

# **Establishing Paternity**

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If a man's wife or bondmaid gives birth to a child, the man is considered to be his father when there is a possibility that the child could be his, as when the woman is living with him as his wife. This is because the Prophet (PBUH) said:

"The child belongs to the owner of the bed (i.e. the husband or the master)."

There are three cases in which there is a possibility that the child belongs to a certain man:

The first case is when the woman is his wife and gives birth to her child after half a year of their first sexual intercourse, whether the man lives with her or not, since the newborn baby can be this man's child and there is nothing to prove otherwise.

The second case is when the woman is divorced and gives birth to her child after less than four years after her irrevocable divorce, for the maximum period of pregnancy is four years. In this case, there is a possibility that the child is from her ex-husband, and thus the child is attributed to him.

In the two aforesaid cases, the husband must be ten years old or more (to be able to have children), for the Prophet (PBUH) said:

"Command your children to pray when they become seven (years old) and beat them for (neglecting) it (i.e. prayer) when they become ten (years old); and arrange their beds (to sleep) separately."

The Prophet's command to make the children sleep separately when they become ten years old is a proof that they can have sexual intercourse, which leads to pregnancy and giving birth. This implies that a ten-year-old child can be a father even though his puberty is not evident, as puberty is evident only when its signs are apparent on him. Thus, Muslim scholars are of the opinion that the husband's ability to have sexual intercourse is enough to make the newborn baby belong to him, and thus people's lineages being preserved.

The third case (in which the newborn baby can belong to the husband) is when the revocably divorced wife gives birth to her child in a four-year period starting after divorce and before the expiry of her waiting period. The same applies when the revocably divorced wife gives birth to a child before a four-year period after the expiry of her waiting period. This is because the ruling on a revocably divorced woman in her waiting period is the same as that of a wife, so the ruling on paternity in case of revocable divorce is similar to that in case of being married.

If a master admits that he has had sexual intercourse with his bondmaid, or if there is a proof of their sexual intercourse, then the child she gives birth to six months or more after the intercourse belongs to this man. This is because she is legally considered his lawful woman by such intercourse, according to the generality of the <u>hadith</u> in which the Prophet (PBUH) said:

"The child belongs to the owner of the bed (i.e. the husband or the master of a slave girl)."

If a master admits that he has had sexual intercourse with his bondmaid, and then he has sold her or set her free, he is considered the father of the child she gives birth to in less than six months after her sale or emancipation. This is because the minimum period of pregnancy is six months, and if this bondmaid

gives birth to her child in less than six months after their separation, and her child lives, it becomes clear that she had conceived her child when she had been her master's lawful woman before her sale or emancipation; the Prophet (PBUH) said:

"The child belongs to the owner of the bed (i.e. the husband or the master)."

### There are two cases in which the child cannot belong to the husband:

The first case is when the woman gives birth to an alive child in a period less than six months after her marriage, for this period is not enough for conceiving and giving birth to a child. In this case, the wife must have been pregnant before her marriage to her present husband.

The second case is when the husband irrevocably divorces his wife and then she gives birth to a child in "more" than four years after divorce. This is because it is evident that she has conceived the child after her divorce.

The child of a bondmaid will not belong to her master if he claims that he made sure she had her menstrual period after having sexual intercourse with him, as this makes him certain she did not conceive a child after having sexual intercourse with him. Therefore, her child surely belongs to another man. The master's claim is accepted in this case, as it is so difficult to verify whether she really had her menstrual period and did not conceive a child after having sexual intercourse with him or not. However, such a claim to disown the child is not legally accepted unless the master takes an oath and swears by Allah that this child does not belong to him, as he thus denies any duty related to his paternity of the child.

If there is a dispute over the lineage of a newborn baby, the lawful bed relations are legally more considered than a mere resemblance between the newborn baby and its claimer. For example, when a master claims the child of his bondmaid to be his and another man who had sexual intercourse with her claims the child because the child resembles him, the child legally belongs to the master, for the Prophet (PBUH) said:

"The child belongs to the owner of the bed (i.e. the husband or the master of a slave girl)."

The child follows the pedigree of his father, for Allah, Exalted be He, says:

"Call them by [the names of] their fathers..."

(Qur'ân: Al-Ahzâb: 5)

However, when it comes to the child's religion, the child follows the better religion of his parents. For example, if a Christian man marries a polytheist woman or vice versa, the child follows Christianity. Yet, the child follows his mother concerning freedom or slavery, except when there is a previous condition or a kind of deception.

After this quick illustration of the Islamic rulings on the establishment of paternity and verification of lineage, we realize the keen interest of Islam to protect and verify people's pedigrees as there are consequent interests, such as maintaining the ties of kinship, inheritance, guardianship, and the like. Allah, Exalted be He, says:

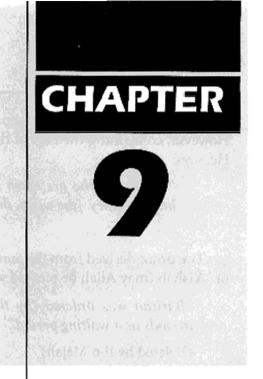
"O mankind, indeed We have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of Allah is the most righteous of you. Indeed, Allah is Knowing and Acquainted."

(Qur'an: Al-Hujurat: 13)

Moreover, the verification of the lineage is not intended for boastfulness and chauvinism known during the Pre-Islamic Period of Ignorance (the *Jâhiliyyah*). Rather, it aims at cooperation, maintaining the blood ties, and being merciful towards one another. May Allah guide us all to what He likes and pleases.

#### Endnotes

1 Al-Bukhârî (2218) [4/519] and Muslim (3600) [5/279].



# Waiting Period

The waiting period is a result of divorce, and it refers to a legally specified period of waiting after divorce. The proofs of the waiting period are derived from the Noble Qur'an, the Sunnah (Prophetic Tradition) and the consensus of Muslim scholars.

Concerning the proofs in the Noble Qur'an, Allah, Exalted be He, says:

"Divorced women remain in waiting [i.e., do not remarry] for three periods..." (Qur'an: Al-Baqarah: 228)

He also says:

"And those who no longer expect menstruation among your women - if you doubt, then their period is three months, and [also for] those who have not menstruated. And for those who are pregnant, their term is until they give birth..."

(Qur'ân: At-Talâq: 4)

This concerns the cases of separation between wife and husband in life. However, concerning the case of the death of the husband, Allah, Exalted be He, says:

"And those who are taken in death among you and leave wives behind – they, [the wives, shall] wait four months and ten [days]"

(Qur'an: Al-Baqarah: 234)

The proof derived from the *Sunnah* is the *hadîth* narrated on the authority of 'Â'ishah (may Allah be pleased with her) who said:

"Barîrah was ordered (by the Prophet) to count three monthly periods as a waiting period."

(Related by Ibn Mâjah)

There are other hadîths indicating the same legal ruling.

As for the wisdom behind the prescription of the waiting period, it is to make sure the woman has not conceived a child before separating from her husband, in order not to let any confusion take place concerning the lineage of the child. Moreover, this waiting period gives the husband the chance to repent divorcing her and to take his wife back as long as his divorce is revocable. Honoring the marriage contract and pointing out its sanctity are also intended through the prescription of the waiting period, and so is esteeming the right of the ex-husband. Besides, the right of the fetus is highly observed through the prescription of the waiting period when the divorced wife is pregnant. In general, the waiting period is considered protective of the previous marriage.

The waiting period is obligatory upon every woman who has separated from her husband whether by divorce, by the *khul*' (wife's release against payment), by a dissolution of the marriage contract, or by the death of her husband. It is a condition to make the waiting period valid that such a husband consciously had privacy with the wife with her consent and he was potent, whether she was a freewoman or a slave girl, an adult or a minor of those fit to have sexual intercourse.

As for the woman from whom her husband separates before consummating marriage with her, whether through divorce or the like, while he is alive, she has no waiting period. Allah, Exalted be He, says:

"O you who have believed, when you marry believing women and then divorce them before you have touched them [i.e., consummated the marriage], then there is not for you any waiting period to count concerning them..." (Qur'ân: Al-Ahzâb: 49)

The verb "to count" in the verse refers to counting the periods or months to determine the time of the waiting period, and "have touched them" implies having sexual intercourse with them. The noble verse indicates that there is no waiting period for the woman divorced before consummating marriage, and there is no dispute among scholars over this ruling. The mentioning of the "believing women" in the verse is a mere reference to the majority of the wives of Muslims, since Muslim scholars unanimously agree that there is no difference between the believing women and those of the People of the Scripture (Christian or Jewish women) concerning this ruling.

However, when the husband dies, his wife must count her prescribed waiting period whether he has had consummated the marriage or not, for Allah, Exalted be He, says:

"And those who are taken in death among you and leave wives behind - they, [the wives, shall] wait four months and ten [days]..." (Qur'an: Al-Baqarah: 234)

Moreover, there is no legal text or proof to differentiate between the consummated and unconsummated marriages in this respect.

There are six kinds of women in their waiting period:

- 1) The pregnant widow or the pregnant divorced woman
- 2) The non-pregnant widow
- 3) The divorced woman who still has her monthly menstrual period
- The divorced woman who does not have a monthly menstrual period, due to young age or menopause
- The divorced woman who no longer has her monthly menstrual period, without an apparent reason
- The wife of a missing man

Concerning the pregnant widow or the pregnant divorced woman, her waiting period lasts until she gives birth, for Allah, Exalted be He, says:

"...And for those who are pregnant, their term is until they give birth..." (Qur'an: At-<u>T</u>alaq: 4)

The noble verse indicates that the waiting period of the pregnant woman ends when she gives birth. Some of the Salaf (early Muslim scholars) maintained that the pregnant widow must consider the longer period: either until she gives birth or until four months and ten days pass<sup>2</sup>. However, afterwards, Muslim

scholars unanimously agreed that the waiting period for the pregnant woman ends when she gives birth, whether she is a divorcee d or a widow.

However, the waiting period prescribed for the pregnant woman does not end if she miscarries, and her embryo is a mere unformed lump of flesh. The waiting period of the pregnant woman ends when she gives birth to a newborn that belongs to the separated (by divorce, death, etc.) husband; thus, her waiting period does not end if she gives birth to a child that does not belong to the separated husband. For example, if the husband cannot have children due to a congenital defect or young age, or when the child is born alive in a period of pregnancy less than six months after consummating their marriage, this child does not belong to this separated husband. Therefore, her waiting period does not end by giving birth in such cases.

The minimum period of pregnancy is six months, as Allah, Exalted be He, says:

"...and his gestation and weaning [period] is thirty months..."

(Qur'ân: Al-Ahqâf: 15)

And

"Mothers may nurse [i.e., breastfeed] their children two complete years..." (Qur'an: Al-Baqarah: 233)

If we subtract the period of breastfeeding, twenty-four months, from thirty months, the remaining is six months which is the minimum period of pregnancy, and there is no child that can live if born in less than six months after conception.

Muslim scholars differ on determining the maximum period of pregnancy. The most preponderant view is that this period depends on the actual cases that have already occurred. Al-Muwaffaq Ibn Qudâmah said, "When there is no legal text, we must resort to the actual cases, and some cases of pregnancy have been reported to last for five years and more." However, the common period of pregnancy is nine months, for most women give birth after nine months of the conception.

It is impermissible to harm or assault the embryo as it is highly protected in the Islamic *Sharî'ah* (Islamic Law). If the embryo, after the soul has been breathed in it, is miscarried and dies, due to an assault against it, blood money and expiation are obligatory upon the criminal. If the pregnant woman deserves the legal punishment of lashing or that of stoning to death, it must be postponed until she gives birth. Also, it is impermissible for the pregnant woman to cause herself to miscarry by taking medicine or the like.

These rulings indicate the comprehensiveness of the Sharî 'ah that observes and protects the rights of the embryos. Then, all praise is due to Allah, Lord of the worlds, for His granting us this just and comprehensive Sharî 'ah. We ask Allah to help us adhere to His Sharî 'ah and be sincere to Him in religion, although the disbelievers dislike it.

Concerning the non-pregnant widow, her waiting period is four months and ten days, whether her husband has died before or after the consummation of marriage, and whether she is fit to have sexual intercourse or not. This is because Allah, Exalted be He, says:

> "And those who are taken in death among you and leave wives behind - they, [the wives, shall] wait four months and ten [days]..." (Qur'an: Al-Baqarah: 234)

### Ibnul-Qayyim said:

"The waiting period prescribed for the widow is obligatory, whether her marriage has been consummated or not, according to the generality of the legal texts in the Noble Qur'an, the Sunnah (Prophetic Tradition) as well as the unanimous agreement of Muslims. The waiting period for the widow is not merely intended for making sure of pregnancy nor is it an absolute act of worship, since every ruling in the Sharî'ah has its wisdom which is understandable to some and ambiguous to others."

Al-Wazîr and other scholars stated, "Scholars unanimously agree that the waiting period for the non-pregnant widow is four months and ten days." 5

As for the widowed slave girl, she must observe half the waiting period of the free widow; that is two months and five days (including five nights). This is because the Prophet's Companions (may Allah be pleased with them all) unanimously agreed that the divorced slave girl must observe half the waiting period prescribed for the free divorced woman, and so is the ruling on the widowed slave girl compared to that on the free widow. Al-Muwaffaq Ibn Qudâmah said, "This is the view of the majority of scholars, such as Mâlik, Ash-Shâfi'î, and Scholars of Interpretative Opinions." Al-Muwaffaq Ibn Qudâmah also said in his book entitled Al-Mubdi' (the Creative):

"The Companions unanimously agreed that the widow slave girl must observe half the waiting period prescribed for the free widow woman; otherwise, the verse states a general ruling concerning both the salve and free women."<sup>7</sup>

### There are some Rulings pertaining to the Widow

The widow must spend her prescribed waiting period in the house where she was staying at the death of her husband, and it is impermissible for her to leave this house except for a legal excuse, as the Prophet (PBUH) said to a widow:

"Stay at your home."8

In another narration, he (PBUH) said:

"Stay during your waiting period in the house where you were informed of your husband's death."

(Related by the Compilers of the Sunan)10

However, if the widow is obliged to move into another house, she is permitted to go wherever she desires in order to avert any harm. For example, she can leave the house if she fears for herself from staying there or is forced to leave it, or if the house is rented and its owner asks her to leave or asks for a higher rent.

It is permissible for the widow to go out from her house for her needs during the daytime, not at night when evil incidents are expected, for the Prophet (PBUH) said to the widows observing waiting periods:

"Talk as much as you want at the home of one of you and when you want to sleep, then everyone of you should return to her home."

Moreover, it is obligatory for the widow to show the signs of her mourning by avoiding all that which may arouse others' desire towards her or make her attractive to look at. With regard to this, the great scholar **Imâm Ibnul-Qayyim** (may Allah have mercy on him) said:

"This (the widow's mourning over her late husband) indicates the perfection and wisdom of the Islamic Sharî 'ah (Islamic Law) and how it thoroughly looks after the interests of Muslims. Mourning the deceased signifies the big disaster of death which people used to exaggerate excessively during the Pre-Islamic Period of Ignorance (the Jâhiliyyah). During such days, the widow used to stay in the worst and smallest house, without touching perfumes, applying oil to her body, taking a bath or suchlike acts that indicate dissatisfaction with the Divine Predestination. Out of His mercy, Allah, Exalted be He, has nullified this way of mourning observed by the people of the Pre-Islamic Period of Ignorance (the Jâhiliyyah), and substituted

patience, thankfulness, and turning back to Allah by saying 'Indeed, we belong to Allah and indeed to Him we will return.' Since the disaster of death naturally causes pain and sadness to the people of the deceased, Allah, the Wise, the Acquainted, allows them (the relatives other than the wife) to show only a few signs of mourning, that last for three days only in order to provide them with comfort and release their sadness. So, mourning is prohibited after these three days as it is considered a prospective evil. What is meant here is that Allah permits women to mourn over their deceased, other than the husband, for three days. However, mourning over the husband is related to the waiting period as it is considered of its necessities and complementary practices."

As for the pregnant widow, she ends her obligatory mourning as soon as she gives birth to her child. Her mourning is restricted to her waiting period and is complementary to it, and one of its rulings and obligations. Therefore, her mourning is obligatory as long as she is still in her waiting period.

### Imâm Ibnul-Qayyim then said:

"A woman needs to adorn herself to be lovely for her husband. When he dies and she is still in her waiting period and cannot be the wife of another man, she must be prevented from doing what a woman does for her husband, in order to observe the right of the deceased husband by preventing herself from another man until the decreed waiting period ends. This also helps block the means to desire men or be desired by men if she adorns herself."

Therefore, the widow in her waiting period must avoid adorning herself by applying dyes, henna, and the like. She must not wear any jewelry, apply any perfume, or wear any adorned clothes, as she has to wear only unadorned ones. However, there is no special clothing for the mourning period, and hence the widow can wear her usual clothes except the adorned ones. When her waiting period is over, she has no legal obligation to say or do anything, unlike what some common people think.

The waiting period prescribed for the woman who no longer expects menstruation is three months, for Allah, Exalted be He, says:

"And those who no longer expect menstruation among your women - if you doubt, then their period is three months..."

(Qur'ân: A<u>t</u>-<u>T</u>alâq: 4)

The prescribed waiting period for a divorced woman, who is not pregnant and still has menstrual periods, is three menstrual periods, for Allah, Exalted be He, says:

> "Divorced women remain in waiting [i.e., do not remarry] for three periods, and it is not lawful for them to conceal what Allah has created in their wombs..." (Qur'an: Al-Baqarah: 228)

This noble verse indicates that the divorced woman must observe a waiting period of three menstrual periods, and then she can remarry if she likes. The word "periods" mentioned in the verse refers to menstrual periods, as narrated from `Umar Ibnul-Khattâb, `Alî Ibn Abû Tâlib, and Ibn `Abbâs (may Allah be pleased with them all). The Prophet (PBUH) used the same word to refer to the same meaning as he (PBUH) said to a woman in a state of <code>istihâdah</code> (i.e. a woman having vaginal bleeding other than menstruation):

"... When your menstruation comes, do not perform prayer." 13

Moreover, these three menstrual periods must be complete, and thus if the woman is divorced during her menstrual period, this period will not be counted as one of the three menstrual periods prescribed for her as a waiting period. It is worth mentioning that though divorce is prohibited during the menstrual period, it is legally valid.

The prescribed waiting period for the divorced slave girl is only two menstrual periods, for the Prophet (PBUH) said:

"The waiting period of the slave woman is two monthly periods."

This is the opinion of 'Umar, his son ('Abdullâh Ibn 'Umar), and 'Alî Ibn Abû Tâlib, and no one of the Prophet's Companions opposed this opinion. Thus, this ruling makes an exception of the generality indicated by the Qur'anic verse, "Divorced women remain in waiting [i.e., do not remarry] for three periods..." (Qur'ân: Al-Baqarah: 228) According to the analogical deduction, the waiting period of the slave girl is half that of the freewoman 'i.e., one and half menstrual periods. Yet, as the menstrual period cannot be divided, thus the waiting period of the slave girl is two menstrual periods.

As for the divorced woman who does not have a monthly menstrual period due to menopause or young age, her waiting period is three months. This is according to the noble verse, "And those who no longer expect menstruation among your women - if you doubt, then their period is three months, and [also for] those who have not menstruated..." (Qur'an: At-Talaq: 4)

With regard to this, Imâm Muwaffaqud-Dîn Ibn Qudâmah and other scholars stated that:

"Muslim scholars unanimously agree that the waiting period prescribed for the menopausal freewoman and for the young freewoman, who has not menstruated yet, is three months." 15

As for the woman who has reached the age of puberty but has not menstruated yet, her waiting period is to be the same as the menopausal woman, as she is included in the verse: "...and [also for] those who have not menstruated..." (65: 4) When the menopausal divorced slave woman or that who has not menstruated is the mother of a child of her master, her waiting period is two months, for 'Umar (may Allah be pleased with him) said:

"The waiting period prescribed for the divorced slave girl who has begotten a child to her master is two menstrual periods. If she has not menstruated, her waiting period is two months." 16

This is because the months substitute for the menstrual periods. Some scholars maintain that waiting period of such a woman is only one and half months. Their proof of this is that the waiting period prescribed for the slave girl is half that observed by the freewoman, and the waiting period for the freewoman who has not menstruated is three months; thus, the menopausal slave woman is one month and a half.

Concerning the divorced woman who used to menstruate but suddenly stops menstruating not because of old age, she has two cases:

The first case is when she does not know the cause that prevents her menstrual period, and hence, she is to observe a waiting period of one year: nine months for pregnancy and three months for the waiting period prescribed for the menopausal woman. Ash-Shâfi'î (may Allah have mercy on him) said:

"This is the judgment of 'Umar issued among the Muhâjirûn " and the Anṣâr, and none of them denied it. The reason behind legislating such waiting period is to make sure that the woman is not pregnant, and when nine months pass, it becomes certain that she is not pregnant. Then, she is to observe the waiting period prescribed for the menopausal woman, i.e., three months. The total waiting period is thus twelve months, during which it will be certain that she is not pregnant and that the three months supposed to be for menstruation have passed."

The second case is when such a woman knows the cause that prevents her menstrual period, such as illness, breastfeeding, or taking a medicine that prevents menstruation. In this case, she is to wait until the cause no longer exists, and then if she menstruates again, she is to observe a waiting period of three menstrual periods. However, if she does not menstruate, she is to observe a waiting period of one year just as the woman who does not know the cause that prevents her menstrual period, according to the most preponderant view. This is the opinion of Shaykhul-Islâm Ibn Taymiyah and one of the opinions related about Imâm Ahmad.

### There are some cases pertaining to the mustahadah18:

The first case is when she knows her time and habit of menstruation before istihādah<sup>19</sup>. Then, her waiting period must equal three menstrual periods according to her usual pattern.

The second case is when she forgets the duration of her menstrual period before the <code>istihadah</code>, but she distinguishes her menstrual blood (from the blood of <code>istihadah</code>); thus, she must consider her menstruation period relying on the distinction between the menstrual blood and that of <code>istihadah</code>.

The third case is when she forgets the time of her menstruation and she cannot distinguish her menstrual blood, then she is to observe the same waiting period of a menopausal divorced woman, namely three months.

One of the rulings pertaining to the waiting period is the marriage proposal to a woman observing her waiting period. It is prohibited to propose frankly to the widow or the irrevocably divorced woman as long as any of them is observing her waiting period. For example, a man is prohibited to say to such a woman something like, "I want to marry you." However, he can allude concerning a proposal to her, such as when he says, "I want to marry someone like you", for Allah, Exalted be He, says, "There is no blame upon you for that to which you [indirectly] allude concerning a proposal to women..." (2: 235)

In addition, it is permissible for the man to propose, whether frankly or indirectly, to his revocably divorced wife during or after her waiting period, since he is permitted to take back his revocably divorced wife during her waiting period or remarry her after her waiting period.

