

PROPOSING *DIYAT* AS AN ALTERNATIVE TO DEATH PENALTY FOR THE CRIME OF MURDER IN MALAYSIA

Siti Zubaidah Ismail

Department of Shariah and Law, Academy of Islamic Studies, Universiti
Malaya, 50603 Kuala Lumpur, Malaysia

Email: szubaida@um.edu.my

DOI: <https://doi.org/10.22452/syariah.vol32no3.6>

ABSTRACT

Pressure has increased on retentionist countries, including Malaysia, to consider finding an alternative penalty to the death penalty for murder. In mid-2023, the government decided to abolish the mandatory death penalty and proposed alternative sentences for the crime of murder. Concurrently, the concept of diyat or Islamic monetary compensation has also been raised by many quarters for consideration. This article examines the concept of forgiveness and diyat and addresses the potential impact of incorporating them into Malaysian criminal law. Employing a normative empirical method, the study utilized literature from predominantly secondary sources. Normative analysis was conducted to describe the findings. It is found that diyat has the potential to replace the death penalty for intentional killing, provided that amendments to the law are made. Most importantly, the victim's heirs must grant forgiveness. This is because the victim's family holds the right to decide whether to accept diyat, demand retribution or pardon the offender entirely. The

core changes required include amendments to the Penal Code and Criminal Procedure Code. This article contributes to the existing literature on the harmonization of Islamic principles and law, and explores the potential applicability of Islamic law within the Malaysian legal system.

Keywords: *diyāt, qisas, death penalty, alternative punishment, Islamic criminal law*

INTRODUCTION

Over the past few decades, many countries around the world have moved toward abolishing the death penalty for murder, often replacing it with life imprisonment. Life imprisonment, including life without parole, has been increasingly adopted globally.¹ This global trend is seen as progress in the protection of human rights. However, this discussion has varying implications based on regional contexts, such as in Malaysia, where the death penalty remains a contentious issue. While life imprisonment is often considered a humane alternative to the death penalty, it is not without its challenges. Described as "a fate worse than death",² concerns have been raised regarding the human rights of prisoners. Life imprisonment has been cited as a factor contributing to prison overcrowding and mental illness among prisoners and death row inmates, subjected to prolonged waiting periods and harsh prison conditions. Prolonged imprisonment can lead to mental health issues, including depression, anxiety and post-traumatic stress disorder,³ exacerbated by isolation, overcrowding, and violence within prisons. The case of *Michael Philip Spears v. Ketua Pengarah Penjara Kajang*,⁴ highlights this concerns. Spears, sentenced to death and

¹ Dirk van Zyl Smit, C. Appleton, G.Vuong (eds), *Life Imprisonment in Asia*, Palgrave Advances in Criminology and Criminal Justice in Asia. (Palgrave Macmillan, Singapore, 2023) p.4

² Rachel Stokes, 'A Fate Worse than Death? The Problem with Life Imprisonment as an Alternative to the Death Penalty', in Jon Yorke (ed.), *Against the Death Penalty: International Initiatives and Implications*. (London: Routledge, 2016) at p.281

³ M. Browne, S. Kandelia, R. Reddy and P Hodgkinson, 'Capital Punishment and Mental Health Issues: Global Examples', *St Louis University Public Law Review*, 25/2(2006):383-407

⁴ [2017] 1 MLJ 472

imprisoned for 14 years, was diagnosed with schizophrenia and ultimately deemed unfit to for execution.⁵

Diyat aligns with the principles of Islamic jurisprudence, offering a path for reconciliation and restorative justice. It serves as an alternative to *qisas* (retributive justice) when the victim's family agrees to accept monetary compensation in lieu of retribution. This approach not only upholds the rights of the victim's family but also promotes forgiveness and societal harmony.⁶ The question is whether monetary compensation, as an alternative to death penalty, is reasonable and feasible within the Malaysian legal framework. Is it possible to implement *diyat* in Malaysia apart from life imprisonment? How could it be integrated into Malaysia's criminal law? This article aims to examine the concept of *diyat* and explores its potential application as an alternative to the death sentence in Malaysia. It does so by analyzing the basic structure of the country's criminal law framework and addressing certain hypothetical possibilities for implementation.

DIYAT AS A POTENTIAL ALTERNATIVE IN MALAYSIA

In Malaysia, the concept of *diyat*, or monetary compensation under Islamic law, has been proposed as an alternative to the death penalty. The idea was first raised by the Sultan of Pahang in 2017 and reaffirmed in 2022. His Majesty Sultan Abdullah Ahmad Shah, as the Head of Pardon Board of Pahang, has emphasized the importance of justice for the victim's family and urged the authorities to explore this option.⁷ The suggestion also came from the Special Committee on Substitute Sentences for the Mandatory Death Sentence, established by the previous government in 2019 to abolish the death penalty.⁸ Although *diyat* has been discussed at the ministerial level, a concrete proposal has yet to materialize. A roundtable discussion

⁵ Roger Hood & Caroline Hoyle, *The Death Penalty: A Worldwide Perspective*. (Oxford: Oxford University Press, 2015).

