

# A Critical Study of a Novel Notion that *Diyat is Hadd*.

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## Abstract

This research paper, firstly, emphasizes on the necessity of a systematic analysis of the notion that *Diyat is Hadd* and secondly, focuses on mainly *seven* vivid reasons for its refutation.

Interestingly, the said notion seems to be logically based on the following syllogism:

All men are mortal.

Mr. R.G is a man.

Therefore, Mr. R.G is a mortal.

Likewise:

Hadd is prescribed by the Holy Quran and Sunnah.

Diyat is prescribed by the Holy Quran and Sunnah.

Therefore, Diyat is Hadd.

Curiously, what's wrong with a so logically built notion? Why, how and on what logical grounds to differ and refute it reasonably? Are the questions which form the main body and spirit of this analytical study?

**Keywords:** Hadd, Diyat, Equation, Syllogism, Analysis, Refutation, Reasons, Invalidity

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## **A Critical Study of a Novel Notion that *Diyat is Hadd.***

### **Introduction**

The notion that *Diyat is Hadd*, is claimed to be based on very strong and logical contention that the punishment of *Diyat* is ordained by the Holy Quran<sup>2</sup>, whereas, *Hadd* is also defined as a punishment ordained by the Holy Quran or *Sunnah*<sup>3</sup>. Therefore, *Diyat* is a *Hadd* and it must be treated by all Courts as *Hadd*, for all of its practical purposes such as standard of evidence and awarding of a sentence to a culprit etc.

This, of course, is a novel notion in judicial history of interpretation of laws in our country and is attracting very intelligent minds and discussions of legal fraternity because of its novelty and the face value of the use of logical method of interpretation and conclusion, which resultantly allows no apparent scope to feel any need to seek any further in-depth analysis by the savants of the relevant fields.

### **Origin and History**

For tracing the origin, history, and the strength of its formulation and logical basis of this innovative notion, it is appropriate to refer a research-article titled as “The Provisions Foresighted”<sup>4</sup>. Before proceeding further, the readers of this critical study are urged to go through the said research-article thoroughly, so as to properly understand and realize the importance of this analytical study.

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<sup>2</sup> The Holy Quran, Ch.4, V.92.

<sup>3</sup> The Offences Against Property (Enforcement of Hudood) Act 1985 AJ&K/1979 PPC.

<sup>4</sup> By Faiz Rasool Khan Jalbani, available at <http://www.pljlawsite.com/2011art48.htm>

## **Necessity of Analysis**

A deep critical and analytical study of the warp and woof of the said notion introduced and stressed through the said article, can clearly lead to a thinking mind that ‘all that glitters is not gold’.

While making a tentative assessment of the said article, one cannot help but appreciate on the one hand the knowledge, the labour, and the ingenuity of the learned author of it, and on the other hand, a deeper critical appraisal of the whole article, in its true perspective, can prove that this innovation is a best example of a fallacy and that the very notion of equation of Diyat with Hadd is;

- i) against the very text of the enactments concerned,
- ii) against the settled principles of judicial interpretation/s;
- iii) against pure reason and logic;
- iv) against established norms of justice;
- v) and above all, against the injunctions of Quran and Sunnah.

But how and on what grounds and valid logical reasons? The detailed answer to this query, in fact, forms the main body of this critical study of the said notion.

## **Logical basis of the notion**

But before the required detailed answers are disclosed, it is very pertinent, at this juncture, to ask some other simple questions concerning the logical basis of the said notion, provided that you have already comprehended the notion fully by reading the said article. These simple but relevant questions may be as under:

- i. What is wrong with the arguments advanced in favour of such a novel notion with such a lucid logical deduction?

- ii. Don't you know a very simple and a very well-known example of logical deduction founded on a syllogism such as follows:

*“All humans are mortal.*

*Mr. R.G is a human.*

*Therefore, Mr. R.G is a mortal.”*

- iii. Isn't the said notion founded on the same pattern of the above example of syllogism?