As for the wife of a missing man who has disappeared and it is not certain that he is alive, she is to wait a sufficient period, set by the judge, for him to come back or until something certain is known about him. During this period, she is still considered his wife, since the principle acted upon in this case is that he is considered alive. When this period expires, he is legally considered a dead person, and his wife is to observe the waiting period prescribed in case of death, which is four months and ten days. This is the judgment the Companions (may Allah be pleased with them all) gave in such a case. Imâm Ibnul-Qayyim said:

"...The Rightly-guided Caliphs gave judgments concerning the wife of a missing man as narrated about 'Umar Ibnul-Khattab. Imam Ahmad Ibn Hanbal said, 'I do not doubt this ruling, for five of the Companions ordered the wife of the missing man to observe the waiting period prescribed for the widow." "20

Imâm Ibnul-Qayyim added, "The opinion of `Umar is the most preponderant view by means of analogical deduction, and Shaykhul-Islâm Ibn Taymiyah said, 'This is the soundest opinion.'"

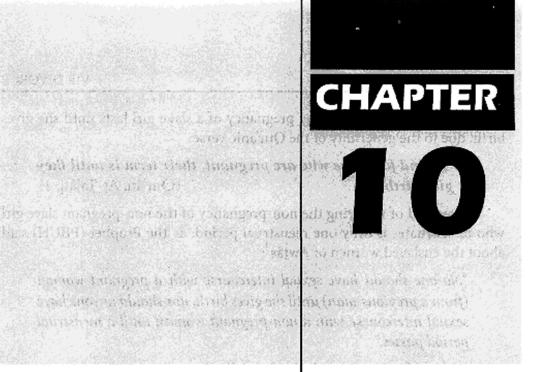
When the waiting period of the wife of a missing man expires, she is permitted to marry another man, and she does not need to get a divorce from the guardian of her missing husband. If she remarries and then her first husband returns, he has the option to take her back or approve of her second marriage and restore his dowry, according to the preponderant view, whether his return is before or after the consummation of her marriage to the other man. With regard to this, Shaykhul-Islâm Ibn Taymiyah (may Allah have mercy on him) said:

"The soundest ruling on the wife of a missing man is the judgment of 'Umar and some other Companions; she must wait four years, then observe the waiting period prescribed for the widow. After completing her waiting period, she is permitted to marry another man. If her first husband returns after she has married, he has the option to take her back or to restore his dowry, whether his return is before or after the consummation of her marriage to the other man. And this is the opinion acted upon in the Hanbali School."

He added, "Giving the man the option of taking back his wife or restoring his dowry is the most preponderant view."<sup>21</sup>

#### **Endnotes**

- 1 Ibn Måjah (2077) [2/531].
- 2 This is the waiting period of the non-pregnant widow.
- 3 See: Al-Mughnî (11/234).
- 4 See: "Zâdul-Ma `âd" (4/206).
- 5 See the footnote in "Ar-Rawd Al-Murbi" (7/55).
- 6 See: "Al-Mughni" [9/107].
- 7 See the footnote in "Ar-Rawd Al-Murbi" [7/56].
- 8 Abû Dâwûd (2300) [2/500], At-Tirmidhî (1204) [3/509], An-Nasâ'î (3528) [3/510], and Ibn Mâjah (2031) [2/506].
- 9 Ibn Mâjah (2031) [2/506] and An-Nasà'î (3529) [3/511].
- 10 The Sunan refers to compilations of the Prophetic <u>hadîths</u> classified according to the Islamic jurisprudential subjects; the main four compilers of the Sunan are Abû Dâwûd, Ibn Mâjah, At-Tirmidhî and An-Nasâ'î.
- 11 Al-Bayhaqî (15512) [7/717].
- 12 See "I'lâm Al-Mwaqi'in" [2/165].
- 13 Abû Dâwûd (280) [1/139], An-Nasâ'î (211) [1/131], and Ibn Mâjah (620) [1/343].
- 14 This is because the diyah (blood money) of a slave girl is half that of a freewoman and, likewise, the punishment a slave girl receives is half that of a freewoman.
- 15 See "Al-Mughnî" [11/265].
- 16 Ad-Daraqutnî (3785) [3/214), Al-Bayhaqi (15451) [7/698], and `Abdur-Razzáq (12872) [7/221].
- 17 The Muhājirūn: The Emigrants; those Muslims who emigrated from Mecca to Medina for being persecuted in Mecca because of embracing Islam.
- 18 Mustahâdah: A woman in a state of istihâdah (i.e. a woman having vaginal bleeding other than menstruation).
- 19 Istihadah: Vaginal bleeding other than menstruation.
- 20 See "I'lâm Al-Muqi 'în" (2/53).
- 21 See " Majmu`ul-Fatâwâ" (10/377—381).



# Verifying the Slave Girl's Non-Pregnancy

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Verifying that the slave girl is not pregnant is achieved by her master abstaining from having sexual intercourse with her for a specified period sufficient to make sure that she has not conceived. Thus, when a slave girl is sold, given as a gift or captured and she is fit to have sexual intercourse, her new master is prohibited to have sexual intercourse with her or even foreplay until making sure that she is not pregnant, for the Prophet (PBUH) said:

"It is not lawful for a man who believes in Allah and the Last Day to water what another has sown (meaning having sexual intercourse with a pregnant woman)."

(Related by Ahmad, At-Tirmidhî and Abû Dâwûd)

In another narration related by Abû Dâwûd, the Prophet (PBUH) said:

"No one should have sexual intercourse with a pregnant woman (from a previous man) until she gives birth."2

The period of verifying the pregnancy of a slave girl lasts until she gives birth, due to the generality of the Qur'anic verse:

"...And for those who are pregnant, their term is until they give birth..." (Qur'an: At-Talaq: 4)

The period of verifying the non-pregnancy of the non-pregnant slave girl who menstruates is only one menstrual period, as the Prophet (PBUH) said about the enslaved women of Awtas<sup>3</sup>:

"No one should have sexual intercourse with a pregnant woman (from a previous man) until she gives birth, nor should anyone have sexual intercourse with a non-pregnant woman until a menstrual period passes."

(Related by Ahmad and Abû Dâwûd)

This <u>hadith</u> indicates the obligation of verifying if the slave girl is pregnant or not, whether captured or not, before having sexual intercourse with her. Moreover, this <u>hadith</u> illustrates how to verify the pregnancy of the pregnant slave girl and that of the menstruating one.

As for the menopausal slave girl or one who is still young and has not menstruated yet, she needs one month to verify her pregnancy, since one month substitutes for one menstrual period in counting the waiting period.

The wisdom behind the prescription of verifying the pregnancy or the non-pregnancy of the slave girl is implied in the <u>hadith</u> in which the Prophet (PBUH) says:

"It is not lawful for a man who believes in Allah and the Last Day to water what another has sown (meaning having sexual intercourse with a pregnant woman)."

This indicates that the objective of verifying the pregnancy is to avoid any possible confusion concerning the lineage of the offspring.

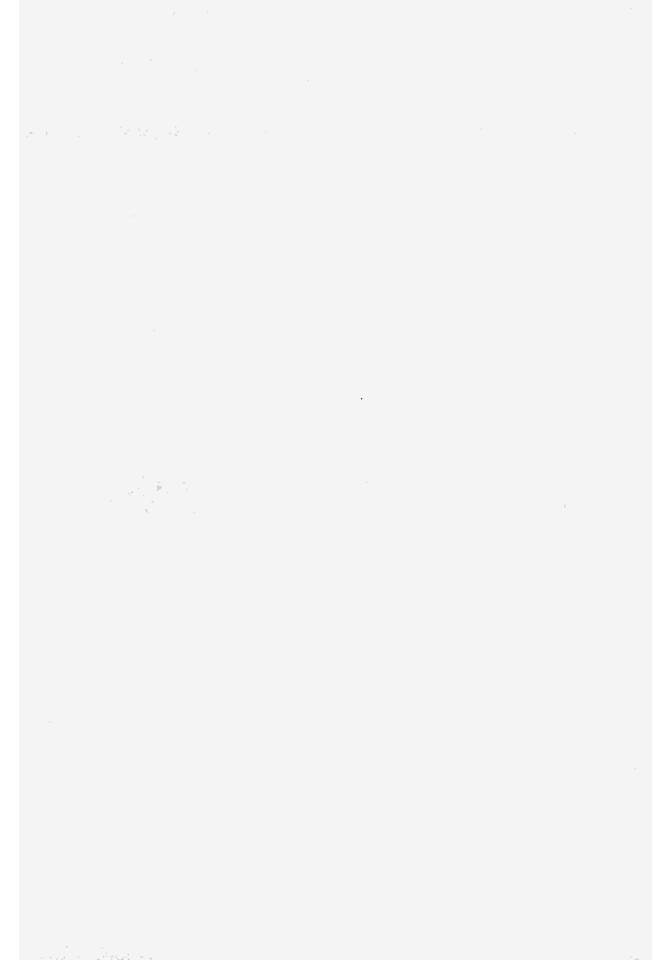
### **Endnotes**

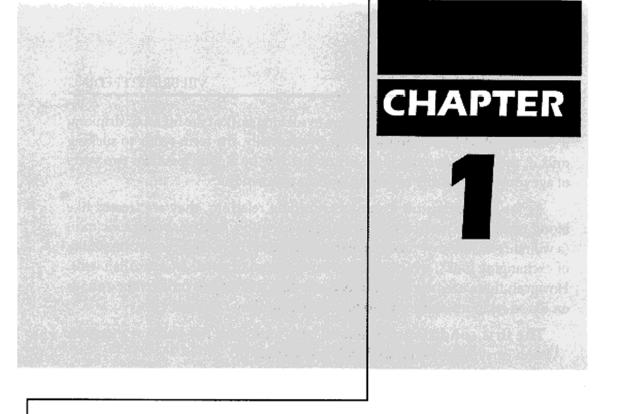
<sup>1</sup> Abû Dâwûd (2158) [2/425] and At-Tirmidhî (1133) [3/437].

<sup>2</sup> Abû Dâwûd (2157) [2/424].

<sup>3</sup> The place where the Battle of Hunayn took place.

# VIII: BREASTFEEDING





# **Breastfeeding**

Allah, Exalted be He, says concerning women one is forbidden to marry (temporarily or perpetually):

"...your [milk] mothers who nursed you, your sisters through nursing..." (Qur'an: An-Nisa': 23)

This is also demonstrated in the Prophetic <u>hadîths</u> as it is related in the two authentic books of Al-Bukhârî and Muslim that the Prophet (PBUH) said:

"All things which become unlawful because of blood relations are unlawful because of the corresponding foster breastfeeding relations."

He (PBUH) also said in a <u>h</u>adîth related by the Group of Compilers of <u>H</u>adîth:

"What is unlawful because of blood relations is also unlawful because of the corresponding foster breastfeeding relations."<sup>2</sup>

Linguistically, breastfeeding refers to sucking milk at the breast or drinking it (when milked in a container). Jurisprudentially, the term refers to sucking milk at the breast or drinking it in another way by a child less than two years of age provided that the milk results from pregnancy.

As for the rulings on foster breastfeeding relations, they are treated like blood relations in marital affairs, being alone with a woman, being a mahram (a woman's husband or any unmarriageable kin of hers) and the permissibility of exchanging looks, which will be demonstrated in detail later, if Allah wills. However, there are two conditions the fulfilling of which renders the rulings on blood relations applicable to foster breastfeeding relations:

The first condition: The nursed baby must have five sucks or more, for `Aishah (may Allah be pleased with her) narrated:

"It had been revealed in the Glorious Qur'ân that ten clear sucks make the marriage unlawful, then it was abrogated (and substituted) by five sucks and Allah's Messenger (PBUH) died while it (i.e. the verse indicating five sucks) was still recited as a verse of the Qur'ân (for some Muslims were unaware that it was also abrogated.)"

(Related by Imâm Muslim)

The abrogation here is applicable only to the recitation and not to the juristic ruling. This narration gives more elaboration to the general meaning of the above-mentioned verse and <u>hadîth</u> as far as nursing is concerned.

The second condition is that the nursed baby is to be breastfed five sucks (or more) during the nursing period which is two years, for Allah, Exalted be He, says:

"Mothers may nurse [i.e., breastfeed] their children two complete years for whoever wishes to complete the nursing [period]..."

(Qur'ân: Al-Baqarah: 233)

This verse signifies that the breastfeeding meant here is the one which takes place during the two years of nursing. This is also asserted in a <u>hadîth</u> in which the Prophet (PBUH) says:

"The only breastfeeding which makes marriage unlawful is that which is taken from the breast and enters the bowels, and is taken before the time of weaning."

At-Tirmidhî says, "This is a <u>h</u>asan (good) <u>sah</u>îh (authentic) <u>h</u>adîth." This <u>h</u>adîth means that the nursing which prohibits marriage is that which the

nursed baby gets into his bowels in a way that nurtures him and makes his bowels grow and enlarge. Thus, the little insignificant nursing that does not enter the bowels of the nursed baby nor render them wide does not prohibit marriage. Besides, the nursing which prohibits marriage and to which the rulings on blood relationships are applied is that which takes place before the weaning. That is to say, the prohibiting nursing (prohibiting marriage and other affairs) is the one occurring while the nursed baby is still taking his nourishment only by breastfeeding; only milk which makes his flesh grow and thus becomes a part of him (in the form of flesh and bones).

It is considered a suck when the nursed baby starts sucking milk at the breast then stops for breathing or sucking another breast or for another reason. If he returns to the same breast afresh after that pause, it is considered two sucks even if this occurs at one time. This is because the Lawgiver has defined a certain number for the prohibiting nursing and not the way of nursing itself. It is rather determined to be a suck according to the commonly acknowledged customs.

If the milk enters the abdomen of the nursed baby without being sucked, by way of letting it fall in drops into his mouth or nose or by drinking it from a container and the like, it is then treated as being sucked at the breast as far the juristic ruling is concerned. This is because the nursed baby takes nourishment from it that way the same as done in breastfeeding, provided that he sucks five times.

As for prohibited things due to nursing, the nursed baby is considered as the son of his wet nurse since the latter has breastfed him at least five times when he has been under the age of two. Thereby, it is prohibited for her to marry him, and he is a mahram for her, in consideration to what Allah, Exalted be He, says:

"... your [milk] mothers who nursed you..."

(Qur'an: An-Nisa: 23)

Thus, it is allowed for the foster-son to look at his foster-mother and be alone with her. However, the foster son is not regarded as the son of the wet nurse regarding the other rulings; he is not obliged to provide her sustenance, they are not entitled to inherit each other, he is not to pay the blood-money on her behalf if she kills or injures some person, and he is not empowered to act as her legal guardian. This is because blood relationships are stronger than that resulting from nursing. Yet, both relationships are not to be treated alike as far as juristic rulings are concerned except in matters stated in a Qur'anic or a Prophetic text, such as being prohibited to one's foster-mother in marriage, being lawful to look at each other and being alone with each other.

The nursed baby is regarded as the son of the man to whom the milk of the foster-mother is ascribed to have been caused by him by way of pregnancy or sexual intercourse through marriage or the like, since her pregnancy is ascribed to him and nursing is one of its results. Thereby, the nursed baby is regarded as the son of the foster-father, and the same rulings that concern the foster-mother apply to the foster-father. That is, it is prohibited for the foster-father to marry his foster-daughter, yet it is permissible to look at her, be alone with her and be her mahram, but she is not regarded as his daughter in other rulings.

Besides, all the mahrams of the foster-father -his fathers, children, mothers, grandfathers, grandmothers, brothers and sisters and their children, his paternal uncles, his paternal aunts, his maternal uncles and maternal aunts - are mahrams for the nursed baby. Likewise, all the mahrams of the foster-mother - her fathers, children, mothers, sisters, maternal aunts, paternal aunts and the like are his mahrams.

Since nursing makes it prohibited for the foster-father (or mother) to marry the nursed person, beside the rulings on marital affairs, all of these rulings apply to the children of the foster child, his grandchildren, but not to his fathers, mothers, paternal uncles, paternal aunts, maternal uncles and maternal aunts nor to his brothers and sisters.

If a baby breastfeeds at the breast of a woman who is married through an invalid marriage contract or a woman who has committed adultery, he is to be ascribed only (as a foster child) to the foster-mother, since his paternity has not been established from family relationship (his father is unidentified). As paternity is not established through a blood relation, it is not established from nursing, for nursing is a branch of paternity.

If two children (a male and a female) have breastfed from the milk of a milch animal, this is not a prohibiting nursing.

Scholars disagree as to the case of the child being nursed from a woman who may breastfeed without being pregnant or having sexual intercourse, whether this nursing is a prohibiting one or not. Some scholars maintain that it is not a prohibiting nursing, since her milk is not a real one (not resulting from having sexual intercourse), but rather a biological, unnatural one. Besides, real milk is the one sucked from a female breast making the bones and the flesh of the nursed baby grow, while this milk does not do this. Other scholars, such as Al-Muwaffaq and others, are of the view that this nursing is a prohibiting one.

Breastfeeding is confirmed by a testimony of an upright woman. In this regard, Shaykhul-Islâm Ibn Taymiyah says:

"...If this woman is known to be truthful, and has mentioned that she has breastfed a certain baby (under the age of two) five times, her testimony is acceptable according to the soundest view, and the rulings on nursing are applicable in this case."

If the nursing is not confirmed, or the sucks are doubted to be five or less and there is no evidence proving the contrary, then there is no prohibition. This is because the original ruling is that there is no nursing. And, Allah, Exalted be He, knows best.

### Endnotes

- 1 Al-Bukhårî (2645) and Muslim (1447).
- 2 Al-Bukhārî (2646) [5/312] and Muslim (3554) [5/260].
- 3 Muslim (3582) [5/271].
- 4 At-Tirmidhî (1154) [3/458].
- 5 See: 'Majmu 'ul-Fatâwâ' (34/52).

ર્કે કર્યું કે ઉપલબ્ધ મામલા કરવા હતું. તેને તૃષ્ય મહિલાઓને પ્રાથમિક છે. સ્થાપન સામાર્થી આવેલે સ્થાપીઓની સ્થાપના સામાર્થિક ત્રાપના કર્યા છે.

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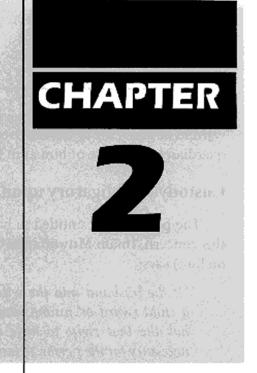
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# Custody

Jurisprudentially, custody is the protection of a child or a mentally ill adult and the like, preventing any harm from befalling him, bringing him up through seeing to his physical and moral needs.

The wisdom behind custody is manifest; the child and those of his case (lacking discernment, such as the insane and the lunatic person) are unable to manage their own interests. Therefore, they need a guardian to take care of them by protecting them from any harm, bringing about whatever is useful for them and bringing them up in the proper way.

The Shari ah (Islamic Law) has decreed custody, and it is in fact a divine mercy through which the affairs of the wards are conducted, a way to do them the power of good. If the wards are left without being taken care of, they will be lost. As Islam is the religion of mercy, solidarity, and consolation, it enjoins Muslims to show mercy to them, take care of them and solace them. Islam also forbids Muslims from leaving such persons without a guardian and makes it

obligatory upon Muslims to provide for them. Moreover, it is a right of the ward to be cared for by his relatives, and it is at the same time a duty upon the guardian to take care of him as in the case of guardianships.

### Custody is Obligatory upon Guardians in the Following Order

The person most entitled to have the custody of a child is the mother. In this concern, Imâm Muwaffaqud-Dîn Ibn Qudâmah (may Allah have mercy on him) says:

"If the husband and the wife are legally separated and they have a child (ward or insane whether male or female), his/her mother has the best right to have custody, if she fulfills the conditions necessary for the person to have custody over a child. This is the view maintained by Imâm Mâlik and the scholars known for personal interpretative judgments, and it has not come to my knowledge that there is a contrary opinion."

A woman has no right of the custody (of her child from a previous marriage) when she marries (another person), and the child's custody in such a case automatically devolves to the next most eligible person. This is because once a woman came to the Messenger of Allah (PBUH) and said:

"O Messenger of Allah! My womb was a vessel to this son of mine, my breasts were a means of quenching his thirst, and my lap was a place of protection for him. Yet, his father has divorced me, and wants to take him away from me." The Prophet (PBUH) said, "You have more right to him as long as you do not marry (another person)."

(Related by Imâm Ahmad, Abû Dâwûd, and Al-Hâkim who deems it a <u>sahîh</u> (authentic) <u>h</u>adîth)

The <u>hadith</u> signifies that the mother has the best right to have custody of the child if her husband (the child's father) divorces her and wishes to have him under his custody. It also signifies that if the mother marries another person, she is no more entitled to be the child's guardian.

The mother takes precedence in having the child in her custody since she is tenderer toward the child than his closest relative. None shares her closeness of blood relationship except the child's father, yet his tenderness is less than hers. In case the child's father is entitled to have custody over the child, he would let his present wife take care of him. The child's mother has the best right than

the husband's wife to have the child under her custody. In this connection, Ibn `Abbâs (may Allah be pleased with him) once said to a man:

"Her (the mother's) smell, bed and lap are better for your son until he reaches the age of discretion and is given choice as to which of his parents he wants to stay with."

### In this regard, Shaykhul-Islâm Ibn Taymiyah says:

"The mother has more right to have custody over her child than the father, since she is closer to the child than his father, as she knows best about his nourishment, carrying him, lulling him to sleep and giving him things to play with and the like. Moreover, the mother knows better about her child, and is more merciful, capable, patient with him/her than anyone else. Therefore, she is specifically designated, according to Sharî 'ah, to have custody over her undiscriminating child."

However, when a mother's right to the custody of her child is lost, it devolves to her mother (the child's maternal grandmothers in ascending lineage) according to their closeness to the child. This is because they are regarded as the child's mother, for they are the persons who have begot the child's mother, and whose mercy to the ward is more ensured than others.

Then the father, to whom the child's existence is ascribed, is given precedence over other relatives concerning the custody of his child (after the child's maternal grandmothers), for he is closer and more loving to him than others.

After that, the right of the custody of the child devolves to the paternal grandmothers for they are among the child's agnate relatives. They are preferred to grandfathers, for when there are some persons with the same degree of relation to the child, the woman is more entitled to take precedence, for she is closer to the child. This is the same as in the case of the father and the mother.

The right of custody devolves then to the child's paternal grandfathers, according to their closeness to the child, for they are regarded as the ward's father.

Then, the right of custody devolves to mothers of grandfathers (mother of the maternal grandfather then mother of the paternal grandfather), for they relate to the ward by his/her grandfather and they have begotten the ward's grandfather. Thus, the ward is regarded as part of their lineage.

After that, the ward's sisters have the right of the custody of the ward, for they relate to him/her by both or either parents. So, the full sister is given precedence over half sisters, for she has priority in inheritance. The

half maternal sister comes next in having the right of the ward's custody, for she relates to his/her mother who is given precedence over the father as far as the right of custody is concerned; then the half paternal sister. However, some scholars maintain a reasonable opinion that the half paternal sister takes precedence over the maternal one, for the position of authority is for the father's side. They also say that the paternal father is more entitled to inheritance than the maternal sister, since she is regarded as a full sister in case the full sister is absent.