⁶ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*. (Cambridge: Islamic Texts Society, 2000) at p.45

⁷ <https://www.bharian.com.my/berita/nasional/2017/05/278270/majlis-jemaah-pengampunan-pahang-perkenal-kaedah-diyat> (retrieved 23/1/2025)

⁸ Not much is known about this committee. [Form Parliament Select Committee to scrutinise death penalty laws, says Azalina | The Star](https://www.thestar.com.my/news/nation/2022/06/12/form-parliament-select-committee-to-scrutinise--death-penalty-laws-says-Azalina) at <https://www.thestar.com.my/news/nation/2022/06/12/form-parliament-select-committee-to-scrutinise--death-penalty-laws-says-Azalina> (retrieved 12/5/2024)

was initiated in 2022 by the then Minister in the Prime Minister's Department, but no further action was pursued.⁹

Public opinion in Malaysia remains divided on the suggestions to replace death penalty with Islamic compensation mechanism like *diyat*. While many support abolishing the death penalty, research on *diyat* as a viable alternative remains limited. Some critics view *diyat* as a foreign concept incompatible with Malaysia's criminal legal framework and unsuitable for implementation.¹⁰ There is also a perception that incorporating *diyat* into the legal system represents an attempt to Islamize the criminal justice system or achieve greater harmonization between shariah law and the Penal Code.¹¹ Efforts have also been made to introduce the concept of *diyat* into national discourse, including debunking prevalent myths surrounding its application.¹² Scholars have argued for its feasibility since the idea was proposed over a decade ago. However, translating uncodified Islamic principles into enforceable laws poses significant challenges.¹³ Codification and modern interpretation are necessary for *diyat* to align with contemporary criminal justice systems and legal practices.¹⁴

The potential application of *diyat* as monetary compensation for cases involving murder¹⁵ and negligence has been discussed extensively.¹⁶

⁹ "Kerajaan mula sesi meja bulat teliti hukuman diyat" <https://www.pressreader.com/malaysia/berita-harian-malaysia/20220907/281539409787522> (retrieved 23/1/2025)

¹⁰ Abdul Hamid Mohamad, Hukuman Pilihan Mengganti Hukuman Mati Mandatori: Pandangan Awal (2022) (www.tunabdulhamid.my) (retrieved 13/1/2024)

¹¹ Abdul Rahman Awang, 'Diyah (blood money) as substitution to capital punishment: An Attempt Towards Harmonisation Between Shariah and Malaysian Penal Code', *Australian Journal of Basic and Applied Sciences*, 6/11(2012): 106

¹² Siti Zubaidah Ismail, 'Debunking Myths About Diyat', *IAIS Bulletin* July-August 2022.

¹³ Abdullah Sulaiman Alaoudh, 'Saudi judiciary: from the unpredictable unwritten to codified authoritarianism', *Arab Law Quarterly* 36:4-5(2022): 536

¹⁴ Siti Zubaidah Ismail, 'The modern interpretation of the diyat formula for the quantum of damages: the case of homicide and personal injuries', *Arab Law Quarterly* 26(2012): 361-379.

¹⁵ Paizah Ismail, 'Pelaksanaan Diyat dalam Kerangka Perundangan di Malaysia: Cabaran Fiqh Semasa', *Jurnal Fiqh*, vol.9 (2012):1-20.

¹⁶ Siti Zubaidah Ismail, *Pampasan Bagi Kecederaan Fizikal Akibat Kecuaian Menurut Perundangan Islam*. (Kuala Lumpur: ILBS,2017); Ismail, Siti Zubaidah Ismail, "Debunking Myths About Diyat", *IAIS Bulletin* July-August 2022.

Scholars have generally focused on exploring ways to integrate *diyat* into Malaysia's existing legal framework. For instance, Al-Sagoff has comprehensively suggested amendments to the Penal Code and the Criminal Procedure Code to encompass homicide and personal injury cases.¹⁷

A contemporary interpretation for *diyat's* quantum has also been proposed. Research indicates that the quantum of *diyat* exceeds the compensation currently awarded by Malaysian courts for personal injury cases.¹⁸ Nonetheless, the proposed amounts are still comparable to practices in other jurisdictions. Despite scholarly attention, significant gaps remain in providing constructive suggestions within the existing legal framework. Greater efforts are required to establish *diyat* as a legally recognized punishment within the context of Malaysia's criminal justice system. Malaysia's legal framework retains the death penalty for several serious crimes, including murder, drug trafficking, terrorism-related offenses, and certain firearms-related crimes. Under the Penal Code, Section 302 mandates the death penalty for murder, with no discretion for alternative sentences. This mandatory nature has long been criticized for limiting judicial discretion, leading to debates about the need for reforms. Despite these criticisms, the Malaysian legal system blends elements of common law and Islamic law, particularly in areas of personal and family law for Muslims.

While *diyat* presents a compelling alternative, its implementation within Malaysia's legal framework poses significant challenges. Incorporating *diyat* into Malaysia's existing criminal law system, which blends common law and Islamic law, would require substantial legislative amendments. Not only that, determining appropriate *diyat* amounts and ensuring fairness would also require careful deliberation. Gaining public acceptance for *diyat* as a viable alternative to the death penalty, particularly among victims' families, would be critical. What more, establishing clear guidelines and processes for implementing *diyat* would also be essential to prevent misuse or inequities.

THE ABOLITION OF DEATH PENALTY, LIFE IMPRISONMENT, AND THE IDEA OF *DIYAT*

¹⁷ Syed Ahmad al-Sagoff, *Al-Diyah as Compensation for Homicide, Wounding in Malaysia*. (Kuala Lumpur: ILBS, 2006).

¹⁸ Please refer Compendium for Personal Injuries Awards 2010 used by the court as guidelines. See detail discussion in Siti Zubaidah Ismail, *Pampasan Bagi Kecederaan Fizikal Akibat Kecuaian Menurut Perundangan Islam*. (Kuala Lumpur: ILBS, 2017).