In other words, it is an established fact that, as a minor premise, *the punishment of Diyat is, prescribed clearly by chapter 04 verse 92 of the Holy Quran* in terms of “*Wa diya-tun-musallamah*” and at the same time, on an other hand, it is also an admitted truth, without any kind of any opposition from any corner, that *the punishment of Hadd, as a major premise, is prescribed by the Holy Quran or Sunnah, therefore, when both the premises of this syllogism are admitted factually true, the conclusion rightly follows that Diyat is Hadd, of course, along with all its practical uses and legal consequences.*

## **Refutation and its reasons**

The essence of some little deliberations on the above proposition is that the essential elements for the formulation of the notion under discussion, seems, superficially, fully compatible with the logical method for drawing a conclusion in the set form of syllogism, as it is clearly fortified and sanctified by the above example of a mortal and its analogous comparison with the premises and the conclusion of the notion being analyzed here.

However, with all its force of compatibility with the set form of a formal syllogism, intrinsically, this notion proves to be misleading for the following reasons, based on preferably question-method, which, in fact, is a very effective way for analyzing a certain idea from its all possible corners and angles of deliberations:

### **Reason One:**

There are four Hudood Acts promulgated in Azad Jammu & Kashmir:

1. The Offences Against Property (Enforcement of Hudood) Act 1985 AJ&K/ 1979 PPC.  
This Act includes two kinds of Hudood:
  - I) Hadd-e-Saraqah;
  - II) Hadd-e-Harabah.
2. The Offence of Zina (Enforcement of Hudood) Act, 1985 AJ&K/ 1979 PPC.
3. The Offence of Qazf (Enforcement of Hadd) Act 1985 AJ&K/ 1979 PPC.
4. The Prohibition (Enforcement of Hadd) Act 1985 AJ&K, / 1979 PPC<sup>5</sup>.

Point to note here is that Hadd is defined in all these Hudood Acts as under:

*'Hadd' means punishment ordained by the Holy Quran or Sunnah.*

In addition to the above Hudood Acts, we have another set of offences which is related to the topic in hand and that is:

Qisas and Diyat Act (The Azad Penal Code (Amendment) Act, 1995/1997 PPC)<sup>6</sup>.

Note here again that Diyat is defined in this Act as follows:

*'Diyat' means the compensation specified in section 323 payable to the heirs of the victim.*

It is much clear from the comparative examination of all the above acts that:

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<sup>5</sup> Hudood Acts 1985 AJ&K/ 1979 PPC.

<sup>6</sup> *Qisas & Diyat Act*, 1995 AJ&K /1997 PPC.

- i. Diyat is nowhere defined in any of Hudood Acts and to me, neither should it have been discussed in Hudood Acts.
- ii. Likewise, Hadd is also not defined in Qisas and Diyat Act and neither the Hadd should have been defined in Qisas and Diyat Act.

Why? Because both sets of these Acts, (Hudood Acts and Qisas & Diyat Act) are different and both of them have been enacted and enforced at different times.

Now my question is: *Can you apply the definition of one set of Acts (i.e. Hudood Acts) to another set of Act (i.e Qisas and Diyat Act)?* Especially in a situation where it is clear that:

- a. Both sets of these Acts are quite different and enforced at different times.
- b. There is no *express* provision in any of the both sets that allows to transfer and apply any definition from one set to another set of these enactments.
- c. Contrary to any concept of transfer of any definition from one set of Acts to another set of Acts, it is *explicitly* specified in the *Definition Clause* of each of these Acts that the terms defined in each Act are confined to the same Act. Suffice it to refer to one example from Definition Clause of the Offences Against Property (Enforcement of Hudood) Acts, 1985 AJK/ 1979 PPC which runs as under:
  2. Definitions: *In this Act*, unless there is anything repugnant in the subject or content:
    - a) .....
    - b) .....
    - c) *'Hadd' means punishment ordained by the Holy Quran or Sunnah.*"

Notice the very first phrase along with caption c:

*“In this Act ..... Hadd means .....”*

d. Another noticeable fact here is that this *confining phrase* in terms of applying any definition to “*this Act,*” is also in addition to the preamble of such Acts which already shows the purpose of each Act confined to that very Act in different words. For example:

- i. Law relating to certain offences *against property*;
- ii. Law relating to *offences of Zina*;
- iii. Law relating to certain offences of prohibition of *intoxicants* etc.