The right of custody then devolves to maternal aunts for their relation to the ward's mother. In this regard, it is narrated in the Two Authentic Books of Al-Bukhârî and Muslim that the Prophet (PBUH) said:

"The maternal aunt is of the same status as the mother."3

However, the mother's full sister takes precedence, then the mother's maternal sister, then the mother's paternal sister, as in the sisters' case.

The paternal aunts then have the right of custody for their relation to the ward's father, who comes after the mother as far as the right of custody is concerned. In this regard, **Shaykhul-Islâm Ibn Taymiyah** (may Allah have mercy on him) says:

"The paternal aunt is more entitled to the right of the custody of the ward than the maternal aunt, the same is true with the paternal female relatives who take precedence over the maternal ones, for the father has the upper hand and so the same will be with his close relatives. The mother takes precedence over the father in having the custody of the child, for she is the best one to see to the child's interests than anyone else. In this concern, the lawgiver gave precedence to the maternal aunt of Hamzah's daughter over her paternal aunt Safiyyah, for the latter did not claim the custody of the ward while Ja' far (the husband of the ward's maternal aunt) claimed it on behalf of his wife (the ward's maternal aunt). Thus, the Prophet (PBUH) judged that Hamzah's daughter is to be in the custody of her maternal aunt while she (the aunt) was absent."

Shaykhul-Islâm Ibn Taymiyah (may Allah have mercy on him) also says:

"All the principles of the Shari`ah approve that the father's relatives are to take precedence over those of the mother in having custody of the ward. Thus, whoever does the opposite breaches these principles and the Shari`ah."

After the ward's paternal aunts, the right of custody devolves to the ward's brothers' daughters, then to the sisters' daughters, then to the paternal uncles' daughters, then to the paternal aunts' daughters, then to the rest of closest agnate relatives to the ward. This must be according to their relation to the ward; the closer takes precedence, as follows: brothers, their sons, paternal uncles, then their sons (cousins).

If the ward is a female, the person who is entitled to have her custody must be one of her mahrams. If he is not from her mahrams, he should entrust her to some trustworthy woman he chooses for the ward.

#### Endnotes

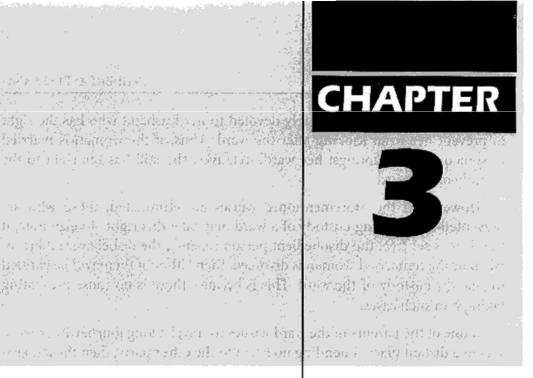
- 1 Ahmad (6707) [2/182], Abû Dâwûd (2276) [2/490], and Al-Hâkim (2889) [2/247].
- 2 See: 'Majmu'ul-Fatâwâ' [17/216-218]
- 3 Al-Bukhârî (2699) [5/373].
- 4 See: 'Majmu'ul-Fatâwâ' (34/122).

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# **Causes Preventing Custody**

The right of custody may be taken away due to the following reasons:

**Slavery**: A slave is not allowed to have the custody of a ward, for custody is a position of authority to which a slave is not entitled. This is because a slave is always busy serving his master and totally devoted to his benefits.

**Disobedience**: A defiantly disobedient person is not entrusted to the custody of a ward for fear that he may render harm to the ward by badly raising him/her according to the same evil manners.

Likewise, a **disbeliever** is not entitled to take a ward in custody, for he causes much harm to the ward by turning him/her away from Islam by raising him/her according to the teachings and manners of disbelief.

Moreover, the woman who is married to someone who is not among the agnate relatives of the ward is not entitled to take the custody of the ward. This is because the Prophet (PBUH) once said to a child's mother:

"You have more right to him as long as you do not marry."

This is because she is entirely devoted to her husband who has the right to prevent her from looking after the ward. Thus, if the woman is married to someone from amongst her ward's relatives, she still has the right to the custody of the ward.

However, if the aforementioned causes are eliminated, those who are prevented from having custody of a ward may take this right. To elaborate, if the slave is set free, the disobedient person repents, the disbeliever embraces Islam or the remarried woman is divorced, then either of them will be entitled to take the custody of the ward. This is because there is no cause preventing taking it in such cases.

If one of the parents of the ward wishes to travel a long journey in order to stay in a distant place, intending no harm to the other party, then the father is more entitled to take the custody of the child. It does not make any difference whether the father is the one traveling or the one staying behind in the homeland. It is also stipulated that the way and the place this one is traveling to be safe. This is because the father is the one who undertakes disciplining and protecting him/her as best as possible. So, if the father were to be away from his child, he would not be able to undertake this duty and thus the child would be lost.

On the contrary, the mother is more entitled to the custody of her child if either of the parents travels to live in a near place, the distance of which is less than that of shortening prayer. It does not make any difference whether the mother is the one traveling or the one staying behind. This is because she is more merciful to the ward and in such a case the ward's father can look after him/her.

However, if the travel was for a certain purpose after fulfilling which the one traveling will return, then the ward is to be kept in the custody of the one staying behind of either of the parents. This also is to be applied in case the place of travel or the way is perilous. This is because taking the ward along in such cases may cause harm to him/her. With regard to this, Imâm Ibnul-Qayyim (may Allah have mercy on him) said:

"It is a trick contradicting what the Lawgiver intends that a father intentionally travels to take his child away from his/her mother to deprive her from the right of the child's custody. The Lawgiver decreed that the mother is more entitled to have the custody of her child than the father in case they live near each other and it is possible for them (the father and the child) to meet at any time..."

### Ibnul-Qayyim then added:

"The Prophet (PBUH) said that whoever separates a mother and her child, Allah will separate him from his beloved persons on the Day of Resurrection. Moreover, the Prophet (PBUH) forbade selling a slave woman alone without her child or vice versa, even if they are both in the same town. Thus, it is more deserving to be forbidden that a father makes a trick to separate between a mother and her child in such a way that it becomes hard for the mother to see, meet and bear the absence of her child. This is too hard for her; thus, the judgment of Allah and His Messenger is the worthiest to be followed: the mother is more entitled to have the custody of the child, whether the father travels or stays at home. To illustrate, the Prophet (PBUH) said to a woman, 'You have more right to him as long as you do not marry.' Therefore, how is it reasonable to say that the mother is more entitled to have the custody of her child as long as the child's father does not travel? Surely, this view is not supported by any evidence from the Glorious Qur'an, the Sunnah (Tradition) of the Messenger of Allah (PBUH), the fatwas2 of the Prophet's Companion or the authentic analogical deduction."

### The Child's Right to Choose between His/Her Parents

'Umar and 'Alî (may Allah be pleased with them both) decreed that a child, at the age of seven and being sane, can choose to stay with either parents. This view is asserted by the <u>hadîth</u> related by At-Tirmidhî and other compilers on the authority of Abû Hurayrah who narrated:

"A woman came to the Prophet (PBUH) and said, 'My husband wants to take away my son (after divorcing me).' The Prophet (PBUH) said to the child, 'This is your father and this is your mother, so take the hand of any of them whom you like most.' The boy took his mother's hand and she went away with him."

The aforesaid <u>hadith</u> signifies that a child, if able to discern, is to be given the choice to stay with either parent (in case of divorce). When a child reaches the age of discrimination and leans to either parent, this means that the one chosen is more merciful to the child than the other. The child is only given such a choice when two conditions are fulfilled: First: Both parents must be entitled to have the custody of the child.

**Second:** The child must be sane and if not so, s/he is to stay with the mother who is more merciful to him/her and knows better about his/her interests.

If a sane child chooses the father (as guardian), s/he stays with him day and night, to protect, instruct and educate him/her. However, a father is not allowed to prevent the child from visiting his/her mother, for this may render the child undutiful and make him/her sever ties of relationship. If a child chooses the mother, s/he is to spend the night with her and the day with his/her father in order to educate him/her. If a child chooses neither of the parents, then lots are to be drawn in order to see who receives the custody of him/her, as this is the only way to prefer one to the other.

The father is more entitled to have the custody of his daughter once she is seven, for he is more able to protect her and has more right than anyone else to be her guardian and this is to continue until she is married. However, the mother is to be permitted to visit her daughter in case no evil might happen<sup>4</sup>. If the father is not able to protect his daughter or that he neglects her due to his being busy or impious, while her mother is apt to preserve her well, then the daughter is to stay with her mother.

### Shaykhul-Islâm Ibn Taymiyah (may Allah have mercy on him) says:

"Imâm Ahmad and his followers give the father precedence over the mother with regard to the custody of their daughter in case this does not cause her any harm. If the father is not able to protect his daughter or that he neglects her due to being busy and the mother is able to take care of her and protect her, then she (the mother) is to take precedence over the father in regard to their daughter's custody. Thus, if the daughter may not be safe with one of the two parents, then the other parent is surely more entitled to keep her in his/her custody." 5

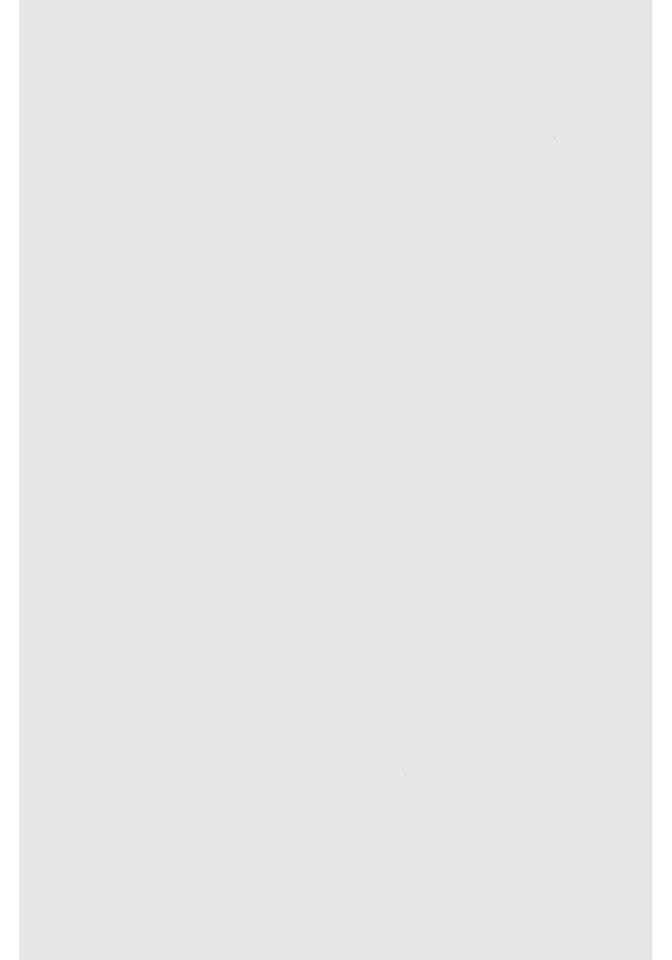
Shaykhul-Islâm Ibn Taymiyah, (may Allah have mercy on him) also said:

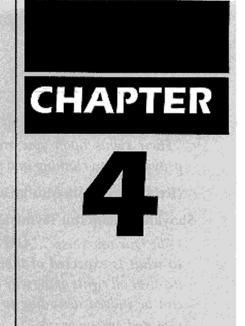
"If the father marries another woman who causes harm to his daughter and neglects the girl's interests while the mother observes the girl's interests and does not hurt her, then definitely the mother has more right to have the custody of the daughter."

And Allah knows best.

## **Endnotes**

- 1 See: 'I'lâm Al-Mûwqqi'în' (2/295).
- 2 Fatwa: A legal opinion issued by a mufti [A Muslim scholar specialized in issuing legal rulings] in response to a layman's question on a point of the Islamic Law.
- 3 Abû Dâwûd (2277) [2/490], At-Tirmidhî (1361) [3/638], An-Nasâ'î (3496) [3/497], and Ibn Mâjah (2351) [3/111].
- 4 This is because after divorce, it is not allowed that the mother be in privacy with the father.
- 5 See: 'Majmû'ul-Fatâwâ' (34/131).





# The Wife's Alimony

Jurisprudentially, alimony refers to the maintenance one provides to whom one financially supports in terms of food, clothing, housing and the like, according to what is reasonable.

Maintaining one's wife, in terms of food (provision), clothing and housing of the same quality as that of other similar women, comes at the top of one's duties toward her. For Allah, Exalted be He, says:

"Let a man of wealth spend from his wealth..."

(Qur'ân: At-Talâq: 7)

And He also says:

"... And due to them [i.e., the wives] is similar to what is expected of them, according to what is reasonable..."

(Qur'an: Al-Baqarah: 228)

Moreover, the Prophet (PBUH) said:

"Their rights upon you are that you should provide them with provision and clothing in a reasonable manner."

(Related by Imâm Muslim and Abû Dâwûd)

Shaykhul-Islâm Ibn Taymiyah (may Allah have mercy on him) said:

"The Qur'anic verse '... And due to them [i.e., the wives] is similar to what is expected of them, according to what is reasonable...' involves all rights of the wife and other rights she is to do. This matter can be judged according to what is commonly acknowledged and repeated among people."<sup>2</sup>

When there is a dispute between the two spouses, the judge estimates the amount of the wife's alimony according to the financial level of them both, whether they both are rich or only one of them is rich. Thus, a well-off wife who is married to a well-off husband is entitled to have a sufficient amount of provision of the same quality as that of similar women in that town; the same is true for clothing and furniture. Likewise, a poor wife with a poor husband is entitled to have a sufficient amount of food, clothing and furniture of the same quality as that of similar women. However, the wife of the middle class with a similar husband (of the same conditions), a well-off wife with a poor husband, and a poor wife with a well-off husband, are entitled to have the maintenance of the average level, according to the known customs. Moreover, the husband is to provide for what his wife needs such as water for personal cleanliness, drinking and purification, etc. However, the husband is not to provide the aforementioned needs if they are no longer married. Once a wife is divorced and becomes in her waiting period, the following cases are to be observed:

A revocably divorced woman is entitled to be maintained by her husband as long as she is in her waiting period, as she is regarded as a wife. This is because Allah, Exalted be He, says:

"...And their husbands have more right to take them back in this [period]..." (Qur'an: Al-Baqarah: 228)

A major or minor irrevocably divorced woman is not entitled to any financial support or housing by her husband. This is based on the <u>hadîth</u> narrated in the Two Authentic Books of Al-Bukhârî and Muslim that when the husband of Fâtimah Bint Qays (may Allah be pleased with her) irrevocably divorced her, the Prophet (PBUH) said to her:

"There is neither alimony nor lodging for you."3

With regard to this, the great scholar Ibnul-Qayyim (may Allah have mercy on him) said:

"According to the authentic Sunnah (Tradition) of the Messenger of Allah (PBUH) which agrees with the Glorious Quran, an irrevocably divorced woman is not entitled to any alimony or lodging. This also comes in conformity with the analogical deduction and is the view of the scholars of Hadîth as well."

However, a pregnant irrevocably divorced woman is entitled to alimony, for Allah, Exalted be He, says:

"...And if they should be pregnant, then spend on them until they give birth..." (Qur<sup>3</sup>ân: A<u>t</u>-<u>T</u>alâq: 6)

And He, Exalted be He, also says:

"Lodge them [in a section] of where you dwell out of your means..."

(Qur'an: At-Talaq: 6)

Moreover, the Prophet (PBUH) said to Fâtimah Bint Qays:

"There is no alimony for you except if you are pregnant."5

This is because since the husband is the father of the unborn child, he then is to financially support it and this cannot be achieved except through maintaining the mother. Concerning this view, Al-Muwaffaq and other scholars commented saying:

"This opinion is unanimously agreed upon by all scholars. However, they entertained different views concerning whether alimony is paid for the fetus itself or for the woman for the sake of the fetus?"

With this in mind, the issues involved in the aforesaid two opinions are summarized in numerous rulings explained in books of jurisprudence and legal rulings.

A wife is not entitled to maintenance by her husband for several reasons as follows:

When the wife keeps herself away from her husband, then she is not entitled to be maintained by her husband, this is because, in such a case, he does not sexually enjoy her and he is to maintain her in return for enjoying her.

The same is true when a wife shows disobedience to her husband, i.e. disobeys her husband in doing her marital duties, such as refusing to allow him to have sexual intercourse with her, refusing to move in to another suitable

house, or leaving his house without his permission. In such cases, the wife is considered disobedient, as he cannot enjoy her. Thus, she is not entitled to receive her alimony, for, as mentioned before, he is to maintain her in return for enjoying her.

Furthermore, when the wife keeps herself away from her husband by traveling for some purpose, then she has no right to be maintained by her husband, for, in such a case, he cannot enjoy her.

Moreover, a widow is to be provided for by herself or whoever is responsible for her if she is poor. This is because she is not entitled to have the alimony out of her husband's estate, which belongs then to his heirs.

A pregnant widow is entitled to be maintained from the estate of her husband, if he has left any, due to the existence of the fetus; if the deceased husband has left nothing, the well-off among the fetus' legal heirs (in case the fetus dies) is to maintain the mother.

It is permissible that the two spouses agree that the maintenance be afforded in advance or be delayed either for a long or a short time; they have the full right to do so. If they disagree (concerning when to pay the maintenance), the husband is to pay the maintenance at the beginning of the day. It is permissible to pay it in grain, if they agree to do so, but as it requires a great deal of effort, she has the right to accept or refuse the maintenance in grain.

Likewise, the husband is to provide his wife with the annual clothing at the beginning of every year. If the husband is absent and has not left the usual maintenance for his wife or if he is present but has not given the maintenance to her, then he still has to give the previous delayed maintenance, for it is still her right which the husband must give in ease or hardships. This right does not become invalid with the passage of time.

The husband is to start maintaining his wife once she allows him to enjoy her in the marital life. If he is unable to financially support her, it is permissible for her to nullify the marriage contract. This is based on the <u>hadîth</u> Abû Hurayrah (may Allah be pleased with him) narrated that the Prophet (PBUH) said concerning a man who cannot financially support his wife:

"They are to be separated (by divorce)." (Related by Ad-Dâraqutnî)

This is also asserted by the following verse as Allah, the Almighty, says,

"...Then [after that], either keep [her] in an acceptable manner or release [her] with good treatment..." (Qur'an: Al-Baqarah: 229)

Undoubtedly, keeping a wife without financially supporting her is not an acceptable manner.

If a well-off husband is absent without leaving sufficient expenditure to his wife and she cannot take it from his estate or borrow it to his debit, then she has the right to nullify the marriage contract by the permission of the judge. If she is able to take from his estate, she is allowed to take the amount that suffices her. The evidence of this is shown in the <u>hadith</u> related in the Two Authentic Books of Al-Bukhârî and Muslim that when Hind Bint `Utbah told the Prophet (PBUH) that her husband (Abû Sufyân) does not give her sufficient money, he (PBUH) said to her:

"Take what is sufficient for you and your children, and the amount should be just and reasonable."

In view of the aforementioned opinions, we realize how perfect the *Sharî'ah* (Islamic Law) is in rendering every right to him who is entitled to it. This is in fact the case in all its wise legislations. Shame on those who replace the Divine *Sharî'ah* with the human laws! Allah, Exalted be He, says concerning such people:

"... Then is it the judgment of [the time of] ignorance they desire?

But who is better than Allah in judgment for a people who are certain [in faith]."

(Qur'an: Al-Ma'idah: 50)

#### Endnotes

- 1 Muslim (2941) [4/402] and Abû Dâwûd (1905) [2/312].
- 2 See: 'Majmû'ul-Fatâwâ' (34/132).
- 3 Muslim (3682) [5/338].
- 4 See: 'Zâdul-Ma' âd' [5/470-471].
- 5 Abû Dâwûd (2290) [2/496], An-Nasâ'î (3222) [3/370], and Muslim (3688) [5/340].
- 6 Ad-Dâraqutnî (3742) [3/306].

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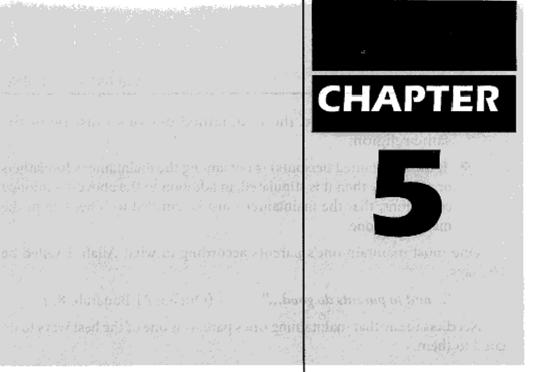
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# Maintaining Relatives and Possessions

One's close relatives here refer to those who are entitled to inherit from one either by virtue of the prescribed shares or by being an agnate relative. Possessions refer to those who are under one's possession, slaves or animals.

When one's relatives are descending from the two origins of lineage, i.e., parents and grandparents of the maintainer no matter how high they are in ascending lineage, or children no matter how low they are in a descending lineage, then it is obligatory to maintain them, provided that the following conditions are fulfilled:

- The maintained persons must be poor who possess nothing, or possess insufficient provisions, while being unable to earn their living.
- Moreover, the maintainer must be well-off who possesses abundant provision for himself, his wife and his slaves (if any).

- The maintainer and the maintained persons must be of the same religion.
- If the maintained person(s) is not among the maintainer's forefathers or offspring, then it is stipulated, in addition to the above-mentioned conditions, that the maintainer must be entitled to inherit from the maintained one.

One must maintain one's parents according to what Allah, Exalted be He, says:

"...and to parents do good..." (Qur'an: Al-Baqarah: 83)

Needless to say that maintaining one's parents is one of the best ways to do good to them.

The evidence that the father must maintain his children is shown in the noble verse as Allah, the Almighty, says:

"...Upon the father is their [i.e., the mothers'] provision and their clothing according to what is acceptable..."

(Qur'an: Al-Baqarah: 233)

The noble verse states that the father is to provide his wife with provision and clothing in an acceptable manner as followed with similar women in their town, in accordance with the husband's financial conditions with no squandering or niggardliness. With regard to this, the Prophet (PBUH) said:

"Take what is sufficient for you and your children, and the amount should be just and reasonable."

One is to maintain the person one is to inherit by virtue of the prescribed shares or by agnation. The evidence to that is shown in the verse as Allah, Exalted be He, says:

"...And upon the [father's] heir is [a duty] like that [of the father]..." (Qur'an: Al-Baqarah: 233)

This is because the kinship between the inheritor and the inherited person necessitates that the heir is the most entitled person to the inheritor's estate than any one else. Thus, the inherited person is more entitled to be maintained by the inheritor not by those who are not entitled to inherit him (the inherited person).