Since 2018, the Malaysian Government had announced its intention to abolish the death penalty. In the same year, Malaysia imposed a moratorium on the implementation of the death penalty and supported a motion to abolish it at the United Nations General Assembly in New York.¹⁹ Although the proposal for *diyat* was not pursued, amendments to the law were eventually realized. In April 2023, the Parliament passed two bills that subsequently became law:

- i. Revision of Sentence of Death and Imprisonment for Natural Life (Temporary Jurisdiction of Federal Court) Act 2023. This law grants the Federal Court jurisdiction to review the cases of 840 death row prisoners, including 25 individuals whose appeals were previously rejected by the Pardons Board.
- ii. Abolition of Mandatory Death Penalty Act 2023. The law introduces several policies, including:
 - a. For offences resulting in death,²⁰ the court has the discretion to impose either the death sentence or imprisonment for a term of not less than 30 years, which may extend to 40 years, along with a minimum of 12 strokes of whipping;
 - b. For offences not resulting in death, the court may impose imprisonment for a term of not less than 30 years, which may extend to 40 years and a minimum of 12 strokes of whipping. However, this policy does not apply to section 121A of Penal Code.²¹ Under this section, even if the offence does not result in death, the court retains discretion to impose either the death sentence or life imprisonment for a term of not less than 30 years, which may extend to 40 years, along with a minimum of 12 strokes of whipping.

¹⁹ Amnesty International, *Fatally Flawed: Why Malaysia Must Abolish The Death Penalty* (2019), (<https://amnesty.org/en/wp-content/uploads/2021/05/ACT5010782019ENGLISH.pdf>) (retrieved 11/1/2024)

²⁰ For sections 130C (committing terrorist act), 130I (directing activities of terrorist groups, 130N (providing or collecting property for terrorist acts), 130O (providing services for terrorist purposes), 130QA (accepting gratification to facilitate or enable terrorist acts), 130ZB (accepting gratification to facilitate or enable organized criminal activity), 302 (punishment for murder), 374A (hostage-taking).

²¹ Section 121A provides for offence against the person of Yang di-Pertuan Agong.

This legislative progress align with the Government's agenda to enhance human rights and support the long-anticipated ratification of human rights treaties, as recommended by the United Nations Human Rights Council during the 31st cycle of the Universal Periodic Review in 2018 and 2024.²²

While the new laws introduce imprisonment terms of 30 years as an alternative to the death penalty, it raises the question of whether further options can be explored. As previously mentioned, *diyat* was proposed under the previous government. Malaysia introduced new legislation in 2023, and the idea of *diyat* as compensation should not be disregarded but instead explored further. Other Islamic countries have moved toward implementing *diyat* alongside life imprisonment. Among twelve countries practicing Islamic law, particularly in Southeast Asia and the Middle East and North African (MENA) region, the provisions of *qisas* (retribution) and *diyat* have been incorporated into criminal legislation.²³ In Southeast Asia, Brunei was the first Islamic country with specific provisions on *qisas* and *diyat* under the Shariah Penal Code Order 2013. Oman has set *diyat* at an equivalent of 150,000 Omani Riyal, as estimated by the Oman Capital Market Authority. In Qatar, The Diyya Law (No 19/2008) has established a flat rate of QAR260,000 for *diyat*, which applies to both Muslims and non-Muslims.²⁴ Even in non-Islamic countries like China, the concept of compensation for death exists. For instance, China has implemented the Death Penalty Criminal Reconciliation (DPCR) program. Weatherly & Pittam describe the process as involving a reconciliation agreement between victims and perpetrators, applicable to both capital and non-capital crimes.²⁵ Offenders meet with victims to apologize and provide economic compensation. This program offers significant financial and emotional benefits to the victims' families, aids in offender rehabilitation and alleviates broader societal tensions caused by the crime. Financial compensation can help alleviate grief and contribute to the healing

²² Further details on the UPR Report is available at www.ohchr.org

²³ Jan Michiel Otto(ed.), *Sharia incorporated: a comparative overview of the legal systems of twelve muslim countries in past and present*. (Leiden: Leiden University Press, 2010)

²⁴ Ahmed Samir Hassanein, 'The Impact of Islamic Criminal Law on the Qatari Penal Code', *Arab Law Quarterly*. 32(2018):60-79

²⁵ Robert Weatherly & Helen Pittam, "Money for Life: The Legal Debate in China About Criminal Reconciliation in Death Penalty Cases", *Asian Perspective*. 39 (2015):277-288

process,²⁶ particularly when the deceased was a spouse or child, as such losses create immense mental, physical and financial pressure.²⁷ In South Korea, the government paid nearly USD400,000 per student killed in the Sewol Ferry Disaster in 2015.²⁸ In Japan, the government provides 44.2 million yen in compensation to families of individuals who die from the coronavirus vaccine.²⁹ In the United Kingdom, Australia and other countries, Criminal Injuries Compensation Board have been established to provide financial compensation to crime victims, with tariffs determined by the government. These examples demonstrate that the concept of monetary compensation is both practical and effective in addressing the real-life challenges faced by crime victims and their families.

