in Pakistani law. The research is based on qualitative research methods. The analysis in this article finds that though the notion of Daman is treated as a punishment in the Pakistani Penal Code which appears to be contrary is contrary to the classical Muslim jurists. However, rules regarding Daman and the jurisprudence developed by the higher courts in the country have clarified the actual position of Daman that is found in consonance with the principles of Islamic law and jurisprudence.*

**Keywords:** Daman; Value of Daman; Islamic Criminal Law; Pakistan Penal Code

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### 1. Introduction

The word ‘Daman’ has various meanings in the Arabic language such as legal responsibility, commitment, obligation, damages, etc. (Ibn Mukarram, 2000). The word ‘Daman’ has also been

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employed in the sense of surety ship by traditional Muslim jurists (Abu al-Barakat Ahmad, 2013). In its technical legal sense, the expression *Daman* has been described as “the duty to compensate damage either by replacing the damaged property or paying its value” or “repaying the value or equivalent of the damaged property.” (Abu Hamid Muhammad, 1993). It shows that the Muslim legal scholars utilized the word *Daman* to specify “liability or duty to compensate” for the harm inflicted on the reput, person, or belongings of another person. The *Majella*, which is the Ottoman Civil Code, described *Daman* as: “the giving of an equivalent to the thing if it was a fungible, or the giving of its value if it was a non-fungible object.” (The Ottoman Civil Code, n.d. Article 415-6) *Fiqh al-Daman* is an Arabic expression that refers to the Islamic law of torts.

## 2. Legitimacy, Kinds and Elements of Daman In Islamic Law

The legitimacy of *Daman* is established in the primary sources of Islamic jurisprudence i.e. the Holy Qur’an, the *Sunnah*, and the *Ijma*. The *hikmah* or wisdom behind legitimacy of *Daman* is to achieve the realization of *Maqasid al Shariah* (high purposes of Islamic law) i.e. protection and preservation of faith, lives, intellect, family and wealth of the people (Majid Saleh Al-qadan, 2003). Following are the verses of the Holy Qur’an in this context:

*“If then anyone transgresses the prohibition against you, Transgress ye likewise against him.” – Qur’an (2:194)*

Qur’an says:

*“The blame is only against those who oppress men and wrong-doing and insolently transgress beyond bounds through the land, defying right and justice: for such there will be a penalty grievous.” – Qur’an (40:42)*

Qur’an also says:

*“And if ye do catch them out, catch them out no worse than they catch you out: But if ye show patience that is indeed the best (course) for those who are patient.” – Qur’an (16:126)*

There are various traditions of the Holy Prophet (PBUH) that can be referred to describe the legal status of *Daman* in Islamic jurisprudence.

This area of *Daman* is constructed on the deep-rooted maxim of the Islamic jurisprudence: “no harm and no reciprocated harm” - in Arabic “لا ضرر ولا ضرار” (Zayn Al-Abidin, 1985). This rule of Islamic law is based on the hadith of the Holy Prophet (PBUH). It is reported that the Holy Prophet (PBUH) said: “.... there shall be neither harm nor reciprocating harm.” (Abu Abdullah Muhammad, 2009. No. 2340)

It is also reported that as he-camel of Bara’ ibn Azib entered and damaged the garden belonging to another man. The Messenger of Allah (PBUH) decided that it is the responsibility of the property owners to guard their properties during day time, whereas those who own animals are bound to guard them during the night (Malik Bin Anas, 2004. No. 603).