In consideration of this verse:

"...And upon the [father's] heir is [a duty] like that [of the father]" (Qur'an: Al-Baqarah: 233)

Allah, Exalted be He, means that the one who is entitled to inherit a child (in case this child dies) is to maintain this child the same way as the child's father would do. Moreover, Allah, the Almighty, says:

"...And give the relative his right..." (Qur'an: Al-Isra': 26)

There are many other evidences signifying that the affluent person is to maintain his needy relatives. In this connection, Abû Dâwûd related:

"A man asked the Prophet (PBUH), 'O Messenger of Allah! To whom should I show kindness?' The Prophet (PBUH) said, 'Your mother, your father, your sister and your brother.' "

It is also related by An-Nasa'î, on the authority of <u>T</u>ariq Al-Mu<u>h</u>aribî, and deemed a <u>sahîh</u> (authentic) <u>hadîth</u> by Al-<u>H</u>âkim, that the Messenger of Allah (PBUH) said:

"...Start giving first to your dependents: your mother, your father, your sister, your brother, and then your closest relatives according to closeness."

This hadith explains the noble verse that states:

"... And give the relative his right..." (Qur'an: Al-Isra': 26)

The father solely is to fully maintain his children, for the Prophet (PBUH) said to Hind Bint `Utbah when she complained of her miserly husband:

"Take what is sufficient for you and your children, and the amount should be just and reasonable."

This noble <u>hadith</u> signifies that the father solely is to maintain his children, a ruling that is asserted by the noble verse:

"...upon the father is their [i.e., the mothers'] provision and their clothing according to what is acceptable..."

(Qur'ân: Al-Baqarah: 233)

And the noble verse:

"...And if they breastfeed for you, then give them their payment..." (Qur'an: At-Talaq: 6)

This implies that the father is the one who must maintain the breastfeeding baby, not the mother.

As for the poor person who has well-off relatives, excluding his father, they share in maintaining him according to the amount of their shares of inheri-

tance from him. This is because Allah, Exalted be He, has related the maintenance to the inheritance as in the noble verse:

"...And upon the [father's] heir is [a duty] like that [of the father]..."

(Qur'an: Al-Baqarah: 233)

Thus, the amount of maintenance is to be proportional to that of the inherited estate. Hence, whoever has a rich grandmother and a full brother, the former is to undertake one-sixth of his (the inherited person's) maintenance while the rest is to be undertaken by the latter, as they inherit him according to the same shares, and so on.

As for the maintenance of slaves and animals, their master is to maintain his slaves in terms of food, clothing, and housing in an acceptable manner. This is based on the <u>hadith</u> in which the Prophet (PBUH) says:

"It is essential to feed the slave, clothe him (properly) and not to burden him with work which is beyond his power."

(Related by Ash-Shâfî'î in his Musnad (Collection of Ascribed Hadîths))

It is related in the two authentic books of Al-Bukhârî and Muslim that Abû Dharr (may Allah be pleased with him) narrated:

"The Prophet (PBUH) said, 'Your slaves are your brothers (in Islam) and Allah has put them under your command. So whoever has a brother under his command should feed him of what he eats and dress him of what he wears. Do not ask them (slaves) to do things beyond their capacities (power)."

This is also asserted in the noble verse as Allah, the Almighty, says:

"...We certainly know what We have made the obligatory upon them concerning their wives and those their right hands possess..." (Qur'ân: Al-Ahzâb: 50)

These texts signify that the slaves' maintenance is obligatory upon their masters.

If a male slave asks permission for marriage, his master must either get him married or sold, for Allah, Exalted be He, says:

"And marry the unmarried among you and the righteous among your male slaves and female slaves..." (Qur'ân: An-Nûr: 32)

The imperative statement in the aforementioned verse implies obligation when requested by the concerned person. Likewise, if the same is asked by a female slave, her master is given a choice as to have sexual intercourse with her, get her married or sell her to relieve her of any harm.

Whoever owns an animal is to feed it, provide it with water, and do what is good for it, for the Prophet (PBUH) says:

"A woman was punished because of a cat which she had imprisoned until it died out of hunger. She neither gave it food nor water, nor set it free to eat from the vermin of the earth."

(Related by Al-Bukhårî and Muslim)

This <u>hadith</u> signifies that one is to maintain one's animals, for the said woman was admitted to Hellfire due to leaving the cat unfed or maintained. If this is the case with a cat, then other possessed animals are more entitled to be fed and maintained.

Furthermore, it is impermissible for the owner of an animal to overburden it, or to milk it in a way that harms its offspring. The Prophet (PBUH) says:

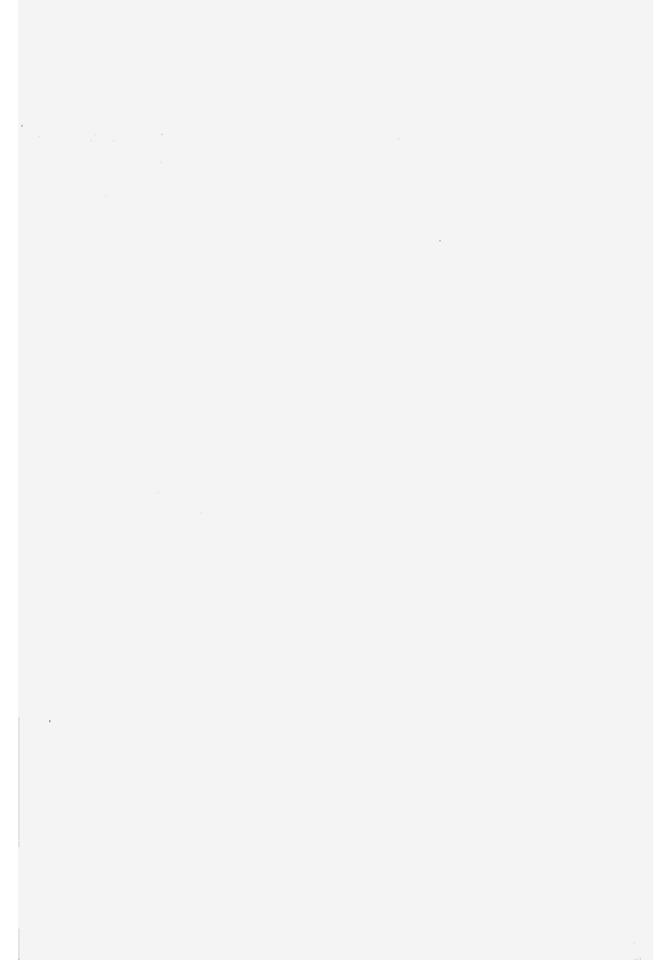
"One should not harm others nor should one seek benefit for himself by causing harm to others."

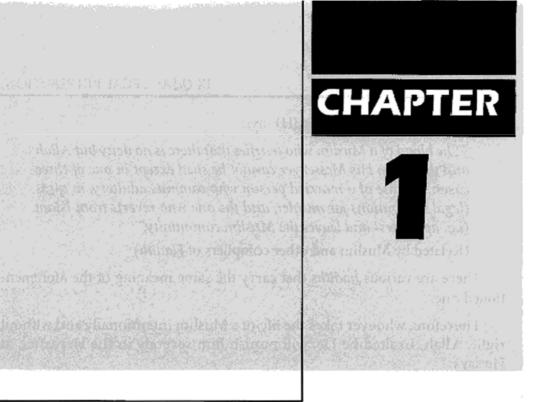
Moreover, it is prohibited for the owner of an animal to curse, hit or brand it on the face. If the animal's owner is unable to maintain it, he is to be forced (by the judge) to have it sold, hired out or slaughtered, if it is lawful to be eaten, as keeping it without maintenance is an act of injustice that must be eliminated. And Allah, Exalted be He, knows best.

### Endnotes

- 1 Abû Dâwûd (5140) [5/221].
- 2 An-Nasâ'î (2531) [3/65], Al-Hâkim (7327) [4/149], and Abû Dâwûd (5139) [5/220].
- 3 Al-Bukhârî (2545) [5/214] and Muslim (4291) [6/136].
- 4 Al-Bukhårî (3482) [6/629] and Muslim (5813) [7/459].

# IX:QI<u>S</u>Â<u>S</u> (LEGAL RETRIBUTION)





# Murder and its Types

Faqîhs define crime as one's transgression against another's body, property, or honor. They have specified "the Book on Crimes" for the rulings on the first kind, which is transgression against someone's body, and "the Book on Penalties" for the second and the third ones, namely transgression against someone's property and that against someone's honor.

The act of assaulting someone's body is the act that obligates qisās (legal retribution), diyah, or expiation. Muslim scholars unanimously agree on the prohibition of taking a person's life without right. The proof of this prohibition is derived from both the Ever-Glorious Book, the Qur'an, and the Sunnah (Prophetic Tradition). Allah, Exalted be He, says:

"And do not kill the soul [i.e. person] which Allah has forbidden, except by right..."

(Qur'ân: Al-An 'âm: 151)

Moreover, the Prophet (PBUH) says:

"The blood of a Muslim who testifies that there is no deity but Allah and that I am His Messenger cannot be shed except in one of three cases: the case of a married person who commits adultery, in qisas (legal retribution) for murder, and the one who reverts from Islam (i.e. apostates) and leaves the Muslim community."

(Related by Muslim and other compilers of Hadîth)

There are various <u>hadiths</u> that carry the same meaning of the aforementioned one.

Therefore, whoever takes the life of a Muslim intentionally and without right, Allah, Exalted be He, will punish him severely in the Hereafter, as He says:

"But whoever kills a believer intentionally – his recompense is Hell, wherein he will abide eternally, and Allah has become angry with him and has cursed him and has prepared for him a great punishment." (Qur'an: An-Nisa': 93)

Such a murderer is regarded as a defiantly disobedient person, as he commits one of the major sins, namely murder. Still, Allah is the One to judge such a person; He will punish him if He wills or forgive him if He wills. Allah, Exalted be He, says:

"Indeed, Allah does not forgive association with Him, but He forgives what is less than that for whom He wills..."

(Qur'ân: An-Nisâ': 48)

Hence, such a sin, murder, may be forgiven, as it is lesser than associating others in worship with Allah. This is the case when the murderer does not repent, but if he repents, his repentance is accepted, as Allah, Exalted be He, says:

"Say, 'O My servants who have transgressed against themselves [by sinning], do not despair of the mercy of Allah. Indeed, Allah forgives all sins. Indeed, it is He Who is the Forgiving, the Merciful." (Qur'an: Az-Zumar: 53)

However, the right of the murdered person is not dropped in the Hereafter by the repentance of the murderer. The right of the murdered person will be taken from the good deeds of his murderer according to the wrong done to him, or Allah will grant the murdered person good deeds out of His bounty, i.e. without taking from the good deeds of the murderer. In addition, the right of the murdered person is not dropped through qisas (legal retribution), as

such retribution is only the right of the family of the murdered person. In this respect, Ibnul-Qayyim (may Allah have mercy on him) said:

"There are three rights relating to murder: the first belongs to Allah, the second to the murdered person, and the third to the family of the murdered person. Hence, if the murderer gives himself up to the family of the murdered person, showing regret, fear of Allah, and sincere repentance, Allah's right will be dropped and the right of the family of the murdered person will be dropped when the qisas (legal retribution) or reconciliation is applied. As regards the right of the murdered person, Allah will compensate him on the behalf of the repentant murderer on the Day of Resurrection and reconcile between them as well."

# Types of Murder

According to the majority of Muslim scholars, there are three kinds of killing:

- Premeditated murder
- Quasi-premeditated murder
- Manslaughter

As for the premeditated killing and manslaughter, they are stated in the Ever-Glorious Book of the Qur'an. Allah, Exalted be He, says:

"And never is it for a believer to kill a believer except by mistake. And whoever kills a believer by mistake – then the freeing of a believing slave and a compensation payment [diyah] presented to his [i.e. the deceased's] family [is required] unless they give [up their right as a] charity... But whoever kills a believer intentionally – his recompense is Hell, wherein he will abide eternally, and Allah has become angry with him and has cursed him and has prepared for him a great punishment." (Qur'an: An-Nisa': 92-93)

Concerning the ruling on quasi-premeditated murder, it is stated in the honorable Sunnah of the Prophet (PBUH). For example, 'Amr Ibn Shu'ayb reported on the authority of his father and grandfather respectively that the Prophet (PBUH) said:

"The diyah (blood money) for quasi-premeditated murder is to be made as much as that for premeditated murder, but the culprit in the former case is not to be killed. Satan (in quasi-premeditated murder) insinuates people and then blood is shed blindly without any previous malice or weapon."

(Related by Ahmad and Abû Dâwûd)

Moreover, 'Abdullâh Ibn 'Amr (may Allah be pleased with him) narrated that the Messenger of Allah (PBUH) said:

"The diyah (blood money) for quasi-premeditated murder, such as that committed with a whip or a stick, is one hundred camels, forty of which are pregnant."

(Related by the Five Compilers of Hadîth except At-Tirmidhî)

#### Premeditated Murder

It is the type of murder in which one intentionally kills a human being – while being aware that his blood is inviolable – by attacking him with something fatal. This definition involves that the case is not regarded as premeditated murder unless the following conditions are met:

- Having the intention of killing
- Being previously aware of the inviolability of the victim's blood as a human being
- The weapon or the tool used is a fatal one, whether it is specified for killing or not.

Therefore, if one of these conditions is not present, the case will not be regarded as premeditated murder. This is because the absence of intention does not obligate qisâs (legal retribution), and the occurrence of death with something that is not supposed to be fatal indicates that death may have been due to something else as scholars agreed.

According to induction, there are nine forms of premeditated murder:

- 1- The murderer wounds a person with something sharp and body-penetrating, such as a knife, a spike, or the like. In this regard, Al-Muwaffaq said, "As far as we know, there is no juristic disagreement among scholars on this ruling (i.e. killing using such tools is deemed premeditated murder)."
- 2- The murderer kills a person with something heavy, such as a stone and the like. Therefore, if the stone, for example, is small, the case will not be regarded as premeditated murder, unless it is intentionally aimed at a vital spot of the body. Similarly, it will be regarded as premeditated murder if such a small stone (that usually does not cause death) is used while the victim is in a state of weakness, illness, youngness, oldness,

coldness, hotness, and the like. The same applies when the murderer repeats the action of beating the victim with such a small stone or the like until he dies. This is also similar to the cases when a person kills another by letting a wall fall on him, hitting him with a car, or throwing him from a high place.

- 3- The murderer throws a person to a deadly animal, such as a lion or a serpent. Thus, if one intentionally throws another to such deadly creatures, the case is deemed premeditated murder, for such creatures are generally known to be killers.
- 4- The murderer throws a person into fire or deep water, which may cause him to drown, while the victim cannot escape from them.
- 5- The murderer strangles a person with a rope or the like or stifles him to death.
- 6- The murderer imprisons the victim and deprives him of food and drink until he dies, being imprisoned for a period in which anyone is supposed to die out of hunger and thirst if they do not find food or water. Such a case is considered premeditated murder.
- 7- The murderer, knowingly, uses sorcery or black magic that often causes death to the victim.
- 8- The murderer knowingly makes the victim drink poison or cunningly mixes it with the victim's food while the latter is unaware.
- 9- Some witnesses falsely testify against someone causing the latter to be sentenced to death, as in cases like adultery, apostasy, or premeditated murder, whose penalty in Islam is capital punishment. Such witnesses are regarded as murderers, as they intentionally kill an innocent person. So, if they renege on their testimony or if their plot is disclosed, they are to be sentenced to death as well.

# Quasi-premeditated Murder

According to faqihs, quasi-premeditated murder occurs when someone kills another with the intention of causing him harm or injury, not death. Such a case is regarded as quasi-premeditated murder whether the murderer's purpose is aggression or mere disciplinary punishment, as the offender exceeds the limits in doing so until it results in death. It is called "quasi-premeditated murder" as the perpetrator just intends harm or injury, but he unintentionally kills the victim. In this connection, Ibn Rushd said:

"As for the one who intends harm to another person and strikes him with something generally nonfatal, the ruling wavers between intentional and unintentional killing. It is similar to premeditated murder as the perpetrator intentionally beats the victim, and it is similar to manslaughter as he beats him with something that is generally not intended to cause death."

Among the examples of quasi-premeditated murder is the case in which one strikes a person in a non-vital bodily spot with a whip or small stick. Another example is the case when one punches another with the hand in a non-vital spot but it results in the latter's death. Such cases are regarded as quasi-premeditated murder that obligates expiation taken from the perpetrator's money. The expiation for quasi-premeditated murder is emancipating a slave; if the perpetrator does not have a slave or cannot afford to buy one to emancipate, he must perform fasting for two consecutive months, just like the case of manslaughter. In addition, binding diyah (blood money) is to be paid by the murderer's agnate relatives. To illustrate, Abû Hurayrah (may Allah be pleased with him) narrated:

"Two women from (the tribe of) Hudhayl fought with each other and one of them hit the other with a stone that killed both her and the fetus she carries. The killer's agnate relatives and those of the victim submitted their case to the Prophet (PBUH) who judged that the diyah for the murdered woman was to be paid by the murderer's agnate relatives."

(Related by Al-Bukhârî and Muslim)

Hence, the aforementioned <u>hadîth</u> shows that <u>qisâs</u> (legal retribution) is not obligatory in the case of quasi-premeditated murder. It also indicates that the <u>diyah</u> is to be paid from the wealth of the murderer's agnate relatives. Since it is considered a murder that does not obligate <u>qisâs</u>, the <u>diyah</u> is to be paid by the murderer's relatives just like the case of manslaughter. In this regard, **Ibnul-Mundhir** said, "All Muslim scholars unanimously agree that the diyah (for quasi-premeditated murder) is to be paid by the murderer's agnate relatives." In addition, **Al-Muwaffaq** said, "We know no juristic disagreement on the ruling that the diyah (for quasi-premeditated murder) is to be paid by the murderer's agnate relatives." The same opinion was adopted by other scholars as well.

## Manslaughter

According to *faqîhs* (may Allah have mercy on them), manslaughter occurs when someone kills an inviolable human being by mistake while doing something permissible for him to do, such as shooting or hunting. The same applies when a Muslim kills a fellow Muslim in a battle, thinking he is one of the disbelievers.

The ruling on the intentional murder committed by a child or an insane person is the same as that on manslaughter. This is because the condition of intention is lacking in case of such persons (due to their lack of mental maturity or soundness). Thus, the premeditated murder of a minor or an insane is regarded as the manslaughter of a legally accountable person.

Likewise, the ruling on killing due to being a causative factor is the same as that of manslaughter. For example, when one digs a well or a hole on a road or a street and another falls therein and dies, or when one stops a car on the road or a street and one crashes against it and dies, the ruling in such cases is the same as that of manslaughter.

The expiation for manslaughter is obligatory to be taken from the wealth of the murderer; the expiation for it is the emancipation of a believing slave, and if one does not have one or cannot afford to buy one to emancipate, then he should perform fasting for two consecutive months instead. Moreover, the *diyah* for manslaughter is obligatory to be paid by the perpetrator's male agnate relatives.

Furthermore, if a Muslim kills a Muslim mistakenly in a war believing that he is one of the disbelievers, there will be nothing obligatory on him except for the expiation. Allah, Exalted be He, says:

"...And whoever kills a believer by mistake – then the freeing of a believing slave and a compensation payment [diyah] presented to his [i.e. the deceased's] family [is required] unless they give [up their right as a] charity. But if he [i.e. the deceased] was from a people at war with you and he was a believer – then [only] the freeing of a believing slave; and if he was from a people with whom you have a treaty – then a compensation payment presented to his family and the freeing of a believing slave. And whoever does not find [one or cannot afford to buy one] - then [instead], a fast for two months consecutively, [seeking] acceptance of repentance from Allah. And Allah is ever Knowing and Wise"

(Qur'ân: An-Niså': 92)

Hence, Allah, Exalted be He, stated two kinds of manslaughter:

First: the first kind of manslaughter is that in which the expiation is obligatory on the murderer and the *diyah* on his agnate relatives. This kind involves killing a believer unintentionally without mistaking him for a disbeliever in the battlefield. The same ruling applies to the case of unintentional killing of one of those with whom Muslims have a peace treaty.

**Second:** the second kind of manslaughter is that in which only the *diyah* is obligatory. This kind involves killing a believer unintentionally in the battlefield, mistaking him for one of the disbelieving enemies.

In his book entitled Fathul-Qadîr (The Bestowal of the Omnipotent), <sup>10</sup> Imâm Ash-Shawkânî (may Allah have mercy on him) said:

"Allah, Exalted be He, says, "... But if he [i.e. the deceased] was from a people at war with you and he was a believer then [only] the freeing of a believing slave...' (Qur'an: An-Nisa': 92) The verse indicates that in case of killing a believer whose people are in a state of war against Muslims, such as killing a believer in a disbelieving country to which he belonged, thinking he was still a disbeliever, there is no diyah to be paid by his murderer. Yet, it is obligatory for him (i.e. the murderer) to emancipate a believing slave in expiation. Muslim scholars differ concerning the principle on which there is no diyah obligatory in case of killing a believer mistaking him for a disbelieving enemy. Some scholars say that the people of the killed person are disbelievers, so they are not entitled to claim his diyah. Others maintain that the blood sanctity and inviolability of the one who has converted to Islam but has not yet moved from his disbelieving country is still insufficient. This is because Allah, Exalted be He, says, …But those who believed and did not emigrate - for you there is no guardianship of them...' (Qur'an: Al-Anfal: 72) Yet, some other scholars view that the diyah is obligatory in this case, and that it is to be paid to the Muslims' Public Treasury."

In this respect, Shaykhul-Islâm Ibn Taymiyah (may Allah have mercy on him) said:

"The diyah is due in case of mistakenly killing a Muslim whose people are disbelievers, provided he is among them due to a legal excuse, such as being a captive or one who is unable to emigrate. Contrarily, there is by no means diyah for mistakenly killing a Muslim who willingly

chooses to remain among his disbelieving people who are enemies of the Muslims, as he thus exposes himself to danger without a legal excuse."

The proof of the fact that it is obligatory for the perpetrator's agnate relatives to pay the *diyah* in case of manslaughter is derived from the following *hadîth* narrated by Abû Hurayrah (may Allah be pleased with him). He narrated:

"The Messenger of Allah (PBUH) gave the judgment that a male or female slave is to be given (as diyah) in compensation for an abortion of a woman from (the tribe of) Banû Lahyân. Then the woman on whom the compensation had been imposed died, so the Messenger of Allah (PBUH) ordered that her offspring and her husband are to inherit her property and that her agnate relatives are to pay the diyah (blood money)."

(Related by Al-Bukhârî and Muslim)

So, the <u>hadîth</u> states that the <u>diyah</u> for manslaughter is to be paid by the perpetrator's agnate relatives; an opinion on which there is consensus among scholars.