DIYAT AS COMPENSATION: BRIEF HISTORY AND PRACTICE

1. Origins of *Diyat*

The imposition of compensation is a common practice in past societies, especially as a remedy for bodily injury.³⁰ The term *wergild* (literally man-price) was used in ancient Roman, German and Anglo-Saxon societies.³¹ Similarly, *diyāt* was an ancient practice in the *Jahiliyah* society, and was later recognised and formalized by Islam. Before the advent of Islam to the Arab land in 610 AD, the *Jahiliyyah* Arab community was structured around tribal affiliations.³² Tribes fostered close internal connection but

²⁶ Yulong Cao, Hongbo Yu, Yanhong Wu, Zhou Xiaolin, 'Can money heal all wounds? social exchange norm modulates the reference for monetary versus social compensation'. *Front.Psychol* . 6(2015):1411.

²⁷ Andrew J. Oswald, Powdthavee, Nattavudh, 'Death, Happiness and the Calculation of Compensatory Damages', *Journal of Legal Studies* (2008):37.

²⁸ News on 1 April 2015 available at <https://www.bbc.com/news/world-asia-32153772> (retrieved 23/12/2025)

²⁹ <https://www.lbc.co.uk/news/japan-pay-families-295000-pounds-44-millions-yen>. (retrieved 23/1/2025)

³⁰ Luke Wilson, 'Monetary Compensation for Injuries to the Body, AD 602-1697'. in Jean Howard & Holly Dugan (eds.). *Early Modern Cultural Studies 1500-1700*. (London: Palgrave Macmillan, 2003):116-127

³¹ P.S. Barnwell, 'Emperors, jurists and kings: law and custom in the late roman and early medieval west', *Oxford Journals: The Past & Present Society* .168 (2000):6-29; Heidari, Mohammad Ali, 'Study of Restorative Justice and Distributive Justice from the Perspective of Islamic Law and Jurisprudence'. *New York Science Journal* (2015): 80-85

³² Carol Bakhos and Michael Cook (eds.), *Islam and Its Past: Jahiliyya, Late Antiquity and the Quran*, (Oxford: Oxford University Press,2017); Khan, Ayaz.

were often divided as a broader society. The harsh desert environment, where survival depended heavily on collective effort and mutual support, reinforced a strong sense of brotherhood within tribes. However, this same environment also fueled frequent conflicts over resources like water, leading to bloodshed, disputes, and wars between tribes.³³ The challenging living conditions shaped a rough and defensive community, especially when there were conflicts with other tribes. Tribal loyalty became an obsession,³⁴ and members were willing to offer material contributions to pay compensation for crimes committed by their kin. This culture of collective responsibility gave rise to a system known as the *'aqilah* system, in which the tribe shared accountability for its members' actions. In terms of governance and administration, there was no organized government to maintain social order or adjudicate wrongdoings.³⁵ Justice was highly decentralized, and personal revenge dominated the culture. Retribution for injury or death was seen as an individual or familial matter, often escalating into tribal revenge and prolonged enmity. A single personal disagreement, could ignite a conflict that spiraled into tribal warfare, which was rarely resolved through reconciliation or negotiation. If one member of the tribe was harmed, the whole tribe will take revenge without investigating who was at fault. A war would break out and would not have ended easily. Offer of amends or compensation were often rejected outright, as revenge was considered a sacred duty.³⁶ A deeply ingrained belief at that time was that, the soul of a murdered person could not find peace until revenge had been taken. Folklore depicted the dead as restless spirit - owls flying over their graves, crying out: "give me a drink, give me a drink" (*isquni!, isquni!*). Only by avenging their death could peace be restored to the soul.³⁷ The death of a leader could only be avenged by the

(2013). Human Ignorance (Jahiliyyah) Past & Present. *The Dialogue*, 2013. Vol. 8(4):346- 359.

³³ Joseph Ginat, *Blood Disputed Among Bedouin and Rural Arabs in Israel: Revenge, Mediation, Outcasting and Family Honour*. (Pittsburgh: University of Pittsburgh Press,1987); Aharon Layish, (2006). Interplay between tribal and shar`i law: a case of tibbawi blood money in the shari`a court of Kufra. *Islamic Law and Society* 13:1,63-75

³⁴ Mohd Shukri Hanafi, 'From Jahiliyyah to Islamic Worldview: In a Search of an Islamic Educational Philosophy', *Int.J of Humanities and Soc Sci* . vol.3/3(2013): 213-221

³⁵ Sedat Tuna, 'The Effect of Politics in the Jahiliyyah Period on the Literature', *OSUBLAD* 12/2(2002) :1231 -1264.

³⁶ Ayaz Khan. (2013). Human Ignorance (Jahiliyyah) Past & Present. *The Dialogue*, 2013. Vol. 8(4):346- 359.

³⁷ R.A Nicolson, *A Literary History of the Arabs*. (London: Curzon Press,2003).

blood of another leader, and monetary compensation or goods such as camels were unacceptable substitutes.³⁸

Diyat only emerged as a conflict resolution method due to the effects of the economic system.³⁹ The importance of goods began to be increasingly recognised, and the practice of bartering became more prevalent among people for survival. As exchanging goods became a central part of the economic activity, they soon began to negotiate to resolve conflicts and disputes. Initially, there were objections from those who considered *diyat* as “selling blood” and an insult. *Diyat* was viewed as an offer aimed at easing tensions between tribes. On one occasion, the *diyat* offered was rejected by the victim's family. This occurred during the reign of Muawiyah bin Abu Sufyan (602-680 AD), where a man named Huwayt bin Khasyram killed a man named Ibn Qanbal. Huwayt's tribe offered seven *diyat* for Huwayt to be forgiven. However, the victim's family refused any reconciliation and insisted on Huwayt's execution.⁴⁰