By now, it must have been clear from the above analysis as to why the notion of equating Diyat with Hadd is against the textual examination of the Acts concerned, against prudence, reason and simple logic as well as against the settled principles and established rules of legal and judicial system of interpretation?

### **Reason Two:**

In addition to the above analysis, based on viewing the subject of definition and its application from the angle of difference of two Acts, preamble and Definition Clause, another dimension to examine the said notion, is the Interpretation Clause of Qisas and Diyat Act which encapsulates as under:

**338F. Interpretation:** In the interpretation and application of the provisions of this Chapter, and in respect of matters ancillary or [akin] thereto, the Court shall be guided by the Injunctions of Islam as laid down in the Holy Qur’an and Sunnah.

In view of this *Interpretation Clause*, one is quite justified to ask the proponent and propagators of the said notion, a very simple question: What “*guidance*” have you sought from “*the injunctions of Islam as laid down in the Holy Quran and Sunnah*”

for “*the interpretation and application*” of “Diyat” equating with Hadd?

Had any such guidance been sought, it must have been referred, alluded or unveiled anywhere attached with the equation under discussion.

This is another reason as to why the equation of Diyat with Hadd is against the letter and spirit of the *express* law.

### **Reason Three:**

As opposed to English law, the terms of Diyat and Hadd are originally derived from Islamic law and they stand distinguishably firm on time-tested, logically built, rationally convincing and intellectually invincible principles of Fiqh (Islamic Law) for the sake of their implications, connotations, interpretations, applications and implementations. Therefore, it is quite logical that for research of any of such term, one must have proper recourse to the *original sources* embodied in Fiqh-e-Islami (Islamic Jurisprudence), instead of relying on any secondary source such as translated or even legislated items.

It is a very simple, vivid and established way for interpretation and application of any legal term that we gain our legal sense and insight to determine the meaning of a certain term or a word, *firstly*, from examination of a text, then, among other things, from the *Definition Clause, the Interpretation Clause, the context, the Preamble of any Act* and from Judgment Law etc. but during this pursuit, we cannot go against any *express provision* of any statute and no statute can go against *the Constitution* of the land, and even no interpretation of Constitution can go against the Fundamental Rights enshrined in it because the Fundamental Rights are considered to enjoy the supremacy over all the other articles of the Constitution itself.

In the same way, for interpretation and application of any term of Fiqh, we need to rise above *Statutes and Acts*, where and when needed, of course, while travelling from an Act to Fiqh. It is also



clear that Fiqh too is not absolute in some matters. Fiqh itself is based on *Usool-e-Fiqh* which deals with the sources of Islamic law, principles of logical deduction, rules of interpretation and application of a word etc. Needless to say here that even nothing of *Usool-e-Fiqh* can go against the Holy Quran. This logical travelling from present Islamic codified law to Fiqh, from Fiqh to *Usool-e-Fiqh* and from *Usool-e-Fiqh* to the Sunnah and Holy Quran, may be called *the Epistemological Foundations* of the law enforced in the country.

Viewed from this angle, the notion of equating Diyat with Hadd, is absolutely devoid of its epistemological basis.

While tracing epistemological basis of Diyat and Hadd, we come across with a very *defining factor* analyzed in Fiqh which breaks the equation of Diyat with Hadd. That defining and equation-breaking factor is that in all the offences of Hudood, *The Right of God* is *dominant* except Hadd-e-Qazf in which the *right of a servant / person* is *dominant*. In Qisas and Diyat too, *the right of a person* is *dominant*<sup>7</sup> despite the fact that the punishments of Hudood, Qisas and Diyat are originally ordained by the Holy Quran and Sunnah.

*For the reason above, the definition of Hadd in Hudood Acts, without such defining factor is, incomplete.*

This defining factor will be more highlighted in the coming pages, in the light of The Holy Quran.

#### **Reason Four:**

Is an offence of Hadd compoundable according to present body of law or Fiqh-e-Islami? And is a punishment of Diyat non-compoundable offence in the law in vogue or Fiqh-e-Islami?