Perhaps the wisdom behind this opinion is that if the *diyah* for manslaughter is to be paid by the perpetrator, there will be a great financial harm caused to him for a sin he has unintentionally committed, as such accidents happen recurrently. Thus, if the committer is to shoulder the consequences alone, i.e. paying the *diyah*, it will be regarded as doing him financial injustice. On the other hand, there must be a kind of compensation for the murdered person, as he is considered an inviolable soul, whose killing causes harm to his heirs, especially his family. Hence, the Wise Lawgiver<sup>12</sup> obliges those who stand beside and support the perpetrator to help him in such a matter (i.e. in paying the *diyah*), just like the obligation of providing for their needy relatives or freeing their captivated relatives. Since one's agnate relatives generally inherit from one when one dies, they have to compensate on one's behalf when one commits manslaughter due to the general principle stating, "Sharing in affliction in return for getting benefit."

However, the expiation is obligatory on the perpetrator of manslaughter for the following reasons:

- Such expiation is a means of showing respect to the inviolable murdered soul.
- Manslaughter is by no means void of the perpetrator's heedlessness.

Such expiation does not allow the perpetrator to be completely
free from paying for his guilt; since the diyah is not obligatory
upon him (as it is paid by his agnate relatives), he must expiate for
his offense.

That is to say, there are several wisdoms and benefits behind obligating the payment of *diyah* upon the perpetrator's agnate relatives and the expiation for the manslaughter upon the perpetrator himself. Glory be to Allah, the Wise and the Knowing, Who has ordained for people what benefits them in both their religious and worldly lives.

It is important to point out that slaves, poor people, minors, insane people, females, and those of religions different from that of the perpetrator, are not considered among the perpetrator's agnate relatives (who are obliged to pay the *diyah*), as they are not among those who are supposed to be his supporters and backers.

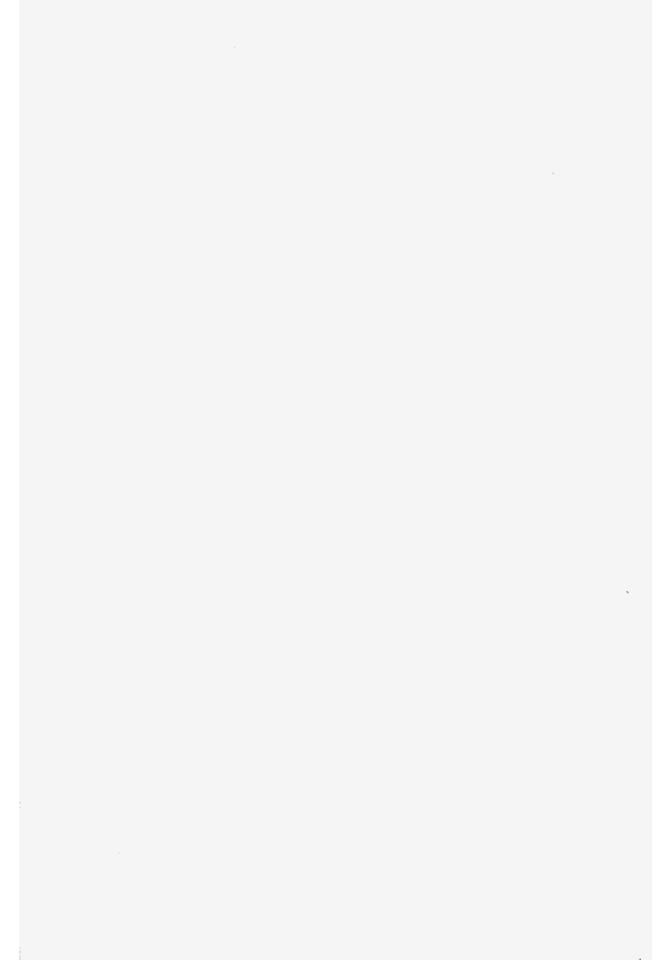
In this connection, the agnate relatives of the perpetrator of manslaughter are allowed to defer the payment of the diyah for three years. Moreover, the magistrate (or the one in authority) should resort to ijtihåd to specify a certain share of the diyah for each of them to pay according to their financial states. In doing so, he is to begin with the closest relatives, then the closer, and so on and so forth. Yet, Shaykhul-Islâm Ibn Taymiyah (may Allah have mercy on him) said:

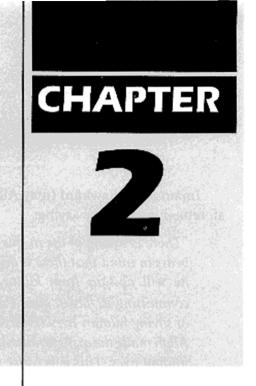
"The diyah is not to be delayed if the ruler perceives a benefit in instant payment..." 13

## **Endnotes**

- 1 Diyah in Arabic means a compensation payment for a murder or an injury; it mainly means "blood money", and it can also mean "indemnity".
- 2 Al-Bukhârî (6878) [12/250] and Muslim (4351) [6/166].
- 3 See the footnote in Ar-Rawd Al-Murbi [7/165].
- 4 Ahmad (6718) [2/183] and Abû Dâwûd (4565) [4/451].
- 5 Ahmad (4583) [2/11], Abû Dâwûd (4547) [4/443], An-Nasâ'î (4805) [4/409], and Ibn Mâjah (2627) [3/267].
- 6 See: "Bidâyat Al-Mujtahid" [2/486].
- 7 Al-Bukhârî (6910) [12/314] and Muslim (4367) [6/177].

- 8 See: Al-Ijmá` [p. 172].
- 9 See: "Al-Mughnî" [12/16].
- 10 See: "Fathul-Qadîr (The Bestowal of the Omnipotent)" (1/792).
- 11 Al-Bukhårî (6740) [12/30] and Muslim (4366) [6/176].
- 12 The Lawgiver of Sharî ah (Islamic Law) is Allah, Exalted be He; the term can also refer to the Prophet (PBUH) as he never ordained but what was revealed to him by Allah.
- 13 See the footnote in Ar-Rawd Al-Murbi (7/287).





# Qisâs for Murder

Muslim scholars unanimously agree on the legality of qisâs (legal retribution) for murder in the case of premeditated murder provided the conditions of such a murder are met. This is because Allah, Exalted be He, says:

"O you who have believed, prescribed for you is legal retribution for those murdered - the free for the free, the slave for the slave, and the female for the female..." (Qur'an: Al-Baqarah: 178)

Allah, Exalted be He, also says:

"And We ordained for them therein a life for a life..."

(Qur'ân: Al-Mâ'idah: 45)

This is also stated in the Law of the Torah, and we are to abide by the laws of the previous heavenly revealed religions as long as they are not abrogated by our *Shari`ah* (Islamic Law). In addition, Allah, Exalted be He, says:

"And there is for you in legal retribution [saving of] life, O you [people] of understanding, that you may become righteous."

(Qur³ân: Al-Baqarah: 179)

Imâm Ash-Shawkânî (may Allah have mercy on him) commented on the aforementioned verse saying:

"There is saving of life in this ruling ordained by Allah, as when one bears in mind that there is qisas (legal retribution) if he kills another, he will abstain from killing, avoid it, and restrain himself from committing it. Thus, qisas (legal retribution) is considered a means of saving human lives. This verse is a great example of eloquence, as Allah made the qisas for murder, which is death, a means of preserving human lives. This is because such a ruling deters people from killing one another to preserve and maintain their own lives. In this verse, Allah addresses the 'people of understanding', as they are the ones who consider the consequences of their actions and avoid that which may cause anticipated harm. However, those characterized by heedlessness and lightheadedness do not, at their times of rage, consider or listen to the voice of reason regarding the bad consequences that may result from their actions. Some of those murderous persons said:

"I will clear my disgrace with my sword

And let Allah ordain for me whatever He may ordain"

Then, Allah, Exalted be He, shows the reason behind ordaining retribution (qisâs) in case of murder saying, ...that you may become righteous.' (Qur'ân: Al-Baqarah: 21) That is to say, avoiding killing because of the qisâs becomes a means leading to righteousness."

In this connection, the Sunnah (Prophetic Tradition) states that the heir or legal representative of the murdered person would choose one of three choices: to seek qisās, to pardon the murderer in return for the diyah, or to pardon him and give it (i.e. the diyah) up, which is considered the best thing to do. Abû Hurayrah (may Allah be pleased with him) narrated that the Prophet (PBUH) said:

"Whoever suffers the murder of a relative, he has the choice between two options: either he may receive the payment of diyah (blood money) or he may choose  $qi\underline{s}\hat{a}\underline{s}$  (legal retribution)."

(Related by the Group of Compilers of *Hadîth*)

Moreover, Allah, Exalted be He, says:

"...But whoever overlooks from his brother [i.e. the killer] anything, then there should be a suitable follow-up and payment to him [i.e. the deceased's heir or legal representative] with good conduct..."

(Qur'ân: Al-Baqarah: 178)

Thus, both the verse and the <u>hadîth</u> mentioned above indicate that the relative or the legal representative of the deceased has the right to choose between carrying out the <u>qisâs</u> and receiving the <u>diyah</u>. Yet, pardoning the murderer and giving up the <u>diyah</u> is considered the best thing to be done by the deceased's heir or legal representative. Allah, Exalted be He, says:

"... And to forego it is nearer to righteousness..."

(Qur'an: Al-Baqarah: 237)

This is also supported by the <u>hadîth</u> narrated by Abû Hurayrah (may Allah be pleased with him) in which the Prophet (PBUH) says:

"No person forgives an act of injustice (done to him) but Allah will add to his honor for it." 3

(Related by Ahmad, Muslim, and At-Tirmidhî)

Moreover, forgoing the qisâs (legal retribution) is the best thing to do as long as it does not cause evil or any kind of corruption. Shaykhul-Islâm Ibn Taymiyah (may Allah have mercy on him) maintained, "Pardoning is not to be applied in the case of assassination, as such a kind of murder cannot be guarded against, such as the case of killing in banditry." Moreover, Al-Qâdî views that the qisâs is to be applied on the killer of Imâms (Muslim rulers), as it is an act of general corruption. The great Muslim scholar Ibnul-Qayyim commented on the story of the men of 'Uraynah' saying:

"Killing through assassination obligates applying the qisas on the killer. Such a legal penalty is not be dropped by pardoning the killer, and no compensation can be accepted as a substitute. This is the opinion adopted by the scholars of Medina, and it is one of the two opinions attributed to Ahmad. In addition, it is the opinion maintained by Shaykhul-Islâm Ibn Taymiyah (may Allah have mercy on him) and he gave a fatwa according to it."

The heirs or the legal representatives of the killed person do not have the right of  $qi\underline{s}\hat{a}\underline{s}$  (legal retribution) unless the following four conditions are met:

- 1- The murdered person must be one of those whose blood is inviolable, as qisâs was ordained to save human lives. Thus, if a Muslim kills a disbeliever whose people are in a state of war with Muslims, or if he kills an apostate before the latter declares his repentance or an adulterer, there will be neither qisâs nor diyah due on the part of the perpetrator. Yet, he is to undergo discretionary punishment for arrogating to himself the ruler's authority.
- 2- The murderer must be mature and sane, for qisâs is a severe punishment that is not permissible to be applied to a minor or an insane whose case is lacking the condition of intention and premeditation, or their intentions, if any, are deemed void. This is based on the <u>hadîth</u> of the Prophet (PBUH) in which he said:

"There are three (persons) whose actions are not recorded: a sleeper until he awakes, a minor until he reaches puberty, and a lunatic until he comes to reason."

### Imâm Muwaffaqud-Dîn Ibn Qudâmah said:

"There is no disagreement among Muslim scholars that there is no qisas to be exacted against a minor or an insane; the same applies to anyone in a state of unconsciousness due to an excusable reason, such as being asleep or losing consciousness."

3- There must be equivalence between the murdered person and the murderer when the action of killing has taken place. In other words, they must be equal in religion, and freedom or slavery. That is, the murderer should not be superior to the murdered person due to being a Muslim or being a free person while the murdered is a disbeliever or slave. Accordingly, a Muslim is not to be sentenced to death in qisâs for killing a disbeliever. To illustrate, the Prophet (PBUH) said:

"No Muslim should be killed in qisâs (legal retribution) for killing a disbeliever."

(Related by Al-Bukhârî and Abû Dâwûd)

Moreover, a free person is not to be killed in qisas for killing a slave, as Imam Ahmad related that `Alî Ibn Abû Tâlib (may Allah be pleased with him) said:

"It is an act of the Sunnah that no free person is to be killed in qisas for killing a slave."

This is because if the murdered person is not equal to the murderer with regard to the aforementioned aspects, carrying out the  $qi\underline{s}\hat{a}\underline{s}$  on the latter will be more than what the murdered person is entitled to.

No preference is to be taken into consideration between the murdered person and the murderer in matters other than those mentioned above. So, a handsome person is not preferred to an ugly one; if the former kills the latter, the qisâs is to be applied. The same ruling applies when an honorable man kills a mean one, an adult kills a minor, a male kills a female, or a sane person kills an insane one. This is due to the generality of the Qur'anic verse in which Allah, Exalted be He, says:

"And We ordained for them therein a life for a life..."

(Qur'ân: Al-Mâ'idah: 45)

Allah, Exalted be He, also says:

"... the free for the free..." (Qur'an: Al-Baqarah: 178)

4- The murdered person must not be one of the murderer's children or descendants. That is to say, none of the parents is to be killed in qisâs for killing his/her son, daughter, or any of his/her descendants. This is because the Prophet (PBUH) said:

"A parent is not to be killed (in qisas) for his/her child." "

Commenting on the aforementioned <u>hadîth</u>, **Ibn 'Abdul-Barr** said, "This <u>hadîth</u> is well-known among the scholars of <u>Hejaz</u> and Iraq..." This <u>hadîth</u> and the other <u>hadîths</u> that carry the same meaning are of the general rule stating the obligation of <u>qisâs</u> for murder; this is the opinion adopted by the majority of Muslim scholars.

However, the son is to be killed in qisas when killing any of his parents, due to the generality of the Qur'anic verse in which Allah, Exalted be He, says:

"... prescribed for you is legal retribution for those murdered..."
(Qur'an: Al-Baqarah: 178)

Yet, the case when a parent kills any of his/her children is an exception of the aforesaid general ruling according to the legal proofs.

Hence, if the aforementioned four conditions are met, the relatives or the legal representatives of the murdered person will have the right of qisâs.

In fact, Allah's ordainment of qiṣâṣ involves a divine mercy on people as well as a means of saving human lives, as Allah, Exalted be He, says:

"And there is for you in legal retribution [saving of] life..."

(Qur'an: Al-Baqarah: 179)

So woe to those who claim that the obligation of qisâs involves brutality and mercilessness. Such people do not consider the cruelty of the offender when he kills an innocent person, spreads panic in the country, widows women, orphans children, and ruins houses. Such people show mercy toward the murderer rather than the innocent, so woe to their narrow-mindedness and unenlightenment. In this regard, Allah, Exalted be He, says:

"Then is it the judgment of [the time of] ignorance they desire? But who is better than Allah in judgment for a people who are certain [in faith]." (Qur'an: Al-Ma'idah: 50)

The qisâs is a retaliatory punishment exacted by the victim or his/her heir or legal representative against the offender, returning like for like or evil for evil. The wisdom behind qisâs is that it quenches the flames of wrath and ire of the victim or his/her people. Allah, Exalted be He, ordained qisâs as a means of restraining aggression, extinguishing the flames of wrath in the hearts, letting the murderer taste what he has done to his victim, and saving and preserving human lives.

In this connection, the people of the Pre-Islamic Period of Ignorance (the Jâhiliyyah) used to exaggerate in retaliation, killing other innocent people, in addition to the murderer, in revenge. This is undoubtedly a kind of aggression and enflaming of the passions that does not fulfill the purpose of fair retribution. Rather, it is considered a means of more dissention and bloodshed. This is why Islam and its perfect Sharî 'ah (Islamic Law) ordain qiṣâṣ through which fair retaliation is executed only against the perpetrator, not against any innocent people; thus justice, mercy, and prevention of bloodshed are achieved.

We have previously mentioned the conditions obligating *qisâs*. However, if such conditions are met and thus the *qisâs* is obligated, it is not to be carried out unless some other conditions are fulfilled. Those conditions have been stated

by faqîhs (may Allah have mercy on them), who call them, "the conditions for the fulfillment of qisâs." They are three conditions:

- 1- The one who has the right to carry out the qisas in retaliation is to be a legally accountable person. That is, one in this case must be adult and sane. Therefore, if the one (or one of those) entitled to carry out the qisas is a minor or an insane person, one's guardian is not to carry it out on one's behalf. This is because the qisas involves vengeance to quench one's thirst of one's wrath, so its purpose will not be attained if it is taken by others on one's behalf. Therefore, the fulfillment of the gisâs must be postponed in such a case, and the offender is to be jailed until the one who has the right of qisas reaches puberty if he/she is a minor or regains sanity if he/she is an insane person. This is because Mu'âwiyah (may Allah be pleased with him) jailed Hudbah Ibn Khashram in a case entailing qisas until the son of the murdered person reached puberty, and none of the Prophet's Companions who lived at that time denied that ruling. Hence, it was considered a unanimous agreement by the Companions contemporary to Mu'awiyah (may Allah be pleased with him) on that ruling. In such a case, if the minor or the insane person who is entitled to carry out the qisas needs money for expenditure, only the guardian of the insane person has the right to forgo the qisas and accept the diyah instead. This is because no one knows when sanity is regained, unlike the minor who will grow up and reach puberty anyway.
- 2- There must be an agreement among the legal representatives of the murdered person if the qisâs is to be carried out. Therefore, it is not permissible for some of them to carry it out single-handedly without the consent of the others. This is because, fulfilling the qisâs is considered a shared undividable right, so if some of them fulfill it on their own initiative, they thus transgress the right of the other representatives without their permission and without being their legal guardian.

In this regard, if any of those having the right of  $qi\underline{s}\hat{a}\underline{s}$  is absent, a minor, or insane, the fulfillment of  $qi\underline{s}\hat{a}\underline{s}$  is to be delayed until the absent returns, the minor reaches puberty, and the insane regains sanity. Moreover, if any of those entitled to carry out the  $qi\underline{s}\hat{a}\underline{s}$  dies, his heirs are to act in this regard on his behalf. In addition, if some of those entitled to carry out the  $qi\underline{s}\hat{a}\underline{s}$  agree to forgo it, then the  $qi\underline{s}\hat{a}\underline{s}$  is no longer applicable.

The people entitled to carry out the *qisâs* are all the heirs of the deceased, men or women and children or adults, whether through blood or marital ties. However, some scholars maintain that the right of fulfilling or forgoing the *qisâs* is restricted to the deceased's agnate relatives. The latter is the opinion adopted by Imâm Mâlik and one of the opinions reported to be adopted by Imâm Ahmad. It is also the opinion maintained by Shaykhul-Islâm Ibn Taymiyah (may Allah have mercy on him).

3- Executing the qisas should never reach persons other than the offender, for Allah, Exalted be He, says:

"...And whoever is killed unjustly – We have given his heir authority, but let him not exceed limits in [the matter of] taking life. Indeed, he has been supported [by the law]." (Qur'an: Al-Isra': 33)

Therefore, if the action of carrying out the qisâs exceeds the limits, it is considered excessiveness, which is forbidden according to the aforementioned noble Qur'anic verse. Accordingly, if the qisâs is to be applied to a pregnant woman or a woman who conceived after being liable for the qisâs, she is not to be killed in qisâs until she gives birth to her baby. This is because killing such a pregnant woman causes the death of the fetus despite its innocence; Allah, Exalted be He, says:

"...And no bearer of burdens will bear the burden of another..."

(Qur'an: Al-An 'am: 164)

Hence, the pregnant murderer is not to be killed in retaliation unless she gives birth to her baby. Furthermore, after she gives birth to the baby, if there is another woman to breastfeed and take care of the infant, the qisās can be applied to the mother, as there will be no barrier preventing the execution of the qisās then. Otherwise, carrying out the qisās is to be delayed for two years, until the mother weans her infant. This is because the Prophet (PBUH) says:

"If a pregnant woman intentionally murders someone, she is not to be killed (in qisas) until she gives birth and cares for her baby. And if a woman commits adultery (and becomes pregnant), she is not to be killed (as legal punishment) until she gives birth and cares for her baby."

(Related by Ibn Mâjah)

Moreover, the Prophet (PBUH) said addressing the woman who confessed committing adultery:

"Go home until you give birth." Later, when she gave birth to the baby and came back to the Prophet (PBUH), he said to her, "Go home until you wean him." 12

Thus, the two <u>hadiths</u>, as well as the Qur'anic verse mentioned above, indicate the obligation of delaying the <u>qisâs</u> for murder if the perpetrator is pregnant, and this is unanimously agreed upon by Muslim scholars. Such obligation is a proof of the perfection and justice of <u>Sharî'ah</u>, as it maintains the fetuses in their mothers' wombs, and prohibits causing them any harm. Moreover, <u>Sharî'ah</u> observes the rights of children as well as the weak, protecting them against any harm and providing them with what preserves their lives. So, all praise be to Allah for endowing us with such a lenient, perfect, comprehensive <u>Sharî'ah</u> that encompasses all people's interests.

Executing the qisās for murder has to be in the presence and under the supervision of the ruler (or his representative or the one in authority), to avoid injustice and ensure the legality of execution. Moreover, the tool used for executing the qisās for murder must be quite sharp, such as a sword or a knife, for the Prophet (PBUH) says:

"When you kill (in qisâs), do it in a good manner (i.e. gently and mercifully)." 13

Thus, it is prohibited to execute the  $qi\underline{s}\hat{a}\underline{s}$  using a blunt tool, as this is considered excessiveness in killing.

If the person entitled to execute the  $qi\underline{s}\hat{a}\underline{s}$  is able to perform it in the prescribed legal manner, he is allowed to do it. If not, he is to be ordered by the ruler (or the one in authority) to appoint another person to perform it on his behalf.

As for retaliation, the most preponderant opinion among scholars is that the offender is to be punished in a way equal to the harm he caused to the victim. This is because Allah, Exalted be He, says:

"And if you punish [an enemy, O believers], punish with an equivalent of that with which you were harmed..."

(Qur'an: An-Nahl: 126)

Allah, Exalted be He, also says:

"...So whoever has assaulted you, then assault him in the same way that he has assaulted you..." (Qur'an: Al-Baqarah: 194)

In addition, the Prophet (PBUH) ordered that the head of a Jew should be crushed between two stones in retaliation for crushing the head of a girl of the Ansâr (the Supporters)<sup>14</sup>.

Imâm Ibnul-Qayyim (may Allah have mercy on him) said:

"The Qur'an and the principles of justice agree that the offender, before being killed in retribution, is to be retaliated against in the same way he did to the victim before murdering him. That was applied by the Prophet (PBUH), and it is proved through the Qur'an, Sunnah (Prophetic Tradition), and the traditions of Companions..."