At the early stage of *diyat* practice in Mecca, there was no fixed rate, and the amount varied depending on the type and amount offered. Some offered dates, while others offered camels. Soon, it reached a hundred camels, which was sparked by an event related to the leader of Bani Hashim at that time, Abdul Muttalib, the grandfather of Prophet Muhammad (peace be upon him). The story began several years before the birth of Prophet Muhammad (peace be upon him) in 571 A.D, when Abdul Muttalib dreamed that he was instructed to dig a *zamzam* well. When he was about to start the digging, the Quraysh people protested. He, who was alone at the time, had sworn that if God blessed him with ten sons, he would slaughter one of them as a sacrifice. Years later, the dream came true when he was blessed with ten sons. The vote was cast, and it fell on his son named Abdullah. On his way to sacrifice Abdullah, people stopped him and suggested that Abdul Muttalib replace his son with ten camels. Bound by his promise, he refused and decided to cast the vote again. The second vote also fell on Abdullah, and so did the subsequent votes until the tenth vote, which still pointed at Abdullah. This sequence increased the number of camels to a hundred. In the end, he decided to stop casting the

³⁸ Michael J.L. Hardy, *Bloodfeuds and the payment of the blood money in the Middle East*. (Leiden: Brill,1963).

³⁹ Siti Zubaidah Ismail, 'The Modern Interpretation of the Diyat Formula for the quantum of damages: the case of homicide and personal injuries', *Arab Law Quarterly* 26(2012): 361-379.

⁴⁰ Izzat Hasanain, *Jara'im al-I'tida' ala Salamah al-Ajsam Baina al-Shariah wa al-Qanun*. (Riyadh: Dar al-Ulum,1984).

vote, canceled the intention to sacrifice Abdullah and instead, replaced him with 100 camels. Since then, the value of *diyat* among the Quraish was 100 camels. After the advent of Islam, Prophet Muhammad (peace be upon him) promoted peace-making and conflict resolution, thus encouraging people to accept *diyat* instead of revenge. Over time, the revenge culture was forgotten, and the Muslims chose to make peace.⁴¹ With guidance from the Prophet (peace be upon him), some of the practices of the Jahiliyyah community were improved. Among these were the culture of revenge, killing daughters, *diyat* payment, and several others.⁴²

2. The Position of *Diyat* Under the Classification of Crimes and Punishments According to Islamic Law

The jurisprudence of Islamic criminal law was later developed by the jurists based on the sources from the Quran, Sunnah and *ijtihad* of the jurists. After the development of *fiqh* and jurisprudence, jurists constructing the Islamic law of crime introduces a more comprehensive criminal punishment framework through three classifications of punishment for criminal offences⁴³ namely:

1. *Hudud* (plural for *hadd* and meaning limit, obstacle, or limitation): This is the punishment that has been set in the Qur'an to protect the rights of God. Therefore, jurists call any punishment that is clearly stated in the Quran and hadith as *hudud*. There are seven punishments for seven offences, namely adultery, drinking alcohol, theft, accusing of adultery, robbery, apostasy and rebellion. Jurists classify the punishment for these seven offences as violation of God's rights,⁴⁴ which also means a violation of the rights and interests of society.

⁴¹ Mawla al-Bek, Muhammad Ahmad Jad, *Ayyam al-'Arab fi al-Jahiliyyah*. Cairo: Dar Ihya' al-Kutub al-'Arabiyyah, n.d).

⁴² Mohd Shukri Hanafi, 'From jahiliyyah to islamic worldview: in a search of an Islamic educational philosophy', *Int.J of Humanities and Soc Sci* . vol.3/3(2013): 213-221.

⁴³ Abdul Qadir Awdah, *al-Tashri' al-Jina'i al-Islami Muqaranan bi al-Qanun al-Wad'i* .(Cairo: Maktabah Dar al-Turath,2003): Mohammad Hashim Kamali, *Crime and Punishment in Islamic Law: A Fresh Interpretation*, (Oxford: Oxford University Press, 2019). Syed Ahmad al-Sagoff, *Al-Diyah as Compensation for Homicide, Wounding in Malaysia*. (Kuala Lumpur: ILBS,2006).

⁴⁴ Abdul Qadir Awdah, *al-Tashri' al-Jina'i al-Islami Muqaranan bi al-Qanun al-Wad'i*, (Cairo: Maktabah Dar al-Turath,2003). p. 13

2. *Qisas & diyat* (Retaliation and Compensation): crime and punishment related to wrongs against life and limb. *Qisas* relates to the violation of private rights and, as such, is actionable by claims made by the victim. It is the right of the victim and his heirs. The duty of the state is to ensure the form of punishment is available to the victim, i.e. either *qisas* or *diyat* instead. The demand for equal punishment means restoring justice to the victim by restoring the original or similar condition to them. The level of *diyat* set in lieu of *qisas* in certain circumstances shows the high value of life and limb.
3. *Ta'zir* (penalty determined by the lawmakers): punishment that is specified for offences other than *hudud* and *qisas*. The government has the authority to make laws and punishment for any offence. Abdul Qadir `Awdah is of the view that there are three forms of *ta'zir* punishment, which involve sinful acts, offenses that disrupt peace and public interest, and minor offences. Punishments could range from a warning to death penalty.⁴⁵

3. Criteria for Determining the Imposition of *Diyat*

The word *diyat* is clear in a hadith which states:

حَدَّثَنَا مُسْلِمٌ ، حَدَّثَنَا مُحَمَّدُ بْنُ رَاشِدٍ ، حَدَّثَنَا سُلَيْمَانُ بْنُ مُوسَى ، عَنْ
عَمْرِو بْنِ شُعَيْبٍ ، عَنْ أَبِيهِ ، عَنْ جَدِّهِ ، عَنِ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ
قَالَ : لَا يُقْتَلُ مُؤْمِنٌ بِكَافِرٍ ، وَمَنْ قَتَلَ مُؤْمِنًا مُتَعَمِّدًا دُفِعَ إِلَى أَوْلِيَاءِ
الْمَقْتُولِ ؛ فَإِنْ شَاءُوا قَتَلُوهُ ، وَإِنْ شَاءُوا أَخَذُوا الدِّيَةَ ⁴⁶

“Narrated Muslim, narrated Muhammad bin Rasyhid, narrated Sulayman bin Musa from Amru bin Syuaib from his father, from his grandfather that the Prophet (peace be upon him) said: A believer is not killed as a result of killing an infidel. Whoever kills a believer on purpose, it is up to the guardian of the victim, if they like, they can retaliate, and if they like, they can also take *diyat*”.

⁴⁵ Abdul Qadir Awdah, *al-Tashri' al-Jina'i al-Islami Muqaranan bi al-Qanun al-Wad'i*. (Cairo: Maktabah Dar al-Turath, 2003). p.14

⁴⁶ Abu Dawud Sulayman al-Sijistani, *Sunan Abi Daud*. Kitab al-Diyat, Hadith 4506. Tahqiq: Izzat Abid al-Da'as (Beirut: Dar Ibn Hazm, 1997).

Diyat will only be imposed on offenders who kill or cause injury to people either intentionally or unintentionally. The difference between intentional and unintentional act is:

- a) For intentional murder, diyat is an alternative to death if the heirs of the deceased forgive the perpetrator, and agrees not to demand the execution of *qisas*. In other words, the next of kin of the victim has the final say on whether to demand punishment or forgive the offender. If forgiven, *qisas* will not be imposed, and instead, diyat must be paid to them. It should be emphasised that only the victim's heirs have the right to forgive. The determination of guilt must be made beforehand by the court, and not be based on accusations alone. Diyat in such case must be paid by the offender themselves.⁴⁷
- b) For unintentional mistakes, if a person causes the death or injury of another person by mistake or negligence, diyat is the primary sentence, not an alternative (Awdah,2003; Kamali,2019). The payment of diyat in such cases of mistake or negligence will be assisted by the *`aqilah*. *`Aqilah* is an ancient concept of tribal assistance during the Jahiliyyah period. Many contemporary scholars have reinterpreted *`aqilah* to include modern institutions such as insurance companies, professional bodies, *baitul mal*, employers and paid associations.⁴⁸ These entities provide compensation for bodily harms from a fund where all members contribute to protect themselves from unfortunate events.

4. Forgiveness for Causing Death

Since causing death is a crime involving individuals, in order for *diyat* to be imposed on the murderer instead of *qisas*, the murderer must be convicted first and the victim's heirs must forgive the offender.⁴⁹ Forgiveness plays a crucial role in the implementation of *diyat* as it embodies the principles of justice, forgiveness and social harmony. Payment and forgiveness are encouraged, as emphasized by verse 178 in Surah al-Baqarah :

⁴⁷ Izzat Hasanain, *Jara'im al-i'tida' ala Salamah al-Ajسام Baina al-Shariah wa al-Qanun*. (Riyadh: Dar al-Ulum,1984) at p.88

⁴⁸ Siti Zubaidah Ismail, *Pampasan Bagi Kecederaan Fizikal Akibat Kecuaian Menurut Perundangan Islam*. (Kuala Lumpur: ILBS,2017); Mohd al-Adib Samuri, "Preventive Theory as Punishment Justification: Comparative Analysis Between Civil and Islamic Law", *Islamiyyat*, 34(2012):131-143

⁴⁹ For details, see M. Uddin, & Faruqi, S. S., 'Power of Pardon in the Shariah and its Applicability in Common Law', *Jurnal Syariah*, 32/2(2024), 246–274.

يَا أَيُّهَا الَّذِينَ آمَنُوا كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلِ ۗ بِالْحُرِّ بِالْحُرِّ وَالْعَبْدُ
بِالْعَبْدِ وَالْأُنثَىٰ بِالْأُنثَىٰ ۗ فَمَنْ عُفِيَ لَهُ مِنْ أَخِيهِ شَيْءٌ فَاتِّبَاعٌ بِالْمَعْرُوفِ
وَأَدَاءٌ إِلَيْهِ بِإِحْسَانٍ ۗ ذَلِكَ تَخْفِيفٌ مِّن رَّبِّكُمْ وَرَحْمَةٌ ۗ فَمَنْ اعْتَدَىٰ بَعْدَ ذَلِكَ
فَلَهُ عَذَابٌ أَلِيمٌ ﴿١٧٨﴾⁵⁰

“O ye who believe! The law of equality is prescribed to you in cases of murder: the free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand and compensate him with handsome gratitude, this is a concession and a mercy from your Lord. After this, whoever exceeds the limits shall be in grave penalty”.