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<sup>7</sup> Al-Tashree-ul-Jinaee, Abdul Qadir Oudah / *Islam ka Faujdari Nizam* translated by Sajid-ur-Rahman Siddiqui, Islamic Publications, Lahore, 3<sup>rd</sup> Edition, March 2006, Part 2, Chapter 2, Pages 29 & 31.

The answers of both these questions are absolutely in negation. This is yet another strong reason as to why Diyat cannot be a parallel with Hadd, for its definition and for its other practical purposes.

**Reason Five:**

Despite all the reasons discussed above, in view of the enigma or dilemma or a paradoxical, fallacious or a misleading situation or whatever you wish to describe this situation, the real matter of logic remains unresolved with the simple example of syllogism quoted in the preceding pages.

Let me repeat it here for sake of refutation. As said earlier, the notion under analysis, seems to be based on the following syllogism namely;

All men are mortal.  
Mr. R.G is a man.  
Therefore, *Mr. R.G is mortal.*

Likewise:

Hadd is prescribed by the Holy Quran and Sunnah.  
Diyat is prescribed by the Holy Quran and Sunnah.  
Therefore, *Diyat is Hadd.*

Even with such analogous attempt on the basis of the above-mentioned syllogism, the equation of Diyat with Hadd forms an invalid argument for the following reasons:

- I. There are different kinds of syllogism and the validity or invalidity of conclusion of each kind of syllogism is judged on its formal and intrinsic value etc.

Although a detailed discussion on the kinds of syllogism and the criteria of its validity or invalidity, is out of the pale of this study, yet suffice it to say that even if both the

major and minor premises are true in a formal syllogism, it *never necessarily follows* that by dropping the middle term, we always reach a consistent and a true conclusion<sup>8</sup>.

Drawing on the same pattern of the above quoted syllogism (All men are mortal), *will you consider the conclusion of the following syllogism compatible with reality?*

All Horses are quadrupeds.

All Cats are quadrupeds.

Therefore, all cats are horses.

Notice here how a logic rebuts a logic, as an iron cuts an iron.

- II. So far as, the said notion is concerned, it appears that the problem not only lies with the conclusion but also with the both major and minor premises. It is an admitted fact that the both punishments of Hadd and Diyat are ordained by the Holy Quran and Sunnah, but at the same time, it must be drilled deeply in mind that, both are differentiated by the very Quran and Sunnah. In this connection, the gist of analytical study may be described in the following two sentences:

The punishment of Hadd is *prescribed* by the Holy Quran and Sunnah as a *Non-compoundable* offence.

Whereas,

The punishment of Diyat is *prescribed* by the Holy Quran and Sunnah as *Compoundable Offence*.

One of proofs of the non-compound-ability of Hadd is that of well-known saying of the Holy Prophet (Peace Be Upon

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<sup>8</sup> Summarized study from *A Text Book of Deductive Logic*, Karamat Hussain, M.R Brothers, Lahore, 1961.

Him) concerning the intercession of Hadd-e-Saraqah (Theft) which purports as under:

“Even if my daughter Fatima (Radi Allahu Anha) had committed it, I would not have left her unpunished.”<sup>9</sup>

Whereas, the proof of the compound-ability of Diyat is the very same verse of the Holy Quran which is quoted for formulation of the said faulty notion. It is amazing that only a half-part of this verse is quoted in favour of this faulty notion, which describes *a rule* whereas, very shockingly, the second part of the very same verse, is ignored, which describes *an exception*.

*Can a law be complete without its exceptions?*

Surprisingly, the word of exception employed here is also not such which cannot be easily understood by a Urdu speaking person. Rather, this word of exception is frequently used in Urdu and that ignored word is “لَا”، which is commonly translated as “except” or “but” etc.

It is worth-remembering here that it is not the knowledge of *General Rules*, which determines the level of understanding of a person, as general rules often remain in sight of almost all persons of the relevant field. Rather, it is the knowledge of *Exceptions* which measures the level of deep understanding and insight of a jurist, as exceptions usually remain out of sight or are over sighted in general.