Hence, if the perpetrator has cut off the hand of the victim and then killed him, he is to be punished in the same way he acted, i.e. his hand is to be cut off and then he is to be killed in retribution. Similarly, if the perpetrator has killed the victim with a stone, or has drowned him, or anything of the kind, he is to be punished in the same way before killing him. Still, the deceased's heir or legal representative, who is entitled to carry out the qisâs, has the right to forgo such retaliation for injuries and make the qisâs restricted to cutting off the head of the offender with a sword, and this is more favorable. In this respect, if the offender has killed the victim with an unlawful means, he is to be killed with a sword in qisâs. Nowadays, the act of killing with a sword in qisâs can be replaced with killing by shooting, provided it is performed by someone who shoots accurately.

- 1 See: "Fathul-Qadir (The Bestowal of the Omnipotent)" (1/179).
- 2 Al-Bukhârî (2434) [5/108], Muslim (3292) [5/132], Abû Dâwûd (4505) [4/420], At-Tirmidhî (1409) [4/21], An-Nasâ'î (4799) [4/407], and Ibn Mâjah (3624) [3/265].
- 3 Muslim (6535) [8/357] and At-Tirmidhî (2034) [4/376].
- 4 See: "Al-Ikhtiyarat Al-Fiqhiyyah" [p. 422].
- 5 Some people from the tribe of 'Uraynah came to Medina and committed theft and murder after embracing Islam. The Prophet (PBUH) ordered that their hands and feet were to be cut (and it was done); then their eyes were branded with heated pieces of iron and they were left without water until they died.
- 6 See the footnote of "Ar-Rawd Al-Murbi" [7/207].
- 7 Abû Dâwûd (4403) and An-Nasâ'î (3462).
- 8 See: "Al-Mughni" [9/357].

- 9 Al-Bukhârî (111), Abû Dâwûd (4530) [4/433], At-Tirmidhî (1416) [4/24], An-Nasâ'î (4758) [4/392], and Ibn Mâjah (2658) [3/282].
- 10 At-Tirmidhî (1405) [4/19], Ibn Mâjah (2661) [3/283].
- 11 Ibn Mâjah (2694) [3/300].
- 12 Abû Dâwûd (4442) [4/381] and Muslim (4406) [6/198].
- 13 Muslim (5028) [7/107].
- 14 Al-Bukhârî (6877) [12/649] and Muslim (4337) [6/159].
- 15 See: "I'lâm Al-Mwaqi'în" [1/301-302].



# **Qisâs** for Parts of the Body and Wounds

The qisas for parts of the body and wounds is stated according to the Qur'an, the Sunnah, and the consensus of Muslim scholars. Allah, Exalted be He, says:

"And We ordained for them therein a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for wounds is legal retribution..." (Qur'an: Al-Ma'idah: 45)

Moreover, it is recorded in the Two Authentic Books (of Al-Bukhârî and Muslim) that when Ar-Rubayyi` broke a girl's incisor, the Prophet (PBUH) said:

"(The law prescribed in) the Book of Allah is qisas."

Thus, the ruling applying to the killing of a human soul is to be applied regarding parts of the body and wounds, provided that the aforementioned conditions for the validity of the qisâs are met. Such conditions involve that

the victim's blood must be inviolable, the offender must be mature and sane, both the offender and the victim must be equal as regards slavery or freedom, and the offender is not to be one of the victim's parents. On the other hand, the ruling inapplicable in the case of killing is inapplicable in the case of injuries of parts of the body and wounds; this is the general rule in this connection.

Likewise, the condition that obligates the  $qi\underline{s}\hat{a}\underline{s}$  for parts of the body and wounds is the same as that which obligates it for killing, namely premeditation. Accordingly, there is no  $qi\underline{s}\hat{a}\underline{s}$  in cases of injuries done by mistake or quasi-intentional ones. With regard to  $qi\underline{s}\hat{a}\underline{s}$  for parts of the body, an eye is to be taken in retaliation for an eye, a nose for a nose, an ear for an ear, a hand for a hand, a foot for a foot, etc.; the right organ for the right organ and the left for the left. By the same token, a tooth of the offender is to be broken in retaliation for a similar tooth of the victim, an upper eyelid for an upper eyelid, a lower eyelid for a lower eyelid, an upper lip for an upper lip, and a lower lip for a lower lip. This is because Allah, Exalted be He, says:

"...and for wounds is legal retribution..."

(Qur'ân: Al-Mâ'idah: 45)

This is because eyelids and lips have upper and lower parts which should be considered in order to make the  $qi\underline{s}\underline{a}\underline{s}$  carried out accurately. In addition, the same finger of the perpetrator is to be taken in retaliation for that of the victim, and a right hand for a right hand, a left hand for a left hand, a right elbow for a right elbow, and so on and so forth, as such parts of the body can be accurately distinguished. Likewise, a penis is to be taken in retaliation for a penis, as a penis has a specific end, so the  $qi\underline{s}\underline{a}\underline{s}$  can be accurately exacted, without transgression. This is indicated in the general meaning of the Qur'anic verse that states:

"...and for wounds is legal retribution..."

(Qur'ân: Al-Mâ'idah: 45)

There are three conditions for the validity of the qisâs for parts of the body:

First: There must be assurance that there will be neither injustice nor transgression. That is, cutting off the part of the body in retaliation must be from a specific joint or to a certain point. Thus, if there is no specific limit, retaliation will be impermissible. In other words, there is no retribution applicable for an unlimited wound, such as a deep flesh-cutting wound that reaches one's abdomen, as there is no specific depth that can be pointed out. Similarly, there is no retribution

applicable for fractures (not teeth breaking) such as breaking someone's tibias, femurs, or arm, as accurate application of retaliation cannot be guaranteed. As for breaking someone's tooth, the qisâs can be accurately applied by rasping the tooth of the perpetrator until it becomes just like that of the victim broken by the former.

Second: There must be equivalence between the part of the body of the offender and that of the victim in both name and location. That is, a right organ is not to be cut off in retribution for cutting off a left one and vice versa; this applies to hands, legs, eyes, ears, and the like. This is because each of the aforementioned organs has a specific name and use, so they are different from each other. For example, a little finger is not to be cut off in retaliation for a ring finger, for each has a different name. Similarly, a main body part is not to be cut off for a secondary one.

Third: The body part of the perpetrator in question must be in the same condition as that of the victim regarding soundness and completion. So, a sound, functional hand or leg is not to be cut off in retaliation for a paralyzed one. Likewise, a hand or leg with complete fingers is not to be cut off for a defective hand or leg. Furthermore, the qisâs is not to be applied to a sound eye for a blind one, as they are not equal. Similarly, a sound, articulate tongue is not to be cut off in retribution for a speechless one, due to the inferiority of the latter.

Contrarily, a defective organ can be cut off in retribution for a sound, complete organ. That is, a paralyzed limb can be cut off for a functional one, and a defective limb (such as one having incomplete fingers) can be cut off in retaliation for a sound one. This is because the defective organ is similar to the sound organ in respect of the nature of creation, but they differ in quality. Moreover, by cutting off the defective organ, the one who has the right of qisâs receives part of his right, so there will be neither injustice nor excessiveness. And if he is not satisfied, it is permissible for him to receive the diyah (indemnity) instead.

### Qi<u>s</u>â<u>s</u> for Wounds

The qisâs is to be carried out for every wound that reaches the bones, as it can be exacted with neither injustice nor excessiveness, such as the wound of the head, face, upper arm, leg, thigh and foot. This is because Allah, Exalted be He, says:

"...and for wounds is legal retribution..."

(Qur'ân: Al-Mâ'idah: 45)

As for the wounds that do not reach the bones, it is impermissible to apply the qisâs to them, even if they are head wounds or the like. To illustrate, there is no retribution applicable as regards the case of the wound in the internal part of the abdomen, the chest or the upper part of the chest, as the depth of the wound cannot be specified so there is no assurance that there will be neither injustice nor excessiveness. In this regard, Ibn Mâjah related that the Prophet (PBUH) said,

"No qi<u>s</u>a<u>s</u> is to be executed in a skull-fracturing wound, an abdomen deep flesh-cutting wound, nor a bone-breaking-and-dislocating wound."

Moreover, Shaykhul-Islâm Ibn Taymiyah (may Allah have mercy on him) said:

"The qisâs for wounds is stated by the Noble Qur'ân, the Sunnah and the consensus of Muslim scholars, provided that the retaliatory injury is just like the original one. That is, if the head of a person is fractured by someone, the injured person has the right to retaliate for it in the same way. But if it is unattainable to exact just, accurate retribution, as in the case of breaking an internal bone or any other kind of head fracture less in degree than a bone-clearing wound, retribution becomes impermissible, and the diyah (indemnity) becomes obligatory instead."

As for applying the qisâs in cases of striking someone with the hand, a stick, a whip, or the like, Shaykhul-Islâm Ibn Taymiyah said:

"Some scholars say that there is no retribution (qisâs) in such cases, but there must be a discretionary punishment. However, it is reported that the Rightly-guided Caliphs, the Companions and their Followers maintained the permissibility of carrying out the qisâs in such cases. The latter opinion is the one adopted by Imâm Ahmad and other faqîhs, and it is the one stated in the Sunnah of Allah's Messenger (PBUH); this is the sound opinion in this regard. In support of this view, 'Umar Ibnul-Khattâb (may Allah be pleased with him) said to his subjects, 'I do not send my governors to strike your bodies. By Him in Whose Hand my soul is, I shall carry out the qisâs against whoever (governor) does so, as I have seen the Messenger of Allah (PBUH) applying the qisâs to himself."

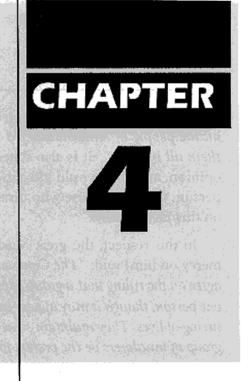
(Related by Imâm Ahmad)

This is when the governor impermissibly strikes his subjects. Yet, due to the scholars' consensus, there is no qisas against the governor if he legally strikes them."

Moreover, Ibnul-Qayyim (may Allah have mercy on him) said:

"The Shâfi`î, Hanafî, Mâlikî, and late <u>H</u>anbalî scholars maintain that there is no retribution for a slap or strike. Some of them claim that there is a juristic consensus on this, exceeding the analogical deduction, the obligation stated in the legal texts (of the Qur'an and Sunnah) as well as the consensus of the Prophet's Companions. Moreover, Allah, Exalted be He, says, 'And if you punish [an enemy, O believers], punish with an equivalent of that with which you were harmed...' (Qur'an: An-Nahl: 126) Hence, it is for the person slapped or struck to do the same to the person who has done it, returning like for like; a slap for a slap and a strike for a strike, in the same spot and with the same tool or a similar one. This makes it so close to achieve the prescribed equality in qisas reasonably and legally as a discretionary punishment void of transgression and anything related to it. This is the opinion derived from the guidance of Allah's Messenger (PBUH) and the Rightly-guided Caliphs, the analogical deduction, and the texts containing the opinions of Imam Ahmad."5

- 1 Al-Bukhârî (2703) [5/376] and Muslim (4350) [6/164].
- 2 Ibn Mâjah (2637) [3/273].
- 3 Abû Dâwûd (4537) [4/438].
- 4 See the footnote of "Ar-Rawd Al-Murbi" [7/221].
- 5 See: "I'lâm Al-Muqi'în" [1/294].



### Qi<u>sâs</u> When a Group Kills an Individual

When a group of people premeditatedly and wrongfully kills an individual, the whole group is to be killed in qisas according to the most preponderant opinion adopted by the Muslim scholars (may Allah have mercy on them). This opinion is based on the general meaning of the Qur'anic verse in which Allah, Exalted be He, says:

"O you who have believed, prescribed for you is legal retribution for those murdered... And there is for you in legal retribution [saving of] life, O you [people] of understanding, that you may become righteous." (Qur'an: Al-Baqarah: 178-179)

The aforementioned opinion is also the one unanimously maintained by the Prophet's Companions. To illustrate, Sa'îd Ibnul-Musayyab reported that 'Umar Ibnul-Khattâb (may Allah be pleased with him) had killed seven men of the people of Sana in retribution for killing one man. 'Umar said: "If all the people of Sana had acted together in killing him, I would have killed them all in qisas." It is also stated that other Companions were of the same opinion, and they would kill a group of people in retribution for killing one person; there was none who disagreed with them, so there was a consensus on this juristic view.

In this respect, the great Muslim scholar **Ibnul-Qayyim** (may Allah have mercy on him) said: "The Companions and the majority of faqîhs unanimously agree on the ruling that a group of people are to be killed (in retribution) for killing one person, though it may appear to contradict the basic principle of qisâs, namely saving of lives. They maintain so as not to let the non-application of the qisâs to a group of murderers be the pretext for further conspiracy to shed blood."

Moreover, **Ibn Rushd** (Averroës) said: "The wisdom behind the application of the qisâs for murder is to avoid further murder as stated in the Qur'an. Thus, if a group of conspirators is not killed in retribution for killing an individual, people will band together in killing. Another reason is that retaliation and deterrence are not attained except through killing all the murderers (in qisâs)."

In this regard, a group of murderers is killed for killing an individual provided the action of each member of the group is fatal. In other words, to kill them all in qisas, it is a condition that all of them have participated in killing the victim, and that the deed of each one of them has been enough to cause death if done separately, so each of them is considered a separate murderer. Even if the deed of each one of them is not separately fatal and they have worked together in killing the victim, the qisas, namely killing them all, is obligatory, as the indirect actions of some of them have supported the direct actions of the rest, resulting in the murder. Similarly, if a person is forced by someone to kill another, it is obligatory to apply the qisas for murder to both of them (i.e. to kill both), the murderer and the one who compelled him to do it, provided the conditions for the validity of fulfilling the qisas are met. This is because the murderer meant to preserve his own life by killing another, and the one who has compelled him to do it has been the instigator and direct cause of certain death. However, if the murder is committed by a minor or an insane person due to the order of someone, only the latter, who has given the order, is to be killed in qisâs. This is because the murderer has just been a tool used by such a person, so the *qisâs* is to be applied only to him as the real cause of the murder, not to the one used as a tool. Likewise, if the murderer is a legally accountable person (i.e. adult and sane) but unaware of the prohibition

of killing, such as those brought up in non-Islamic countries, the qisâs is to be applied only to the instigator. It is not to be applied to the perpetrator due to his ignorance of the prohibition of killing, so the qisâs is applied to the real cause of the murder, namely the instigator. On the other hand, if the one ordered to murder is a legally accountable person and aware of the prohibition of killing, then the qisâs is to be applied to him as well, as he has committed the murder without right. In this regard, the Prophet (PBUH) says, "No person is to be obeyed in a matter of disobedience to the Creator." This is the rule to follow, whether the accessory is a ruler, a master or whoever. Moreover, the one who enjoins such deeds of disobedience to Allah should be discretionarily punished according to what the Imâm of Muslims (the ruler or the one in authority) judges. This is because such an accessory is considered to have committed an act of disobedience to Allah, so he has to receive a discretionary punishment as a means of deterrence.

Furthermore, if two persons conspired and premeditatedly killed someone unjustly, and one of the two does not meet the conditions for the application of the  $qi\underline{s}\hat{a}\underline{s}$ , it is to be applied only to the other one who meets them (i.e. he is to be killed in  $qi\underline{s}\hat{a}\underline{s}$ ), as he has participated in a murder intentionally and wrongfully. That is, the  $qi\underline{s}\hat{a}\underline{s}$  for murder, namely capital punishment, is not to be applied to his partner due to the absence of the conditions obligating the  $qi\underline{s}\hat{a}\underline{s}$  on him, not due to absence of the reason for the  $qi\underline{s}\hat{a}\underline{s}$ . Accordingly, the  $qi\underline{s}\hat{a}\underline{s}$  is to be applied to the one who meets the conditions obligating it. In this connection, if someone holds a person for someone else to kill, the killer is to be killed in  $qi\underline{s}\hat{a}\underline{s}$ , and the other, who has held the victim for him, is to be given life imprisonment.

The ruling applied to the group killing an individual is the same ruling applied in the case of injuries to parts of the body and wounds caused by a group to an individual. To clarify, if a group of people participates in damaging or cutting off a part of the body of a person or wounding him, the qisâs (namely a similar injury) is applied to every member of the group, provided their actions in the crime are undistinguished from one another. For example, if they put a piece of iron on the hand of a person and begin to press heavily on it until his hand is cut off, then the hands of them all are to be cut off in qisâs. This is based on the fact that two witnesses came to 'Alî Ibn Abû Tâlib (may Allah be pleased with him) and testified against someone that he had stolen. Thereupon, 'Alî ordered to amputate the hands of the thief (as a prescribed punishment). After that, they (the two witnesses) came to him along with another person and said, "This is the real thief, as we were wrong concerning the first one."

'Alî Ibn Abû Tâlib rejected their testimony concerning the second man and obligated them to pay an indemnity to the first, and said to them: "If I thought you had intentionally testified against the first, I would have amputated your hands."5 (This narration is related by Al-Bukhârî in a mu'allag form and related by others as well) This incident indicates that the qisas, namely cutting their hands off, would have been applied if they had intentionally testified against the man. This is also supported by analogical deduction regarding the case when a group of people kills an individual, in which case the qisas is killing the murderers. The qisas is estimated according to the consequence of the offense, whether the consequence is death or a minor result. This is because the resulting effect of an offense is the actual crime. To illustrate, if someone cuts off a finger of another, and the wound causes other fingers or the entire hand to be cut off (due to gangrene for example), then the similar hand of the offender is to be cut off in qisas, not just a finger. Moreover, if the injury spreads to the rest of the body until it causes the death of the victim, the perpetrator is to be killed in qişâs for murder.

It is impermissible to apply the *qisâs* for an injury or a wound before it heals to verify that there is no further damage. This is due to the *hadîth* narrated by Jâbir (may Allah be pleased with him) in which he said:

"A man was wounded and he wanted qisas to be applied to the offender. However, the Prophet (PBUH) forbade applying qisas to the culprit until the wounded person was wholly recovered."

(Related by Ad-Dâraqutnî and other compilers of Hadîth)

This is surely in the best interest of the victim, as it verifies that the wound will neither affect the function of any other part of the body nor cause death. Therefore, if the claimer opposes this ruling and exacts the qisās before he wholly recovers, and then his wound spreads and affects another part of the body, he has no right to seek any kind of qisās for the effects of the injury. In this regard, 'Amr Ibn Shu'ayb, on the authority of his father and his grandfather respectively, narrated:

"A man stabbed another in his knee with a horn, so the injured man came to the Prophet (PBUH) and said, 'I want to apply the qisâs (i.e. to cause the offender an equal injury).' The Prophet (PBUH) said to him, 'Only when you are recovered.' Then the man came again (before recovery) and said, 'I want to apply the qisâs.' So, the Messenger of Allah (PBUH) enabled him to execute the qisâs. After

that, the man came to the Prophet and said, 'O Messenger of Allah! I am limping.' Thereupon, the Prophet (PBUH) said, 'I forbade you (to apply the qiṣâṣ until you verify you are wholly recovered) but you disobeyed me, so Allah disgraced you, thus, you have no right to ask for qiṣâṣ for the lameness that afflicted you.' Then the Messenger of Allah (PBUH) forbade executing qiṣâṣ for injuries until the injured person was completely recovered.' "B

(Related by Imâm Ahmad and Ad-Dâraqutnî)

Hereby, Muslims come to know the virtues of their Sharî 'ah (Islamic Law) and realize the perfect justice and the broad mercy it encompasses. True are the Words of Allah, Exalted be He, Who says:

"And the Word of your Lord has been fulfilled in truth and in justice. None can alter His Words, and He is the Hearing, the Knowing."

(Qur'an: Al-An'am: 115)

So, woe to those who replace the sacred Sharî'ah with unjust, innovated, defective, imperfect laws. Allah, Exalted be He, says about such people and their innovated laws:

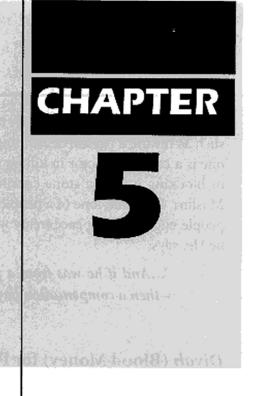
"... Wretched it is for the wrongdoers as an exchange."

(Qur'an: Al-Kahf: 50)

All praise be to Allah, Lord of the Worlds.

- I `Abdur-Razzaq (18075) [9/476] and Ad-Daraqutni (3427) [3/142].
- 2 See the footnote of "Ar-Rawd Al-Murbi" [7/180].
- 3 See: "Bidâyat Al-Mujtahid" (2/489).
- 4 Ibn Abû Shaybah (33706) [6/549], Al-Bukhârî (7257) [13/286], and Muslim (4742) [6/430].
- 5 Ad-Daragutnî (3361) [3/128] and Al-Bukhârî [12/282].
- 6 Mu'allaq (Suspended) <u>Hadith</u>: It is the <u>hadith</u>, the beginning of whose chain of transmission has one or more successive narrators missing, even until the end of the chain of transmission.
- 7 Ad-Dâraqutnî (3092) [3/71] and Al-Bayhaqî (16112) [8/117].
- 8 Ad-Dåraqutnî (3091) [3/71] and Al-Bayhaqî (16115) [8/118].

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## Diyah (Blood Money)

Diyah (blood money) is the money paid by the offender to the victim or his legal representative as legal compensation.

### Its Ruling

Diyah (blood money) is obligatory according to Allah's Book, the Qur'ân, the Sunnah (Prophetic Tradition) and the consensus of Muslim scholars. Allah, Exalted be He, says:

"... And whoever kills a believer by mistake – then the freeing of a believing slave and a compensation payment [diyah] presented to his [i.e. the deceased's] family..." (Qur'an: An-Nisa': 92)

Moreover, it is stated in a sahih hadith that the Prophet (PBUH) says:

"He whose relative is murdered has to choose one of two ways; either to accept the diyah (blood money) or execute the qisås."