It is also reported that Ayesha, the prophet’s wife, once broke “a pot of food” which was given to the

Prophet by his other wives. The Prophet (PBUH) said to her “A pot like pot and food like food.” (Muhammad bin Ismail, n.d. No. 5225). The Holy Prophet (PBUH) said: “The hand that takes is responsible for what it has taken until it returns it.” (Abu Dawud, n.d. No. 3561). It has also been narrated that the Holy Prophet (PBUH) said: “It is unlawful for a Muslim to take the wealth of his brother without his consent.” (Abu al-Hassan Ali, 2004, No. 2885)

There are well-known factors such as ‘*taddi*’ (transgression) and ‘*darar*’ (harm) which are necessary to establish *Daman*. *Al-taddi* factually refers to exceeding or going over. In a practical sense, it is the contravention or infringement of law. In *fiqh*, it is employed in the context of passing beyond the borderline of lawful action (Wahab bin Mustafa, 1982). In Islamic law, the civil liability in the widest meaning of the term, whether it arises from the non-performance of a contract or from tort or negligence (*ta’addi*, literally means “transgression”). A lawful activity refers to one which has not been declared impermissible by *Shariah*. *Al-darar* factually implies harm. In *fiqh* it denotes the meaning of damage caused to someone’s reputation, person or property. The causational link between the *taddi* and *darar* is known as *al-rabita* (the link) (Ibid).

The questions of *daman* are treated sporadically in numerous sections of the works on *fiqh*, and it forms the subject of a number of special treatises. The reason is perhaps that the notion of *daman* applies to many different chapters such as murder, hurts, usurpation, and destruction etc. Similarly, *Daman* in the sense of suretyship or guarantee is a liability specially created by contract; it is synonymous with *kafala*. In a wider sense, *daman* is used of the risk or responsibility that one bears with regard to the property of which one enjoys the profit (Bearman et al, n.d.).

The Muslim jurists have classified *Daman* into *Daman ‘aqd*, *Damanal-fa’l*, and *Damanal-ghashb*, etc.

1. *Daman ‘aqd* refers to the *Daman* that is arising out of a contractual relationship. Prominent particular cases are the liability for the loss of an object sold before the buyer has taken possession (*daman al-mabi*), for eviction (*daman al-darak*), for the loss of a pledge in the possession of the pledgee (*daman al-rahn*), and for loss or damage caused by artisans (*daman al-ṣunna*). The depositary and other persons in a position of trust (*amen*) are not liable for an accidental loss but they lose this privileged position through unlawful acts, e.g., using the deposit, whether the loss is caused by the unlawful act or not.
2. *Daman al-fa’l* is described by modern scholars as “the civil liability or duty that obliges or requires a person to compensate others for damage that results from his act.” (Mustafa Ahmad Al-Zarka, 1988). The following Qur’anic verse is quoted to establish *Daman-al-fa’l*:

“To Solomon We inspired the (right) understanding of the matter: to each (of them) We gave Judgment and Knowledge; it was Our power that made the hills and the birds celebrate Our praises, with David: it was We Who did (all these things).” – Quran (21:79)

In the above case, when David was directed to the decree, he determined that the lambs were to be taken by the holder of the territory. These lambs were to be taken as costs because the damage was caused to the crops. This judgment was known to Solomon. He overruled it on the basis that the holder of the land is entitled to utilize benefit, for one year, from the lambs. During this time, the owner or shepherd of the lambs would farm the land. He would look after the harvest so that it came to the same peak as when it was damaged. Hence the principle of

compensating for damage is established by elucidating the Qur'anic story.

3. *Damanal-ghashb*: Usurpation means that a person unjustly seizes the property or right of another person. The damages for the loss of an object that has been taken by usurpation is known as *damānal-ghaṣb*.

### 3. The Concept of Daman and Its Application in the Pakistani Criminal Law

Pakistan inherited its legal system from British India. As the legal system is mainly established on English common law, all the sources of the English legal system were adopted as the sources of Pakistani law including legislation, precedents, and custom. The same force was given to the legal system through various legislations such as the Indian Independence Act, 1947, Adaptation of Central Acts and Ordinances, 1947, Constitutions, and Legal Framework Orders, etc. Similarly, Islamic law has been given due weightage over the years in the Pakistani legal system. Under Pakistan's three constitutions, several constitutional organizations were given the authority to advise the parliament on the required steps to bring current legislation into compliance with Islamic tenets in order to further Islamization. Currently, the said purpose is served by two constitutional entities. The Council of Islamic Ideology has the authority to suggest to the Legislature that laws be made more Islamically within its recommendatory and advisory jurisdiction. Additionally, the Federal Shariat Court has the authority to rule on the Islamic validity of existing legislation, which, if not appealed, would take effect and require the government to make the necessary changes (Khan, 2018).