After the use of this word of exception “لَا”، the words employed just after it, “أَنْ يَصْدُقُوا“ also need attention to understand the point of compound-ability. Those who are well-versed in Ilm-ul-Sarf/ Morphology / Arabic Grammar, can easily derive the following conclusion from these words:

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<sup>9</sup> Sahih al-Bukhari : Book 4 : Volume 56 : Hadith 681

- i. The compound-ability of Diyat is vested with the heirs of a deceased person.
- ii. The compromise and forgiveness by the heirs should be like an act of charity and should be very *true* as it transpires from the very root-word "صدق".
- iii. And this act of compromise and remittance should not be a result of any coercion. Rather, it should be at the own motion of heirs/ out of their own free will/ voluntary, in the true sense of the word. This conclusion is easily reached by examining the بابُ الفعل (the specific format for use of a verb) in Arabic.

### **Reason Six:**

Another basic but very strong reason for the invalidity of the said notion is related to the jurisdiction of Ijtihad. In this connection, the following celebrated and a perennial principle of Usool-e-Fiqh must not be forgotten at any time:

“Where there is a Nass-e-Qatee (A definite Text), there is no jurisdiction of any Ijtihad at all”<sup>10</sup>.

Viewed from this angle, it must be clear that both Hadd and Diyat are the punishments which are prescribed by Nusoos-e-Qatee (Definite Texts). Therefore, there can be no Ijtihad at all as to the equation of Diyat with Hadd.

### **Reason Seven:**

Though, the six reasons already elaborated in the previous pages are logically quite sufficient to prove the invalidity of the said notion, yet there is another dimension of analysis which seeks proper attention of an analytical mind to do justice with the topic.

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<sup>10</sup> Alwajeez, Duktoor Abdul Kareem Zeedan, Page 406, Faran Academy Lahore.

This dimension of analysis is based on a supposition and its consequences. Let's suppose, just for the sake of *argument for a while*, that the said notion is *admitted true* and is *applied* for the practical purposes perfectly, as it is wished and urged by its proponents, then what will be the *consequences*?

The answer is very obvious that, then, a case of Diyat like that of a Hadd will require:

- i. Two witnesses.
- ii. Both of them being male witnesses.
- iii. Both of them being eye-witnesses.
- iv. Both of them being Muslims.
- v. Both of them must stand the test of Tazkiya-tul-Shuhud.
- vi. And importantly, presiding officers of Courts must also carry the same criteria of these witnesses etc.

Now consider the following questions:

- i. Won't such requirements lead to many hardships for proof of a Diyat-case?
- ii. Won't such stern criterion result into the deprivation of the rights of heirs?
- iii. Won't it be detrimental to even an accused person when a *compoundable* offence will become a *non-compoundable*?
- iv. Won't it be against analytical approach which requires differentiation between Diyat and Hadd at various levels?
- v. Won't it be repugnant to provisions of the Holy Quran and Sunnah where *Khata* and *Amad* are differentiated by describing different names of them and by prescribing different punishment for them<sup>11</sup>?

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<sup>11</sup> Chapter 4, Verses 92 & 93.

- vi. Moreover, it is a universally recognized fact that a punishment should be proportionate to the crime committed.

Now notice that the punishment of Hadd is of the highest level of all punishments, in form of death or amputation of certain organs of human body etc. While in case of Diyat, no such severe type of sentence is awarded in which human body is affected. That's why the very word "Diyat" is usually translated as blood-money.

Won't it be an act of injustice, to award death penalty or any other severe type of sentence in Diyat-case, on the basis of this equation?

Thus, it is easy to understand now that if this equation is, supposedly, enforced, it will result into *injustice* instead of *justice*.

## **Conclusion**

Equation of Diyat with Hadd is absolutely a fallacious and a misleading concept, no matter from whichever angle it is analyzed. Now, this multi-dimensional analysis of the said equation should also provide a sufficient, a thought-provoking, an insightful and a helpful material for an inquisitive mind to further search and research or analyze and categorize the *intrinsic invalidity* of the following equations as well:

- i. Equation of Diyat with Qisas.
- ii. Equation of Diyat with Tazir.
- iii. Equation of Qisas with Hadd.
- iv. Equation of Hadd with Tazir.