(Related by the Group of Compilers of *Hadîth*)

Hence, the diyah is obligatory to be paid by whoever kills a person directly, such as hitting a person or running over him by a car. The same applies when one is a causative factor in killing another, such as digging a hole on the road or blocking it with a stone causing another's death, whether the victim is a Muslim, Dhimmî, one of a people who are not Muslims' enemies, or one of a people engaged in a peace treaty with Muslims. This is because Allah, Exalted be He, says:

- "...And if he was from a people with whom you have a treaty
- then a compensation payment presented to his family ... "

(Qur'an: An-Nisa': 92)

### Diyah (Blood Money) for Premeditated Murder

If the murder is intentionally committed, the *diyah* is to be paid from the killer's own money, as the original rule states that the compensation for an offense is obligatory to be paid by the offender. In this regard, **Al-Muwaffaq Ibn Qudâmah** said:

"Muslim scholars unanimously agree that the diyah for premeditated murder is obligatory to be taken from the murderer's wealth according to the original rule, not to be paid by the perpetrator's agnate relatives. Allah, Exalted be He, says, "...And no bearer of burdens will bear the burden of another..." (Qur'an: Al-An'am: 164)"

However, this original rule – that the *diyah* is to be paid from the perpetrator's own money – is inapplicable in the case of manslaughter. This is because cases of manslaughter recurrently happen and the amount of *diyah* for killing a human being is very large. Thus, it would be unfair if the offender had to pay it alone. Therefore, wisdom necessitates that such a large amount of *diyah* is to be paid by the offender's agnate relatives as a means of helping and supporting the offender and a way of relieving him as his case is excusable. However, in the case of premeditated murder, the murderer has no excuse for his crime, so he deserves no commutation of penalty; rather, killing him as *qisâs* (legal retribution) is applicable to him. Yet, if the premeditator murderer is pardoned by the deceased's family or legal representatives, i.e. they decide not to kill him in retaliation, he is to be burdened by paying the *diyah* alone, without his relatives' support, as a means of redeeming his life. Thus, the *diyah* becomes obligatory for him to pay, just like the obligation of paying indemnity for damages.

### Diyah for Quasi-premeditated Murder and Manslaughter

The diyah in these two cases is to be paid by the perpetrator's agnate relatives. To illustrate, Abû Hurayrah (may Allah be pleased with him) narrated:

"Two women from (the tribe of) Hudhayl fought with each other and one of them hit the other with a stone that killed both her and the fetus she carries. The killer's agnate relatives and those of the victim submitted their case to the Prophet (PBUH) who judged that the diyah for the fetus was a male or female slave, and that for the murdered woman was to be paid by the murderer's agnate relatives."

(Related by Al-Bukhârî and Muslim)

This <u>hadîth</u> indicates that the <u>diyah</u> for quasi-premeditated murder is to be paid by the family of the offender.

Concerning the diyah for manslaughter, Ibnul-Mundhir said:

"All the juristic scholars, on whose rulings we rely, unanimously agree that the diyah (blood money) for manslaughter is to be paid by the agnate relatives of the perpetrator."

### Moreover, Al-Muwaffaq said:

"We are not acquainted with any disagreement among scholars on the fact that it (i.e. the diyah for manslaughter) is to be paid by the agnate relatives of the perpetrator."

The same ruling also applies to the cases similar to manslaughter, such as falling on someone while asleep and killing him, digging a well or a hole excessively where someone falls therein and dies, and suchlike cases.

However, the diyah is not required when killing is the result of legally permissible matters, such as discipline and the like. For example, if a man kills his wife or son while disciplining them, or if a ruler kills any of his subjects while disciplining him, there is no diyah imposed on the killer. This is because discipline is a legally permissible deed, provided the killer has not been excessive nor has he transgressed the customary limits while disciplining them. Otherwise, if there is excessiveness or transgression and death is the result, then the diyah is to be paid.

In this concern, if disciplining a pregnant woman causes her abortion, the perpetrator is to pay the *diyah* for killing the fetus, namely giving a male or female slave as *diyah*. This is due to the <u>hadîth</u> recorded in the Two <u>Sahîh</u>s<sup>5</sup>

which states that the Prophet (PBUH) gave the judgment that a male or female slave is to be given as the *diyah* for causing a woman's abortion<sup>6</sup>. This is the opinion adopted by the majority of scholars.

It may happen that someone scares a pregnant woman that causes her abortion, as when a mighty ruler summons her or when an enemy of hers turns people of high of authority against her. In such cases, the doer is liable for the *diyah* for killing the fetus, as the doer is the main cause for its death. To exemplify, 'Umar Ibnul-Khattab, the great Muslim Caliph, sent for a woman whose husband was absent and there were some people who used to visit her. Thereupon, she said:

"Woe to me! Why does 'Umar send for me?" On her way to 'Umar, being scared at the idea of meeting him, she suffered from the throes of childbirth and gave birth to a male baby who just cried twice and died. 'Umar asked some of the Prophet's Companions about the legal judgment concerning this incident and some of them said to him, 'There is no blame on you concerning that (i.e. you are not guilty).' Thereupon, 'Alî Ibn Abû Tâlib (may Allah be pleased with him) said, 'If they say that to satisfy you, then they are not sincere to you. You are to pay the diyah (blood money) for the baby, as you have scared her (by summoning her) so she gave birth to him untimely.' "

Furthermore, whoever orders a legally accountable person to descend a well, climb a tree, or the like, and that person falls down and dies while fulfilling the order, the former is not liable for any diyah, as he has done him neither wrongdoing nor transgression. Yet, if the victim is not a legally accountable person, then the person who has ordered him is liable for the diyah, as he is the cause of the victim's death. In addition, if a person hires someone to descend a well or climb a tree for example and that hired person dies during performing the task, the hirer will not be liable for any diyah, as there is neither transgression nor assault on his part. Similarly, whoever hires someone to dig him a well in his house and the hired person dies due to an accidental collapse not caused by anyone, the hirer will not be liable for anything, as there is no transgression on his part.

Hence, we realize to what extent Islam takes an interest in the preservation of lives and the prevention of bloodshed. Nevertheless, carelessness and negligence have become so widespread nowadays that some people drive heedlessly and recklessly endangering their lives as well as the lives of others. Many an innocent soul is destroyed as a result of such heedlessness! Nowadays,

the death of an entire group of people or a whole family can simply be caused at the hands of a youth driving his car recklessly and irresponsibly without the least consideration of the consequences. Unfortunately, the parents of such heedless youth and teens may be the cause of such tragedies, as they buy them luxurious cars as if urging them to destroy innocent lives. In this way, such parents give their children fatal weapons to play with, playing with the lives of innocent people, causing them panic as well.

Those people have to fear Allah concerning the way they bring up their children in their best interest, safeguarding their lives and the lives of others. Moreover, those in authority have to deter whoever deserves deterrence to guarantee safety, security, and stability, for Allah may make authority the means of a more powerful deterrent – to some people – than the teachings of the Qur'ân.

- 1 Dhimmi: A free non-Muslim living in and under the protection of an Islamic state.
- 2 See: "Al-Mughni" (2/28).
- 3 See: "Al-Ijmá" (p. 74).
- 4 See: "Al-Mughni" (12/21).
- 5 The Two Sahîhs: the Two Authentic Books of Al-Bukhârî and Muslim.
- 6 Al-Bukhârî (7317) [13/365] and (6740) [12/30] and Muslim (4373) [6/179] and (4366) [6/176].
- 7 'Abdur-Razzáq (18010) [9/458].



# Amounts of *Diyah* (Blood Money)

An amount of diyah differs on basis of Islam, freedom, gender, and whether the murdered human is existent or still a fetus. The greatest amount of diyah is the amount paid for killing a Muslim free man; it is a thousand mithqâls of gold, twelve thousand dirhams (Islamic dirhams of which every ten equal seven mithqâls of gold), a hundred camels, two hundred cows, or two thousand sheep. This is according to the hadîth related by Abû Dâwûd on the authority of Jâbir (may Allah be pleased with him) that goes:

"The Messenger of Allah (PBUH) gave judgment that the diyah to be paid by those possessing camels is one hundred camels, by those possessing cows is two hundred cows, and by those possessing sheep is two thousand sheep." In addition, 'Ikrimah reported on the authority of Ibn 'Abbâs:

"A man was killed and the Messenger of Allah (PBUH) gave judgment that the diyah to be paid was twelve thousand dirhams." <sup>4</sup> (Related by Abû Dâwûd and Ibn Mâjah)

Moreover, it is stated in the letter the Prophet (PBUH) gave to 'Amr Ibn Hazm:5

"One thousand dinars are to be paid (as diyah) by the people possessing gold."

(Related by An-Nasâ'î)

Scholars disagree as to which of the aforementioned types should be regarded as the original type of diyah, i.e. the sufficient one. In other words, they disagree regarding which type the guardian of a killed person is obliged to accept if the diyah is paid in. According to some scholars, the victim's guardian is obliged to accept whatever type of the above-mentioned diyah, regardless of whether the guardian is originally a possessor of that type or not, as long as the payer has fulfilled his obligation. A second opinion, which is the judgment maintained by the majority of scholars, stipulates that only camels are the main type to be paid as diyah. They base their opinion on the following two hadiths: the Prophet (PBUH) said:

"(The diyah) for (killing) a believing soul (i.e. person) is one hundred camels."

#### And:

"Verily, the diyah for quasi-premeditated murder is one hundred camels."

Abû Dâwûd also related that 'Umar Ibnul-Khattâb (may Allah be pleased with him) once delivered a sermon and said:

"Camels have become dear," so he decreed that the diyah to be paid by those possessing gold is one thousand dinars, by those possessing silver twelve thousands, by those possessing cows two hundred cows, by those possessing sheep two thousand sheep, and by those possessing garments two hundred garments."

Since the Messenger of Allah (PBUH) was strict concerning the payment of camels as *diyah* in cases of premeditated murder and was lenient in this regard in cases of manslaughter, then camels are the original type to be paid as *diyah*; this is also the opinion upon which scholars unanimously agreed. In fact, this is the preponderant opinion in this regard, according to which the other aforementioned types of *diyah* are subsidiary and dependent on estimation.

In cases of premeditated and quasi-premeditated murders, the diyah of camels, which are one hundred camels, are paid exactly by being divided into four parts; twenty five one-year-old she-camels, twenty five two-year-old she-camels, twenty five three-year-old she-camels, and twenty five four-year-old she-camels. That is according to the following narration of Az-Zuhrî on the authority of As-Sâ'ib Ibn Yazîd, who said:

"During the lifetime of the Messenger of Allah (PBUH), the diyah was divided into quarters: twenty five one-year-old she-camels, twenty five two-year-old she-camels, twenty five three-year-old she-camels, and twenty five four-year-old she-camels."

So, if the payer of *diyah* pays it in this fashion, the guardian of the murdered person is obliged to accept it. Moreover, the payer can pay the value of each of the four groups of camels according to their estimated price if he likes.

As regards manslaughter, the *diyah* is not that strict; the hundred camels are divided into five groups: twenty one-year-old she-camels, twenty two-year-old she-camels, twenty three-year-old she-camels, twenty four-year-old she-camels, and twenty one-year-old he-camels, or the value of these five groups according to their estimated price.

The diyah to be paid for killing a free man of the People of the Scripture (the Jews and the Christians) equals half the diyah paid for killing a Muslim, be he a Dhimmî, one of a people who are not Muslims' enemies, or one of a people engaged in a peace treaty with Muslims. This ruling is based on the following hadîth narrated by 'Amr Ibn Shu' ayb on the authority of his father and his grandfather respectively:

"The Messenger of Allah (PBUH) gave judgment that the diyah for (killing one of) the People of the Scripture is half the diyah paid for (killing) a Muslim."

(Related by Imâm Ahmad, Abû Dâwûd, and other compilers of Hadîth)

The diyah paid for killing a magus is eight hundred Islamic dirhams<sup>9</sup> (of which every ten equal seven mithqåls 10 of gold), be he a Dhimmî, 11 one of a people who are not Muslims' enemies, or one of a people engaged in a peace treaty with Muslims. This judgment is based on the following marfû (traceable) hadîth reported by Ibn 'Adiyy on the authority of 'Uqbah Ibn 'Âmir (may Allah be pleased with him) that the Prophet (PBUH) said:

"The diyah paid for killing a Magi is eight hundred dirhams."

This is the opinion maintained by most scholars.

The diyah paid for killing a female Jew, Christian, Magi, or Pagan is half the diyah paid for their males, just like the diyah paid for killing a Muslim woman is half the diyah paid for killing a Muslim man. Ibnul-Mundhir said in this connection, "Scholars unanimously agree that the diyah paid for killing a Muslim woman equals half the diyah paid for killing a Muslim man. It is stated in the letter the Prophet (PBUH) gave to 'Amr Ibn Hazm: "The diyah paid for killing a woman is half the diyah paid for killing a man."

The great Muslim scholar Ibnul-Qayyim (may Allah have mercy on him) said:

"Women are not equal to men and are not as beneficial as men are. Men can assume religious offices, assume guardianships, observe night watching, perform the duty of jihâd (fighting in the Cause of Allah), establish civilizations, perform crafts indispensable for human life, protect their people and preserve religion, unlike women. Hence, the diyah paid for killing a woman is not equal to that paid for killing a man. Since women are not equal to men, the Lawgiver rendered a woman's diyah half a man's diyah."

In cases of wounds, the diyah of a woman is equal to that of a man as long as the legal amount to be paid is less than the third of the diyah for murder. This is based on the marfû' hadîth narrated by 'Amr Ibn Shu'ayb on the authority of his father and his grandfather respectively; the Prophet (PBUH) said:

"The diyah (indemnity for a wound) of a woman is equal to that of a man unless it does not reach a third of the man's diyah (blood money)." 16

This <u>hadîth</u> was related by An-Nasâ'î, and the ruling therein was stated as Sunnah (Prophetic Tradition) by Sa'îd Ibnul-Musayyab.

### Ibnul-Qayyim also said:

"Although Abû Hanîfah, Ash-Shâfi`î, and others disagree with that ruling, maintaining that the diyah of a woman is half that of a man in all cases, the Sunnah is more deserving to be followed. If, in cases of wounds, a woman is paid half of the diyah, i.e., half a man's diyah for a similar wound, it will be too little to compensate an afflicted woman. Therefore, in cases of wounds, a woman's diyah (indemnity) is equal to that of a man as long as it does not reach third of the man's diyah (blood money) paid in case of murder. A woman's diyah

is made equal to that of a man, not half of it, as long as it is less than the third of the amount of the man's diyah in case of murder, so that a woman may be compensated sufficiently. For this same reason, the diyah paid for killing a fetus, male or female, is the same because the diyah of a fetus is already so little. The same ruling on fetuses is applied to the value of diyah for a woman's wound as long as it does not reach one third of the man's diyah for a murder."

The diyah for a serf is equal his/her worth, be the serf a male or a female, a child or an adult, with no maximum amount, as long as it does not exceed a free man's diyah, as scholars unanimously agree. However, Ahmad, Mâlik, Ash-Shafi 'î, and Abû Yûsuf maintain that a serf's diyah is equal his/her worth, even if it exceeds the diyah of a free man.

If a pregnant woman is assaulted and she has suffered abortion as a result, the diyah for the dead fetus, be it male or female, is a ghurrah, which is a child male or female serf whose value is estimated as five camels. This is according to the <u>hadîth</u> narrated by Abû Hurayrah (may Allah be pleased with him) that states:

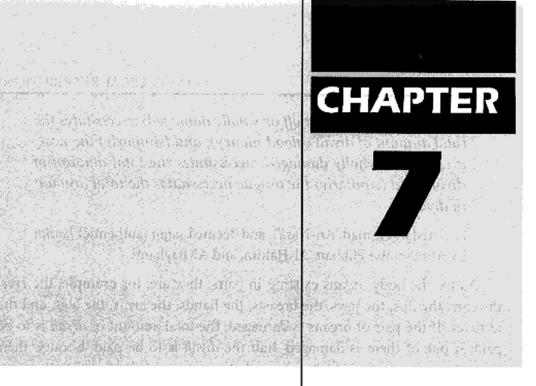
"The Messenger of Allah (PBUH) gave the judgment that a ghurrah is to be given (as diyah) for an abortion case of a woman from (the tribe of) Banû Lahyân." 18

(Related by Al-Bukhårî and Muslim).

According to the majority of scholars, that *ghurrah* (the serf or the five camels), which equals one tenth of the *diyah* (blood money) paid for killing a woman, is inherited by the dead fetus' legal heirs, because it is the *diyah* for its murder.

- 1 Mithqâl: A standard measure that equals 4.25 grams
- 2 A dirham of silver equals 2.975 grams of silver.
- 3 Abú Dâwûd (4544) [4/441].
- 4 Abû Dâwûd (4546) [4/443], At-Tirmidhî (1392) [4/12], An-Nasâ'î (4807) [4/413], and Ibn Mâjah (2629) [3/268].
- 5 The Prophet (PBUH) ordered that this letter be written and given to 'Amr Ibn Hazm to deliver it to the people of Yemen.

- 6 Dinar: An old Arab coin that equals 4.25 grams of gold.
- 7 Abû Dâwûd (4542) [4/441].
- 8 An-Nasâ'î (nos 4868-4872) [4/428-430].
- 9 A dirham of silver equals 2.975 grams of silver.
- 10 Mithqâl: A standard measure that equals 4.25 grams.
- 11 Dhimmi: A free non-Muslim living in and under the protection of an Islamic state.
- 12 Abû Dâwûd (4583) [4/459], At-Tirmidhî (1417) [4/25], An-Nasâ'î (4820) [4/414], and Ibn Mâjah (2644) [3/276].
- 13 Al-Bayhaqî in his "As-Sunan" (16344) [8/176], At-Tirmidhî (4/26], and Al-Bayhaqî (16338) [8/175].
- 14 The Lawgiver of the Shari ah (Islamic Law) is Allah, Exalted be He; the term can also refer to the Prophet (PBUH) as he never ordained but what was revealed to him by Allah.
- 15 See: "I'lâm Al-Mwaqi'în" [2/149] and "Zâdul-Ma'âd" [3/205].
- 16 An-Nasâ'i (4819) [4/414].
- 17 See: "I'lâm Al-Mwagi'în" [2/148-149].
- 18 Al-Bukhârî (6740) and An-Nasâ'î (4821).



## Diyah (Indemnity) for Body **Organs, Senses and Functions**

### First: Diyah (Indemnity) for Organs

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Some scholars aver that there are forty-five organs in the human body. Some of these organs are unique, others are in pairs, and some are more than two parts. If a unique organ, such as the nose, the tongue, or the male organ, is damaged, diyah (indemnity) for it equals the diyah (blood money) paid if the injured person was murdered. Therefore, the amount of diyah is estimated on the previously defined basis, whether the injured person is male or female, free or a slave, Muslim or not. This is because damaging a sole organ that Allah has created unique damages the entire function of that organ. This is what makes it similar to murder, hence deserving diyah equal to that paid in cases of murder as agreed upon by all scholars. It is stated in the letter the Prophet (PBUH) gave to 'Amr Ibn Hazm:

"The male organ (if cut off or wholly damaged) necessitates the total amount of diyah (blood money); and (similarly) the nose, if cut off or wholly damaged, necessitates the total amount of diyah; and (similarly) the tongue necessitates the total amount of diyah."

(Related by A<u>h</u>mad, An-Nasâ'î, and deemed <u>sahîh</u> (authentic) <u>h</u>adîth by A<u>h</u>mad, Ibn <u>H</u>ibban, Al-<u>H</u>âkim, and Al-Bayhaqî)

As for the body organs existing in pairs, they are, for example, the eyes, the ears, the lips, the jaws, the breasts, the hands, the arms, the legs, and the testicles. If the pair of organs is damaged, the total amount of *diyah* is to be paid; if one of them is damaged, half the *diyah* is to be paid, because their importance lies in their function, aesthetic value, and the fact that there are only two of them in the body. Al-Muwaffaq said that there was not a single scholar who disagreed on that ruling <sup>1</sup>.

It is stated in the letter the Prophet (PBUH) gave to 'Amr Ibn Hazm:

"The nose, if cut off or wholly damaged, necessitates the total amount of diyah (blood money); and (similarly) the tongue (if cut off or wholly damaged) necessitates the total amount of diyah; and (similarly) the lips necessitate the total amount of diyah; and (similarly) the testicles necessitate the total amount of diyah; and (similarly) the backbone necessitates the total amount of diyah; and (similarly) the eyes necessitate the total amount of diyah; and (similarly) one leg necessitates half the total amount of diyah."

**Ibn** 'Abdul-Barr (may Allah have mercy on him) said, "The letter written (by the Prophet) to 'Amr Ibn <u>Hazm</u> is well-known to scholars. Its contents are agreed upon, with a few exceptions."

As for the human body organs consisting of three parts, if the three are damaged, the total amount of *diyah* (blood money) is to be paid, and if one is damaged, one third of the *diyah* is to be paid, and so on. For example, a nose consists of three parts, namely two nostrils and the cartilage that separates them; the *diyah* is divided among the three of them.

Regarding the body organs consisting of four parts, if the four are damaged, the total amount of *diyah* (blood money) is to be paid. If only one of the four

organs is damaged, one-fourth of the diyah is to be paid. The four eyelids are an example of such organs; if the four eyelids are damaged, the total amount of diyah is to be paid. This is because the eyelids have an aesthetic value and an important function, as they cover the eyes and protect them against hot and cold weather. So, a quarter of the total amount of diyah is to be paid if one of them is damaged, and so on.

If the ten fingers or the ten toes are cut off, the total amount of diyah is to be paid. The indemnity for each finger or toe equals one-tenth of the total amount of diyah. Ibn 'Abbâs narrated (in a marfû' hadîth) that the Prophet (PBUH) said:

"The indemnity to be paid in case the fingers or the toes are cut off is equal; ten camels for each finger or toe."

(Related and deemed sahîh (authentic) by At-Tirmidhî)

Al-Bukhârî also related on the authority of Ibn 'Abbâs that the Prophet (PBUH) said:

"This and that (referring to the little finger and the thumb) are the same (concerning the due diyah)."

Those two narrations show that it is obligatory to pay the *diyah* (indemnity) in case of damaging (or cutting off) any of the fingers or the toes; one-tenth of the total amount of *diyah* is to be paid for each.

The diyah (indemnity) for each knucklebone of a finger or a toe is onethird of a tenth of the total amount of diyah (approximately 3.3%). Since each finger has three knucklebones, the diyah for each finger is divided among the three knucklebones. Similarly, since a thumb has only two knucklebones, the diyah for each is half the tenth of the total amount of diyah (i.e. 5%), and the same applies to the toes.

The diyah for each tooth is half the tenth of the total amount of diyah, i.e., five camels. In a marfû' hadîth, 'Amr Ibn Hazm narrated that the Prophet (PBUH) said:

"Five camels are to be paid (as indemnity) for a tooth."

(Related by An-Nasá'í)

Al-Muwffaq commented, "There is no disagreement among scholars on the fact that the indemnity for each tooth is five camels."

### Second: Diyah (Indemnity) for Functions

The word "functions" here refers to the functions of the aforementioned organs, such as hearing, sight, smell, speech, movement, etc., due to the fact that each organ has a specific function. Thus, the four senses, namely hearing, sight, smell, and taste, are among the body functions. If any one of them is damaged, the total amount of diyah is to be paid in compensation. "The majority of scholars agree that the total amount of diyah is to be paid if the sense of hearing is damaged," said Ibnul-Mundhir. Al-Muwaffaq also said, "There is no juristic disagreement on the obligation of paying the total amount of diyah in compensation for damaging someone's sense of hearing." It is stated in the letter the Prophet (PBUH) gave to 'Amr Ibn Hazm:

"The total amount of diyah is to be paid for damaging someone's sense of smell."