The legislative assembly of Pakistan adopted the Penal Law of 1860, and it was named as "Pakistan Penal Code, 1860 (PPC)." It was amended time and again. On the orders of the Shariat Appellate Bench of the Supreme Court of Pakistan, *Qisas* (execution) and *Diyat* (blood money) law was promulgated in 1990 through the *Qisas and Diyat Ordinance* and made part of the PPC (The Criminal Law (Amendment) Ordinance 1990). Chapter 16 (Sections 299 -338) of the PPC, which deals with the offenses affecting the human body, was replaced with new provisions based on *Qisas* and *Diyat*. These newly inserted provisions also included provisions relating to *Daman*. This Ordinance was re-promulgated time and again because the life span of an Ordinance is four months, but became an Act of Parliament in 1997, (The Criminal Law (Amendment) Act 1997.) wherein all the offenses relating to the human body were dealt and it provided for *Qisas*, *Diyat*, *Arsh*, and *Daman*. Through this Act, Section 53 of the PPC was substituted and ten types of punishments including *Daman* were introduced. Thus, under the PPC, offenders are liable to ten types of punishments, one of which is *Daman* (Pakistan Penal Code, 1860).

Section 53 of PPC reads as:

"The punishments to which offenders are liable under the provisions of this Code are: *Qisas*, *Diyat*, *Arsh*, *Daman*, *Ta'zir*, Death, Imprisonment for life, Imprisonment which is of two descriptions, namely:- Rigorous i.e. with hard labour and simple, Forfeiture of property and Fine."

*Daman* is also defined in Section 299 (d) of PPC as follows:

"*Daman* means the compensation determined by the Court to be paid by the offender to the victim for causing hurt not liable to *Arsh*."

*Daman* is compensation the determination of which lies with the court. It is paid by the offender to the one who has been caused injury or hurt. In other words, it is compensation for causing such hurt which is not liable to *Arsh* (*Asghar Ali v The State*, 2003).

Section 337-F to Section 337-L of the PPC deals with offenses where *Daman* is payable by the convict to the victim. Section 337-Y of PPC provides for a punishment of simple imprisonment for the convict in case he “fails to pay *Daman* or any part of it” within the stipulated time.

However, in *Abid Hussain and another v Chairman Pakistan Bait ul Mal and others* (2002) the court opined about the provision of Section 337 Y of PPC that “most parts of the said provisions (Sections 331, 337 X and 337 Y PPC) are replete with ambiguities, unexplainable obscurities and sometimes downright absurdities.” The Court further opined that “a law governing crime and punishment and dealing with lives and liberties of citizens cannot be allowed by this Court to hold the field if such law is not only unreasonable but also capable of working as an engine of unjustifiable oppression.” (Ibid).

The Court stated that *Diyat*, *Arsh* and *Daman* “are basically three forms of compensation and are quasi-civil damages provided in different conditions, therefore, if the amount of *Diyat* is payable in a lump sum or in installments then *Arsh* and *Daman* can also be paid in a lump sum or in installments.” (Ibid).