(Surah al-Baqarah, 2: 178)

It is clear that the victim’s family holds the right to decide whether to accept *diyat*, demand retribution or pardon the offender entirely. The emphasis on forgiveness ensures that the family has the ultimate say, reflecting their role in the justice process. Forgiveness also aligns with the Quranic principle of mercy. Accepting *diyat* instead of insisting on retribution can foster reconciliation between the offender and the victim’s family, helping to heal societal division caused by the crime. In Surah al-Isra’ verse 33, the prohibition of killing is clear and there is a way out if it happens:

وَلَا تَقْتُلُوا النَّفْسَ الَّتِي حَرَّمَ اللَّهُ إِلَّا بِالْحَقِّ ۗ وَمَنْ قُتِلَ مَظْلُومًا فَقَدْ جَعَلْنَا
لَوْلِيهِ سُلْطَانًا فَلَا يُسْرَفُ فِي الْقَتْلِ ۗ إِنَّهُ كَانَ مَنْصُورًا ﴿٣٣﴾⁵¹

*“Nor take life – which God has made sacred – except for just cause. And if anyone is slain wrongfully, We have given his heir authority (to demand qisas or to **forgive**); but let him not exceed bounds in the matter of taking life; for he is helped (by the Law)”.*

(Surah al-Isra, 17: 33)

5. Principles and Determination of Diyat Rates Based on the Quran and Sunnah

⁵⁰ Surah al-Baqarah: 178

⁵¹ Surah al-Isra’: 33

Even though the word *diyat* is in the Quran, it does not explain what type of *diyat* must be paid. In the Quran, payment of *diyat* is affirmed as follows:

وَمَا كَانَ لِمُؤْمِنٍ أَنْ يَقْتُلَ مُؤْمِنًا إِلَّا خَطَأً ۖ وَمَنْ قَتَلَ مُؤْمِنًا خَطَأً فَتَحْرِيرُ
رَقَبَةٍ مُؤْمِنَةٍ وَدِيَةٌ مُسَلَّمَةٌ إِلَىٰ أَهْلِهِ إِلَّا أَنْ يَصَدَّقُوا ۖ وَإِنْ كَانَ مِنْ قَوْمٍ عَدُوٍّ
لَكُمْ وَهُوَ مُؤْمِنٌ فَتَحْرِيرُ رَقَبَةٍ مُؤْمِنَةٍ وَإِنْ كَانَ مِنْ قَوْمٍ بَيْنَكُمْ وَبَيْنَهُمْ مِيثَاقٌ
فَدْيَةٌ مُسَلَّمَةٌ إِلَىٰ أَهْلِهِ وَتَحْرِيرُ رَقَبَةٍ مُؤْمِنَةٍ ۖ فَمَنْ لَمْ يَجِدْ فَصِيَامٌ شَهْرَيْنِ
مُتَتَابِعَيْنِ تَوْبَةً مِّنَ اللَّهِ ۗ وَكَانَ اللَّهُ عَلِيمًا حَكِيمًا ﴿٩٢﴾⁵²

“And a believer should not kill another believer unless it is accidental (wrong). And whoever kills a believer because of a mistake, he should free a believing servant and pay the *diyat* that is handed over to the family of the deceased unless they (the victim's family) give charity”.

(Surah al-Nisa', 4: 92)

The above verse clearly states that if there is an accidental death, then the punishment is to free the slave and pay the compensation. However, the Quran neither explains the form of *diyat*, nor who should pay the *diyat*. The details are sourced out from the hadith, mentioning the choice for the victim's family as narrated by al-Tirmizi in his Sunan:

حَدَّثَنَا مُحَمَّدُ بْنُ غَيْلَانَ ، وَيَحْيَى بْنُ مُوسَى ، قَالَ : حَدَّثَنَا الْوَلِيدُ بْنُ
مُسْلِمٍ ، قَالَ : حَدَّثَنَا الْأَوْزَاعِيُّ ، قَالَ : حَدَّثَنِي يَحْيَى بْنُ أَبِي كَثِيرٍ ، قَالَ :
حَدَّثَنِي أَبُو سَلَمَةَ ، قَالَ : حَدَّثَنِي أَبُو هُرَيْرَةَ ، قَالَ : لَمَّا فَتَحَ اللَّهُ عَلَيَّ
رَسُولِهِ مَكَّةَ قَامَ فِي النَّاسِ ، فَحَمِدَ اللَّهُ وَأَثْنَى عَلَيْهِ ، ثُمَّ قَالَ : وَمَنْ قُتِلَ لَهُ
قَتِيلٌ فَهُوَ بِخَيْرِ النَّظَرَيْنِ ، إِمَّا أَنْ يَعْفُوَ ، وَإِمَّا أَنْ يَقْتُلَ⁵³

“Mahmud ibn Ghaylan and Yahya ibn Musa narrated to us, Al-Walid ibn Muslim narrated to us that Al-Awzaie narrated

⁵² Surah al-Nisa': 92

⁵³ Abi Isa Muhammad al-Tirmizi, *Al-Jami' al-Kabir*. Chapter On What Has Been Related About The Guardian Of One Who Was Killed Deciding Between Qisas Or Pardon, Hadith 1405. Tahqiq: Basyar 'Awad Ma'ruf (Beirut: Dar al-Gharb al-Islami, 1996). vol.3, p.75

to us from Yahya ibn Abu Kathir who narrated from Abu Salmah that Abu Hurayrah r.a narrated that: When Allah granted His Messenger (peace be upon him) the conquest of Mecca, he stood among the peoples, praised Allah and glorified Him. Then he said: Whoever has had someone killed among his family, he has two choices: either to forgive or to seek retribution (qisas)”.