During the reign of 'Umar Ibnul-Khattab (may Allah be pleased with him), a man beat another until the latter lost his hearing, sight, sanity, and his ability to copulate. As a result, 'Umar passed a judgment that four amounts of the total amount of diyah were to be paid to that man (i.e. his guardian). It is noteworthy that none of the Companions objected to that judgment passed by 'Umar.

The total amount of *diyah* is to be paid for each of these functions, such as damaging someone's faculty of speech, power of reason, ability to walk, ability to eat, ability to copulate, ability to control urinating or excreting. This is because each of these functions is of a great benefit for man that it could not be compensated.

Damaging the hair of the four parts of the body (namely the hair of the head, the beard, the eyebrows, and the eyelashes) obligates paying the total amount of diyah (blood money) in compensation for each. If one eyebrow is damaged, half the total amount of diyah is to be paid. If the hair of one line of the eyelashes is damaged, a quarter of the total amount of diyah is to be paid, because the diyah is divided among the four lines of eyelashes.

This draws attention to the fact that Islam greatly respects and honors a man's beard. This is why damaging a beard necessitates the payment of the total amount of diyah. A man's beard is dignified thanks to its function, aesthetic value, and the solemnity it gives to one's appearance. The Messenger of Allah (PBUH) enjoined Muslims to grow their beards and groom them well. He (PBUH) prohibited Muslims from shaving their beards or cutting them short.

Therefore, woe to those who transgress by shaving their beards; they thus copy the appearance of women, disbelieving people and hypocrites, and give up their manliness to effeminacy. This is why a poet said:

"Man at times of moral affliction

May see what is ugly as perfection"

Men who follow this attitude should come to reason, reconsider their conduct, and obey the Messenger of Allah (PBUH), who ordered Muslim men to grow their beards that Allah created for them as signs of beauty and manliness.

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1 See the footnote in "Ar-Rawd Al-Murbi" [7/257].
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<sup>2</sup> See the footnote in "Ar-Rawd Al-Murbi" [7/257].

<sup>3</sup> At-Tirmidhî (1395) [4/13].

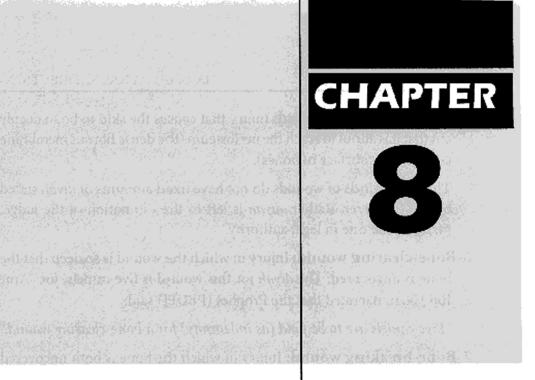
<sup>4</sup> Al-Bukhārî (6895) [12/280].

<sup>5</sup> See: "Al-Mughni" (12/130)

<sup>6</sup> See" "Al-Ijmā " [p. 168].

<sup>7</sup> See: "Al-Mughni" (12/115).

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# **Diyah** (Indemnity) for Wounds and Fractures

### A- Wounds

Ancient Arabs defined ten kinds of face and head wounds; each of them has its own name and ruling concerning diyah (indemnity).

- 1-Abrasion: Injury that causes the skin to be scraped without bleeding.
- 2- Scarification: Injury that causes shallow cuts in the epidermis with little bleeding.
- **3-Flesh-cutting wound:** Injury that causes both the epidermis and the flesh to be cut, but not so deeply.
- 4-Deep flesh-cutting wound: Injury that causes the flesh to be deeply cut.

5-Non-periosteous wound: Injury that causes the skin to be so deeply cut that it is about to reach the periosteum (the dense fibrous membrane covering the surface of bones).

These five kinds of wounds do not have fixed amounts of *diyah* stated by the Lawgiver. Rather, *diyah* is left to the estimation of the judge, jurist, or the one in legal authority.

6-Bone-clearing wound: Injury in which the wound is so deep that the bone is uncovered. The diyah for this wound is five camels, for `Amr Ibn Hazm narrated that the Prophet (PBUH) said:

"Five camels are to be paid (as indemnity) for a bone-clearing wound."

- 7-Bone-breaking wound: Injury in which the bone is both uncovered and broken. The diyah for this kind of wound is ten camels as maintained by Zayd Ibn Thâbit (may Allah be pleased with him) and no one of the Prophet's Companions was known to have questioned the verity of this ruling.
- 8-Bone-breaking-and-dislocating wound: Injury in which the wound causes the bones to be uncovered, broken, and dislocated so that a bone would need to be both relocated and splinted. The diyah for such a wound is fifteen camels. It is stated in the letter written by the Prophet (PBUH) to 'Amr Ibn Hazm that he (PBUH) said:

"Fifteen camels are to be paid (as indemnity) for a bone-breaking-anddislocating wound."

- 9-Skull-fracturing wound: Injury that reaches the outer cover of the brain.
- 10-Brain wound: Injury in which the layer covering the brain is penetrated.

The diyah (indemnity) for the last two types of wounds equals one third of the total amount of diyah (blood money). This is because `Amr Ibn Hazm narrated that the Prophet (PBUH) said,

"One third of the total amount of diyah (blood money) is to be paid (as indemnity) for a skull-fracturing wound."

Since a brain wound is more serious, and can hardly be survived, no certain indemnity was specified for it, as it usually leads to death.

For a wound that reaches the inner part of the head (or the abdomen, the head, the back, the chest, the throat, etc.), one third of the total amount of *diyah* (blood money) is to be paid. It is stated in the letter given by the Prophet (PBUH) to `Amr Ibn Hazm,

"One third of the diyah (blood money) is to be paid (as indemnity) for the wound that reaches the inner part of the head."

#### Imâm Al-Muwaffaq said,

"This is the opinion maintained by the majority of scholars, among them are the Scholars of Medina, those of Kufa, the Scholars of Hadith, and the Scholars of Interpretive Opinions." <sup>2</sup>

#### **B- Fractures**

For a broken rib, that a splint could fix, the indemnity is one camel. The indemnity is also one camel for each of the two clavicles<sup>3</sup>. It was narrated that 'Umar Ibnul-Khattâb (may Allah be pleased with him) said:

"The diyah (indemnity) for (breaking) a rib is one camel<sup>4</sup>. The diyah for a clavicle is one camel."<sup>5</sup>

However, if a rib or a clavicle does not heal properly, a juristic assembly is to be held to estimate the proper *diyah* to be paid.

If an arm, forearm, thigh, leg, or wrist is broken and heals properly, the indemnity for it is two camels. Sa'îd narrated on the authority of 'Amr Ibn Shu'ayb:

"`Amr Ibnul-`Âs (may Allah be pleased with him) wrote to `Umar Ibnul-Khattâb asking him about the legal diyah (indemnity) for a broken forearm. `Umar answered him that the diyah for it is two camels, and four camels for breaking both forearms."

In addition, none of the Companions disagreed on that ruling. In cases of wounds and fractures for which no certain sums of *diyah* (indemnity) are specified, such as the spinal column and pubis, the *diyah* is to be estimated by a juristic assembly or the judge.

## Al-Muwaffaq (may Allah have mercy on him) said:

"The sound opinion is that there is no juristic estimation (of indemnity) except in the five cases: a rib, any of the two clavicles, and any of the two forearms (as their indemnities are already specified). Indeed, estimation is adopted only to determine the due amount of indemnity

for fractures other than the aforementioned ones. According to legal proofs, estimation through juristic assembly (or the judge) is obligatory in such cases as adopted during the reign of 'Umar..."

Scholars maintain that an estimated sum of compensation for a kind of a wound that afflicts a certain body part must not exceed a fixed sum of compensation allocated for a more serious wound in the same body part. That is to say, the amount of indemnity estimated by the judge to compensate a victim for a wound less serious than a bone-clearing wound must not exceed the fixed indemnity paid in case of a bone-clearing wound, which is five camels.

If the victim completely recovers and suffers no complications, the *diyah* (indemnity) should be retroactively estimated on the basis of his state while injured, when his state is worth *diyah* (indemnity) and his life is endangered due to the effect of injury.

#### Endnotes

- 1 Al-Bayhaqî (16203) [8/144] and `Abdur-Razzâq (17348) [9/314].
- 2 "Al-Mughni" (12/166).
- 3 Clavicle: A collarbone between the shoulder and the neck on each side of the body.
- 4 Ibn Abû Shaybah (27126) [5/380] and 'Abdur-Razzâq (17607) [9/367].
- 5 Ibn Abû Shaybah (26946) [5/365] and `Abdur-Razzâq (17578) [9/362].
- 6 See: "Al-Mughni" (12/166).



# **Expiation for Murder**

Expiation is a coverage of and an atonement for sins. There are evidences in the Qur'an, Sunnah (Prophetic Tradition), and consensus of Muslim scholars that expiation is an obligation. Allah, Exalted be He, says:

"And never is it for a believer to kill a believer except by mistake. And whoever kills a believer by mistake – then the freeing of a believing slave and a compensation payment [diyah] presented to his [i.e., the deceased's] family [is required] unless they give [up their right as a] charity. But if he [i.e., the deceased] was from a people at war with you and he was a believer then [only] the freeing of a believing slave; and if he was from a people with whom you have a treaty – then a compensation payment presented to his family and the freeing of a believing slave. And whoever does not find

[one or cannot afford to buy one] - then [instead], a fast for two months consecutively, [seeking] acceptance of repentance from Allah. And Allah is ever Knowing and Wise."

(Qur'ân: An-Nisâ': 92)

Abû Dâwûd and An-Nasâ'î related that the Messenger of Allah (PBUH) said regarding a murderer:

"Free a slave for him (i.e., for the murderer) so that Allah would free for each part of his body (the freed slave's body) a part of the murderer's from the Hellfire."

Expiation is an obligation only in cases of manslaughter and quasipremeditated murder. On the other hand, no expiation is enjoined for premeditated murder, for Allah says:

"But whoever kills a believer intentionally – his recompense is Hell, wherein he will abide eternally, and Allah has become angry with him and has cursed him and has prepared for him a great punishment." (Qur'an: An-Nisa': 93)

There is nothing regarding expiation mentioned in this case.

It was also related that Suwayd Ibnus-Sâmit had intentionally murdered a man, and the Messenger of Allah (PBUH) commanded that he should be killed and did not obligate expiation in his case. Also, when 'Amr Ibn Umayyah Ad-Damrî intentionally murdered two men, the Messenger of Allah (PBUH) ordered diyah (blood money) to be paid to their kinfolks, and did ask 'Amr Ibn Umayyah to make any expiation. The wisdom behind expiation is the alleviation of the sin, as manslaughter in most cases results from inattentiveness, unlike the major sin of premeditated murder, which is too grave to be alleviated by expiation.

Shaykhul-Islâm Ibn Taymiyah (may Allah have mercy on him) said:

"No expiation is enjoined for premeditated murder, nor is it for perjury. And this is not commutation of the penalty to be applied to the sinner."

Moreover, Muwaffaqud-Dîn Ibn Qudâmah et al. maintain that:

"Manslaughter can neither be classified as a prohibited nor permissible act, for it is just like the case of a murder committed by a demented person. However, since it (manslaughter) causes the expiry of a human soul, which enjoys a state of sanctity and preservation, expiation becomes obligatory in this case..."

According to the above, the wisdom behind the prescription of expiation for manslaughter lies in two points:

First: Manslaughter is always the result of the murderer's negligence and inattentiveness.

Second: Expiation is enjoined due to the sanctity of the human soul exterminated.

As for premeditated murder, there is no expiation called for in such a case, as expiation cannot alleviate such a grave sin. Nevertheless, remorse, repentance, and giving oneself up to the authorities for retaliation, assuage a murderer's sin. Hence, his duty towards Allah will be fulfilled through repentance, and that towards the victim's guardians through retaliation, unless they grant him forgiveness. Only the right of the victim remains unfulfilled and Allah would compensate him in the way He pleases. This is the opinion maintained by Ibnul-Qayyim in this regard, as stated in his Al-Jawâbul-Kâfî (The Sufficient Answer)<sup>2</sup>.

A person who commits manslaughter against any inviolable soul, even if it was that of a slave, a disbeliever under a covenant with Muslims, or a fetus through assaulting its mother, must expiate for it. Allah, Exalted be He, says:

"...And whoever kills a believer by mistake - then the freeing of a believing slave and a compensation payment [diyah] presented to his [i.e., the deceased's] family [is required] unless they give [up their right as a] charity. But if he [i.e., the deceased] was from a people at war with you and he was a believer then [only] the freeing of a believing slave; and if he was from a people with whom you have a treaty - then a compensation payment presented to his family and the freeing of a believing slave. And whoever does not find [one or cannot afford to buy one] - then [instead], a fast for two months consecutively, [seeking] acceptance of repentance from Allah. And Allah is ever Knowing and Wise."

(Qur'ân: An-Nisâ': 92)

So, expiation is obligatory in manslaughter whether the murderer commits it himself or with accomplices, directly or indirectly, as in cases of digging a big hole excessively and carelessly, setting up a knife or a pointed thing somewhere, or committing any suchlike trespasses that result in someone's death. Al-Muwaffaq said:

"Each of the accomplices (in manslaughter) is obliged to expiate for it, as maintained by most scholars, among them are Mâlik, Ash-Shâfi`î, and all Scholars of Interpretive Opinions."

According to the general meaning of the aforementioned verse, expiation for manslaughter is an obligation on the murderer with no exception, even if he was a minor, an insane person, or a slave.

The manner of expiation for manslaughter is freeing a believing Muslim slave, or, if one cannot afford emancipation, observing fast for two months consecutively. It is worth mentioning here that the feeding of an adequate number of underprivileged people is not a sufficient substitute for fasting. So, if the murderer is unable to fast, his obligation of expiation will remain unfulfilled. This is because Allah does not mention any substitute for expiation in the verse, and the availability of alternative expiation depends on legal texts, not on analogical deduction.

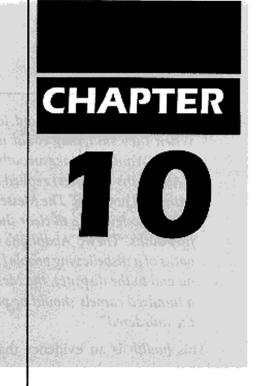
In case the killer in manslaughter is an insane person or a minor, his guardian is obliged to free a slave on his behalf. This is because none of them is qualified to observe fasting, nor is it permissible to observe fasting on someone's behalf. Thus, in case of manslaughter, expiation is an obligation on these two incompetent persons (an insane person or a minor) because expiation is a pecuniary duty like diyah, or a pecuniary act of worship like Zakâh.

Expiation is necessitated for each manslaughter committed by the same person, just like the case with *diyah* (blood money). However, it is noteworthy that there are some cases in which killing is permissible, such as killing a trespasser, an apostate, or an adulterer, in addition to killing in cases of retaliation, retribution, and self-defense. In such cases, no expiation is called for, because there would be no sanctity for the murdered soul.

It is important to point out that people nowadays disregard the expiation for manslaughter, although many are killed in car accidents. It usually happens that perpetrators of manslaughter are reluctant to observe fasting, especially if they have to expiate for more than one accident of manslaughter. Hence, their duty of expiation remains unfulfilled. Moreover, it has become common that the families of the manslaughter perpetrators do not pay or even share in the legal diyah, and those who share in it regard it as a voluntary act of charity. It is no wonder then that some perpetrators of manslaughter ask for charity in order to be able to pay the expiatory money, which hinders the fulfillment of such a religious obligation out of ignorance of such religious rulings. On the other hand, some swindlers may claim they are under debt to pay their expiatory money so that they would unjustly get charity. Such frauds might even support their lies with illegal, forged, or outdated documents, so they must be severely deterred.

## **Endnotes**

- 1 See: "Majmu`ul-Fatáwâ" (13/170).
- 2 See Ibnul-Qayyim in his "Al-Jawâbul-Kâfî" (The Sufficient Answer) (p. 348-350).
- 3 See: "Al-Mughnî" [10/39].



# Qasâmah (Compurgation)

Qasâmah (compurgation) refers to a number of oaths taken to clear someone from the accusation of murdering an innocent person. Such procedure of taking oath is to be followed when the body of a murdered person is found, the identity of his murderer is not known, and someone in particular is suspected.

Evidence from the *Sunnah* and the consensus of juristic scholars proves the authenticity of this practice. It is related in the Two <u>Sahîh</u>s on the authority of Sahl Ibn Abû <u>H</u>athmah,

"Both `Abdullâh Ibn Sahl and Muhayyisah Ibn Mas`ûd set forward to Khaybar. Then, Muhayyisah found `Abdullâh Ibn Sahl while the latter was bleeding profusely. Muhayyisah said to the Jews there, 'You have murdered him.' They said, 'No.' Then, (when `Abdullâh's relatives went and informed Allah's Messenger,) the Messenger of Allah (PBUH) said to them 'Would you take an oath (that the Jews did it) and be deserving of your kinsman's diyah?' (In another

narration, he (PBUH) said to them, 'Can you provide a proof?') When they said they could not, the Messenger of Allah (PBUH) asked, 'Would you take an oath (that the Jews have killed him)?' They ('Abdullâh's relatives) replied, 'How can we take an oath while we witnessed nothing?' The Messenger of Allah (PBUH) then suggested, 'Then the Jews are to clear themselves (from the charge) by taking fifty oaths.' They ('Abdullâh's relatives) said, 'How can we trust the oaths of a disbelieving people (referring to the Jews)?' Finally, (to put an end to the dispute), the Messenger of Allah (PBUH) ordered that a hundred camels should be paid (to the victim's folks) as diyah for the murdered."

This <u>hadîth</u> is an evidence that <u>qasâmah</u> is a legal procedure in Islam and that it is an independent part of <u>Sahrî`ah</u> (Islamic Law) and one of the principles of legal rulings, which particularize general proofs.

# The Conditions for Qasâmah (Compurgation)

#### 1- Enmity

One of the most important conditions for qasâmah is the existence of manifest hostility between the victim and the suspect, like the case with vindictive tribes or individuals leading to likely suspicion. The kinfolks of the victim are then entitled to take the oaths of anyone they suspect, even if they were not eyewitnesses of the crime. Shaykhul-Islâm Ibn Taymiyah (may Allah have mercy on him) maintains that hostility (borne by the suspect to the victim) is not the only factor considered in the case, but there are other aspects that make the accusation likelier to be valid, such as a group of people's departure from a certain place leaving a killed person behind, the testimony of incompetent witnesses...etc.

#### Imâm Ahmad said:

"I resort to qasamah if there is some inadequate testimony, if there is a good reason for the accusation, if there is hostility (between the suspect and the victim), or if the suspect is notorious for committing such a murder."

## Shaykhul-Islâm Ibn Taymiyah commented on this saying:

"Imâm Ahmad mentioned four reasons (for resorting to qasâmah); the presence of witnesses whose testimony is inadequate due to incompetence, the existence of a good reason for the accusation, such as a group of people's departure from a certain place leaving the victim behind, the presence of hostility between the suspect and the victim, or the suspect's notoriousness for committing murder. And these are sound reasons."

#### Ibnul-Qayyim (may Allah have mercy on him) also said:

"These are the best bases of compurgation, as they rely on the apparent signs that support the plaintiff's allegation and, accordingly, it becomes permissible for the plaintiff to take oaths. The judge in this case is entitled, or rather obligated, to entitle the plaintiff- in this case the victim's nearest kinfolk- to retaliation or diyah, even though the judge knows the plaintiff is not an eye witness of the crime."

The victim's kinfolks, however, must not take oaths unless they are nearly certain of their allegation. On the other hand, the judge must preach the victim's kinfolk on the punishment awaiting those who commit perjury.

#### 2- Legal Accountability

Among the conditions for *qasâmah* is that the suspect must be legally accountable; allegation cannot be made against a child or an insane person.

### 3- Availability

It is a condition that the suspect must be able to have committed the murder. Hence, if the suspect has been far from the crime scene at the time when it has been committed, the allegation is rejected.

## The Way Qasâmah (Compurgation) is Made

If the previously mentioned conditions are fulfilled, the plaintiffs, the victim's kinfolks, are asked to take fifty oaths that they believe a particular person committed the murder. The share of each of them in the number of oaths should be equal to their share in the victim's inheritance. The accused person must be present during the taking of oaths. If the victim's inheritors abstain from taking the fifty oaths or from completing them, the accused is asked to take fifty oaths that he is innocent, provided that the plaintiffs accept his taking of oaths. If the accused person completes the fifty oaths, then he is deemed innocent. However, if the plaintiffs do not agree to the accused person's taking of oaths, the judge must order the diyah to be paid from the Public Treasury. This is because when the Ansâr refused to let the Jews take oaths, as mentioned above, the Messenger of Allah (PBUH) ordered the diyah

to be paid from the Public Treasury, as there is no longer any means of proving the guilt of the accused, so that the murder of the innocent victim would not be uncompensated.

Scholars disagree regarding the legal consequence of a valid process of qasâmah if its conditions are fulfilled and the guardians of the victim have taken the fifty oaths. However, the sound opinion is that if the conditions of retaliation are fulfilled, the accused person is to be killed in qisâs. This is because the Prophet (PBUH) said:

"If fifty men of you take oaths against a man of them (that he is believed to be guilty), he will be delivered to you (to execute retaliation)."

Hence, taking oaths replaces, or is regarded as, an evidence.

As regards the legal consequence of a valid process of compurgation, the great scholar **Ibnul-Qayyim** said:

"Mere allegation is not sufficient for any liabilities to follow. If an allegation is based on presumptions such as notoriety and manifest hostility, the legislator allows this allegation to be supported via the process of taking fifty oaths, for it is most unlikely that fifty men would unjustly accuse an innocent man of murder. The hadith that states, "If people are granted (what they claim) on basis of their claim, they would claim the lives and properties of persons, but the oath must be taken by the defendant..." does not contradict the oath-taking process whatsoever, but it stresses that a mere claim is not enough for getting the right of retaliation..."

Scholars have the opinion that if a person dies as a result of over-crowdedness on the Jumu 'ah (Friday) Prayer or during performing tawâf (circumambulating the Ka'bah), his diyah is to be paid from the Public Treasury. They base their opinion on the following narration: A man had been killed on the Day of 'Arafah (the ninth of Dhul-Hijjah) during Hajj (Pilgrimage) as a result of over-crowdedness. His kinfolks went to Caliph 'Umar Ibnul-Khattâb and he told them they had to prove who had murdered him. 'Alî Ibn Abû Tâlib was present and he said to 'Umar,

"O Commander of the Believers! A Muslim's blood must be soon compensated. It is either to find out who murdered him or to pay his diyah from the treasury."

## **Endnotes**

- 1 Al-Bukharî (6142) [10/658] and Muslim (4318) [6/146].
- 2 See: "Al-Ikhtiyarât Al-Fiqhiyyah" [p. 425].
- 3 Muslim (4319) [6/149].
- 4 Al-Bukhārî (4552) [8/268] and Muslim (4445) [6/229].