The nature and kinds of hurt in which *Daman* is awarded is discussed in the following paragraphs:

1. If offence of *ghayr-jaifah* is carried out by a person then he will be subjected to the punishment of *Daman*. The offence of *ghayr-jaifah* is said to have been caused when an act is committed with intent to hurt another person and it includes rupturing of the skin followed by bleeding (Pakistan Penal Code, 1860; s. 337-E (3)(i));<sup>2</sup> cutting of the flesh provided that the bone is not exposed (Pakistan Penal Code, 1860; s. 337-E (3)(ii));<sup>3</sup> lacerating of flesh (Pakistan Penal Code, 1860; s. 337-E (3)(iii));<sup>4</sup> infliction of hurt where the bone is exposed;<sup>5</sup> fracturing of bone provided that it is not dislocated (Pakistan Penal Code, 1860; s. 337-E (3)(iv))<sup>6</sup> and fracturing and dislocation of the bone (Pakistan Penal Code, 1860; s. 337-E (3)(v)).<sup>7</sup> In all these cases, the offender will be liable to *Daman*. In addition to *Daman*, he may also be liable to imprisonment extending from one year to seven years depending on the nature of the hurt (Pakistan Penal Code, 1860; s. 337F).
2. If a person is hurt by driving negligently or rashly driving, then such person or the victim will be paid *Arsh* or *Daman* depending on the case and nature of the hurt. Additionally, the offender may also “be punished with imprisonment extending up to five years.” (Pakistan Penal Code, 1860; s. 337G)
3. If a person is hurt by the reckless or careless actions of another person then the offender is liable to *Arsh* or *Daman* depending on the case and nature of the hurt. But, it does not include injury caused by reckless driving because a separate provision of the PPC deals with the injury

<sup>2</sup> It is known as *damiyah*. Sec 337-E (3) (i), Pakistan Penal Code 1860.

<sup>3</sup> It is known as *badi'ah*. Sec 337-E (3) (ii), Pakistan Penal Code 1860.

<sup>4</sup> It is known as *mutalahimah*. Sec 337-E (3) (iii), Pakistan Penal Code 1860.

<sup>5</sup> It is known as *mudihah*. Sec 337-E (3) (iv), Pakistan Penal Code 1860.

<sup>6</sup> It is known as *hashimah*. Sec 337-E (3) (v), Pakistan Penal Code 1860.

<sup>7</sup> It is known as *munaqqilah*. Sec 337-E (3) (vi), Pakistan Penal Code 1860.

caused due to careless driving. Additionally, the offender may also be liable to imprisonment extending to three years. (Pakistan Penal Code, 1860; s. 337H)

4. If the hurt is caused by mistake or *khata* then the one who has committed the mistake is liable to “*Arsh* or *Daman*” depending on the nature of the hurt which has been caused. (Pakistan Penal Code, 1860; s. 337I)
5. If the hurt is inflicted on a person by the administration of poison or substance having the effect of poison, intoxicating or poisonous drug detrimental to health, or any other substance with intent to inflict injury on another person then the offender will be subjected to *Arsh* or *Daman* depending on the nature of the hurt caused to the victim. The offender will also be liable if he caused the administration of such substance with the intention to commit an offence or to aid the “commission of an offence.” Additionally, the offender may also “be punished with imprisonment extending up to ten years.” (Pakistan Penal Code, 1860; s. 337J)
6. If a person is hurt in order to obtain from him any “confession” or such “information” which is likely to discover the commission of a wrong or malpractice then the offender will be subjected to *qisas*, *Arsh* or *Daman* depending on the nature of the hurt. The offender will also be held liable if he has caused such hurt for compelling the victim to cause the satisfaction of any claim or restoration of property. Additionally, the offender may also “be liable to imprisonment which may extend up to ten years.” (Pakistan Penal Code, 1860; s. 337K)
7. If any other type of hurt is caused which puts the life of a person in danger then the offender will be liable to *Daman* and will also be imprisoned extending to seven years. This punishment will also be applicable to offender who has caused such hurt to the victim due to which the victim suffers with harsh bodily pain or makes him incapable to pursue his usual activities for twenty days or more (Pakistan Penal Code, 1860; s. 337L).
8. In case of *itlaf* of a milk tooth, the convict shall be subjected to pay to the victim *Daman*. In addition to it, he may also be imprisoned for a term extending up to one year. But, in a case where “the *itlaf* of a milk tooth hinders the growth of a new tooth, then the victim has to pay *Arsh* equal to a one-twentieth of the *Diyat*.” (Pakistan Penal Code, 1860; s. 337U)

In *Qamar ul Zaman v State* (2022), it was held that imprisonment, which is a *tazir* punishment, can be awarded to the accused in addition to *Arsh* or *Daman* when it is proved that the convicted person had a record of previous conviction. The previous conviction of the accused will show that he is a habitual offender. Because the repeated convictions show that the accused is a hardened offender and might prove a potential threat to society.

The court stated that “an accused, in addition to a sentence for payment of *Daman* or *Arsh*, etc. may also be awarded the punishment of imprisonment as *ta'zir* only when the prosecution will prove that such accused is a previous convict, habitual or hardened, desperate or dangerous criminal and not otherwise.” (*Qamar ul Zaman v State*)

#### 4. How to Determine the Value of Daman?

The PPC provides how to determine the value of *Daman*. The following aspects are to be considered by the court while determining the value of *Daman*:

- a. The operating cost which has been drawn on the cure of the injured party;
- b. Loss or impairment caused in the “functioning or control” of any organ; and
- c. The damages for the agony sustained by the injured party (Pakistan Penal Code, 1860; S. 337).

In *Muhammad Taj v the State and another*, (2011) the appeal of the appellant was partially allowed. The appellate court set aside the conviction which was recorded under Sections 324/336 PPC and then the appellant was convicted and his sentence was recorded under Section 337-F (iii) PPC. The complainant in the case was shot and injured by the appellant. The complainant was shot in the upper muscle of arm. As the injury was declared to be simple because it was sustained on a non-vital part of the body, therefore, Section 337-F (iii) was attracted. The offender was held liable to *Daman*. The appellant was, consequently, directed to pay Rupees 50000 as *Daman* as compensation for the agony undergone by the victim.

The court also discussed how to determine the value of *Daman*. The compensation accrued as a result of treatment of the injured; loss in the working or ability of the organ and the damages for the agony undergone by the injured party are the determinants that help in deciding the value of *Daman*. The court stated that “the prosecution has neither brought on record any certificate of expenses incurred on the treatment of victim nor any certificate showing loss or disability caused in the functioning or power of any organ to enable the court for determining the value of *Daman*.” Therefore the court held that “in view of the alternate prayer and offer of learned counsel for the appellant, it would be just and proper to direct the appellant to pay Rs.50,000 as *Daman*, the compensation for the anguish suffered by the victim.”(Ibid)

### 5. Mode of Payment of Daman

*Daman* is either paid in a single payment or in parts in the course of five years “from the date of the final judgment.” If the offender neglected to pay the value of *Daman* or a part of it within the time specified above, then he will be jailed and would be treated as if he had been undergoing simple imprisonment till the time he makes full payment of *Daman*. However, he may be granted bail in case he provides “security or surety” equal to the value of *Daman* provided that the court is satisfied. He may also be released on parole in accordance with the rules (Pakistan Penal Code, 1860; S.337Y).

The Federal Government is empowered to formulate rules, in “consultation with the Council of Islamic Ideology,” regarding the establishment of a capital, which is not susceptible to invalidation or expiry and free from the tariff. The objective of this fund will be to make the “payment of *Diyat*, *Arsh*, and *Daman* of the convicts” who are jailed for not satisfying the said liabilities owing to their poverty. This fund will help in the provision of soft loans to the convicts so that they may satisfy the claims of the victim or his heirs (Pakistan Penal Code, 1860; s. 338G).

It was held in *Abid Hussain and another v Chairman Pakistan Bait ul Mal and others*, (2002) that it is against human dignity to put a human being behind bars just because of his poverty. The court stated while referring to Verse 4 of *Sura* 95 of the Holy Qur'an that “putting a human being, the best of Almighty Allah's creations, in an iron cage for the rest of his life for no other reason than his abject poverty is an idea abhorrent to the 'dignity' bestowed upon him by the Creator (*Sura* 17: Verse 70).” Human dignity is inviolable as per Article 14 of the Pakistani Constitution. The court opined that provisions of “sections 331, 337-X and 337-Y” PPC are ambiguous. Law relating to crime and punishment holds significance because it deals with human lives and as such, it should not be oppressive, unjustifiable, or unreasonable. On this very ground, the court held that the aforementioned sections of PPC do not conform to the “principles of Islamic dispensation of criminal justice.” The court further held that the above-mentioned sections which lay down the method of payment and recovery of *Diyat*, *Arsh*, and *Daman* and handling of the convicts for the same are, therefore, declared

to be “avoid on account of their inconsistency with the abovementioned Fundamental and Constitutional Rights.”

In *Government of the Punjab, Lahore vs. Abid Hussain*, (2007) the Supreme Court of Pakistan declared section 337Y of the PPC within the ambit of the Constitution. The Federal Government was also “directed to frame rules” under Section 338G of the PPC. The Supreme Court asked the Federal Government to formulate rules which will provide for the mechanism and creation of funds with an object “to make payment of *Diyat*, *Arsh*, and *Daman* of the convicts, who on account of their weak financial position, are languishing in Jails for want of making the said payment, within a period of three months.”(Ibid) Further directions were issued to examine the possibility of whether the Government could create situations for the convicted persons other than the Government Organizations. The jobs may be provided through a social organization that will help the convicted persons to repay the amount of the loan if there is any previously extended to such convicted persons. *Diyat*, *Arsh*, and *Daman* Fund Rules, 2007 are in place now for this purpose. This fund has been placed under the administrative control of the Ministry of Law, Justice, and Human Rights.

## 6. How Daman is to be Disbursed?

The victim is to be paid *Daman*. However, in case of the victim’s death, *Daman* is to be paid to the successors of the sufferers in accordance with ‘their respective shares in inheritance.’(Pakistan Penal code, 1860; s. 337Z). In *Zahid Rehman v the State* (2015) it was held that if the fine is imposed in *tazir* case then the amount will be credited to the government treasury; but in the case of *Diyat*, *Arsh*, and *Daman*, the victim or the *wali* will be entitled to the payment.

If the convict is unable to pay *Diyat*, *Arsh* or *Daman*, as the case may be, what is the way out? The Lahore High Court in *Abid Hussain v Chairman Pakistan Baitul Mal* (2002) noted that all the learned counsel had a consensus on considering the state as “modern manifestation of ‘*Aqila*’ and that destitute prisoner can seek assistance from the Zakat Fund or *Bait-ul-Mal* for the purposes of payment of these payments. An important question arises here: does directing the state to pay one’s liability in form of *Diyat*, *Arsh* or *Daman* for the convict amounts to penalize the State for an offence committed by an individual living in the state. The Court mentioned the following grounds for putting responsibility on state in such situations: firstly, the requisite compensation is meant to satisfy vengeance of the victim or his heirs and such a payment by the State obviates a likelihood of reprisal or vendetta and thereby achieves peace in the society, which is one of the primary responsibilities of the State. Secondly, the state had failed to protect the victim's life or physical safety and it, thus, cannot avoid sharing the blame for the harm coming to him and therefore, chipping in by the state towards payment of compensation to the victim or his heirs is the least that the State can do in such a situation. Thirdly, being a welfare State, an Islamic State is even otherwise expected to reach out and come to the rescue and assistance of a helpless citizen in need, be he a convict who has substantially cleaned himself of the crime by undergoing the entire substantive sentence of imprisonment passed against him (Tabassum, Munir & Mahmood, 2020).

## 7. Critical Analysis

The notion of *Daman* is treated as a form of punishment in the Pakistani legal system while the fact of the matter is that it should come under the law of torts to redress the victim or his/her heir in monetary form. Various types of punishments are enlisted under Section 53 of the PPC which also includes

*Daman*. On the other side, the concept of punishment is well defined in Islamic law. In the Islamic criminal law, jurists placed crimes into three different categories from the perspective of their punishments:

1. *Offences Labile to Hudud*: in the Arabic language, the word *hadd* (singular of *hudud*) is used in several meanings, such as edge, border, extremity, terminus, and limited, while technically *hudud* referred to the fixed penalties in Islamic law;
2. *Offences Liable to Qisas*: it means retaliation, homicide, and personal injury and forms the second type of offense— falling between *hudud* laws and torts. The word *qisas* as a sanction for murder was already mentioned in *Tawrat*, a revelation given to Prophet Musa (PBUH) (Siti Zubaidah Ismail, 2012). Islamic legal tradition treats *Diyat* as a method of compensation, in lieu of *qisas* if the requirement to perform *qisas* is not fulfilled or if a pardon is agreed upon between the parties. (Ibid) Even though the mainstream view of *fuqaha* that *Diyat* is a form of punishment since it was discussed within the framework of *‘uqubah* (penalty), scholars like Awdah and Sayyid Sābiq view that it is not a punishment *per se*, but more precisely, a compensation in view of justice. This is because it is more of an invasion of private rather than public rights (Abdul Qadir, 1977).
3. *Offences Liable to Tazir*: It means censure or reprimand, but it is discretionary punishment (Alam, 2019).

*Daman* has not been treated as a form of punishment in Islamic law rather it is the compensation to be paid by the offender to the victim for causing harm to the victim. *Daman* is usually paid in minor injuries such as *badiyah*, *hashimah*, *mutalahimah* etc. *Daman* is paid in lump sum or in installments. When we consider something as a punishment it would have its own characteristics and legal effects while *Daman* has its own features. Punishment, under Islamic law, has all the ingredients, to attain the objectives of inflicting punishment on the wrongdoer which includes creation of deterrence, to redress and reformation. While the notion of *Daman* in Islamic legal literature is to compensate “the victim or heirs of the victim” in the form of monetary benefits, in the Pakistani Penal Code it is placed in the category of punishments; hence it gives an impression that it is a penalty whereas it is better to categorize it as compensation or damages. The courts have taken a right approach in this regard and considered *Daman* as a form of punishment. There is a huge difference in the nature and legal effects of *Uquba*’ (punishment) and *Daman* (compensation) in Islamic law. It is pertinent to quote Sir Abdul Rahim in this regard; he states:

“...the line which divides the two kinds of wrongs, torts and crimes, is sometimes very narrow or as the Muhammadan jurists put it there are some matters in which the rights of the public and of individuals are combined. The test is, to whom does the law grants the remedy, the public or the individual. If to the latter, the wrong which gave rise to the remedy will be regarded as a tort, and, if to the former, it will be called a crime.”  
(Rahim, 1911)

‘*Daman*’ as a form of punishment in Pakistan Penal Code raises the persistent question about the nature of Pakistani legal system i.e. is it based on common law, Islamic law or a hybrid of both systems? In the presence of a statutory criminal law, the judges cannot interpret Islamic criminal law without referring to any established system of interpretation of Islamic law. The Enforcement of Shariat Act, 1991 makes it mandatory that the laws shall be interpreted in accordance with the principles of Islamic law especially when the case is that of codified statutory Islamic law.

The Supreme Court judgment in *Zahid Rehman v the State (2013)* also raised questions like should Islamic law be interpreted based on its original sources, i.e. the Qur'an and Sunnah, or through the codified statutory legislation? The codification of a law in statutory form for legislation is surely a human endeavour; should the veil of codification be lifted in interpreting codified Islamic law? All these questions, regarding the nature of the legal system of Pakistan, have persisted. Though the judges tried to resolve this question, but its complex nature hindered their investigation. The questions need to be resolved for the sake of consistency, certainty and for settling the issue at policy level.

It is a matter of fact that a profound theory is still missing regarding the extent to integrate Islamic criminal law into the legal system. This leads to create overlapping domains of the two existing legal systems, and at times opposing methodologies. The lack of such a coherent theory is reflected in case of considering 'Daman' as a form of punishment and other issues.

In Islamic law, *Daman* is applied to all cases of assault, defamation, trespass, miscarriage, abortion, hurts, and others, etc. As the basic purpose is to make good the loss that occurred to the victim by the act/omission of the accused. However, the notion of *Daman* in Pakistani law has a very limited application. It is not applicable in cases other than offenses against the human body while in Islamic law *Daman* covers a huge area i.e. torts. The Islamic law of torts is a set of rules dealing with civil wrongs or injuries. An injury in which the injured or damaged party brings legal action himself in a court of law, and not by the state, such injury is known as civil injury. On the other hand, a wrong or injury that is intended for punishing the defendant, and for which legal proceedings are conducted by the state then it comes within the ambit of 'crime.'

## 8. Conclusion

*Daman* is a quasi-civil liability which is of great significance in civil as well as criminal cases. Liability, obligation, commitment, fine, and compensation are the few meanings that can be attributed to the word *Daman*. The legitimacy of *Daman* is established in the Holy Qur'an, the *Sunnah*, and the *Ijma*. The rationale for inflicting *Daman* is based on the protection of life and wealth of people. The Pakistan Penal Code Provides for ten types of punishments which include *Daman*. *Daman*, *Arsh*, *Diyat* and *qisas* etc. are the types of punishments that were incorporated in P.P.C. through an Ordinance in 1990 in adherence to the judgments of the Federal *Shariat* Court and *Shariat* Appellate Bench of the Supreme Court. Owing to the short life of an Ordinance, 'the *Qisas* and *Diyat* law' was enacted through an Act of Parliament in 1997. *Daman* is usually payable in minor injuries to the human body. In addition to *Daman*, imprisonment may be awarded as *tazir* punishment. However, it has been held in various case laws that imprisonment as a punishment will be awarded, in addition to *Daman*, to those offenders who are proven habitual convicts as it is required for a peaceful society. *Daman* is paid to the victim or his legal heirs. It is equally important to know about the factors necessary for the determination of the value of *Daman*. The expenditure drawn on the 'treatment of the victim' and the agony of the victim must be taken into consideration while determining the 'value of *Daman*.' The estimate of *Daman* depends on various factors. The convict undergoes simple imprisonment in case he is unable to pay *Daman* or a part of it. However, after the Supreme Court judgment in *Government of the Punjab, Lahore vs. Abid Hussain, Diyat, Arsh and Daman Fund Rules, 2007* have been framed to aid those convicts who are unable to pay to the victim the compensatory value because of their abject poverty. The compensatory rights of the victim or his heirs are also protected.

The notion of *Daman* in Pakistani law has a very limited application only in the sphere of offences

against human body. While the notion of *Daman* in Islamic law is applied to all cases of assault, defamation, trespass, miscarriage, abortion, hurts, and others, etc. The basic purpose is to make good the loss that occurred to the victim by the act/omission of the accused through damages. An injury in which the injured or damaged party brings legal action himself in a court of law, and not by the state, such injury is known as civil injury. On the other hand, a wrong or injury that is intended for punishing the defendant, and for which legal proceedings are conducted by the state then comes within the ambit of 'crime.' These characteristics of the notion of *Daman* are ignored by categorizing *Daman* as a type of punishment in the Pakistani legal system. Moreover, the principles of *Daman* enunciated in Islamic law are not consulted when the courts apply the notion of *Daman* in cases before them.

In the end, it is recommended that the Islamic law of torts i.e. *fiqh al-Daman* is a well-established area of Islamic law and there is an immense need to develop jurisprudence keeping in view the contributions of Muslim jurists in this regard. Moreover, the Pakistani legal system can fill its wide open gap of not having an adequate tort regime through the notion of *Daman* which provides a potential solution to the problem. This can be done through enactment of a new statute to extend the liability under the notion of *Daman* to cover the grey areas of the law of torts where Pakistani tort regime failed to provide adequate remedies.

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