Regarding physical injury, its principles were established by the Prophet Muhammad (peace be upon him) through a letter written and sent to Amru ibn Hazm, the Governor of Yemen which is to the effect:

“And that the soul (life) of a person is the diyat of a hundred camels, and on the nose that is cut off (all cut off) one diyat, and on the tongue that is cut off one diyat, and on the two lips of the mouth one diyat. And on the cut testicle one diyat, and on the two testicles one diyat and on the spine one diyat and on the two eyes one diyat and on one leg one half diyat. A wound that reaches the scalp or reaches the brain is one-third of the diyat and a wound that reaches the cavity is one-third of the diyat and a wound that shows and that destroys the bone until it moves from it to some bones of fifteen camels. And on each finger of the hands and feet ten camels. And on one tooth five camels. And on the wound where the bones are visible, five camels. And that a man is killed for killing a woman and for a person who has a gold coin the death penalty is one thousand dinars”.

This letter was regarded as a decree and a reliable source equivalent to a hadith. Two methods of payment of *diyat* were mentioned, namely camels and currency. Another hadith which was narrated by Ibn Majah from Ibn Abbas that the Prophet Muhammad (peace be upon him), set a *diyat* of twelve thousand dirhams. Imam Malik in his book, *Muwatta'* (book 43.2.2) said that "The people of gold are the people of ash-Sham and the people of Egypt. The people of silver are the people of Iraq." Ibn Qudamah (1146-1223) also narrated this occurrence in his famous book, *al-Mughni*:

*“The Messenger of God, may God bless him and grant him peace, wrote to Amru ibn Hazm and the people of Yemen that: for the life of a believer 100 camels and for those who transact with money, 1000 dinars”.*⁵⁴

⁵⁴ Abu Abdullah ibn Muhammad Ibn Qudamah, Abu Abdullah ibn Muhammad, *al-Mughni wa al-Sharh al-Kabir*. Beirut: Dar al-Kitab al-Arabi, 1983). at p.481

From all these sources, it is clear that *diyat* can be paid by the local currency. Thus, in the early Islamic era in the Arabian Peninsula, the use of camels in various economic transactions showed the importance of camels at that particular time and place. However, camels were not favorable in other places. From the letter sent to the Governor of Yemen in northern Africa, the use of the dinar as currency was recognized because it had existed among the people and merchants including in Medina. The evolution of currency as a method of exchange has seen the transition of the exchange system from commodities, including camels, tea, tobacco, cattle, goats and so on, to the use of metal and later paper as currency. Starting with bronze, tin and copper, money was later minted from gold and silver. Iron, bronze, tin and copper rust easily and change color, thus making them less valuable in the market. Silver and gold have special features that are not found in other metals, because both are not merely commercial commodities, but have a high value, are durable and are non-rusting. They can easily be used as the basis of calculations for the exchange of goods. Thus, it cannot be denied that gold plays a role as the most effective medium of exchange.⁵⁵

6. Money as a Method of *Diyat* Payment

The *diyat* formula that can be used as a balance sheet for today's application is 1000 dinars or its value, 100 camels or its value or 12,000 silver dirhams. Dinar refers to the gold dinar. The standard weight of one gold dinar coin equals one *mithqal* which is 4.25 grams. One *mithqal* is "*ithnan wa `ishrun qiraan illa habbatan bi al-shami*", which means 22 carat gold less a fraction. This is explained in the Encyclopaedia of Islam:

“The weight standard of the early transitional dinar appears to have been the same as that of the Byzantine solidus ie approximately 4.55 grams. With Abdul Malik's reform, however, the weight was reduced to 4.25 grams. The accuracy of the latter figure is attested not only by the weights of well-preserved dinars but by the evidence of Egyptian glass dinar

⁵⁵ Umar Vadillo, *Fatwa on Paper Money*. (Granada: Medina Press,1992); Ahmad Kameel Mydin Meera, '*Islamic Gold Dinar*', Subang Jaya: Pelanduk Publications,2002) at p.45

and dinar fraction weights dating from the end of the first to the end of the second century AH The reduced standard of the post reform dinar resulted from a decision to re-define the mithqal (ie dinar) in convenient terms of 20 Syro-Arabian kirats of 0.2125 grams in place of such cumbersome terms as 21 3/7 kirat, or "22 kirats less a fraction" etc., which had been employed by the Arabs in pre-Islamic times to express the weight of the mithqal."

The standard weight that remains until now for a gold dinar is 4.25 grams. The 22 carat gold weighing 4.25 grams will be used as a medium of exchange according to the current value of gold in the market. For full *diyat*, the value is 1000 dinars. The table below explains the rate of *diyat* when taking into account the current market price of gold:

Table 1: The Current Rate of Diyat

Rate of Diyat	Exchange	Current Value
1,000 dinars	1 dinar = 4.25g of 916 gold 1g of gold = RM378.00*	4250g x RM378.00 = RM1,606,500.00
	1 dinar weighing 4.25g = RM1606.50	
Total 1 Diyat		RM1,606,500.00

Source: *as of December 30, 2024 (<https://www.goodretuns.in>)

Based on the above analysis, the following table explains the position of the total amount:

Table 2: The Quantum of Diyat for Murder and Injuries

The offence	Pre-requisite for diyat	Total Diyat
Intentional murder	Forgiveness is granted	<ul style="list-style-type: none"> • Full <i>diyat</i> of 1000 dinars • RM1,606,500.00 • Paid by the murderer
Causing death by negligence, accident or mistake	None	<ul style="list-style-type: none"> • Full <i>diyat</i> of 1000 dinars • RM1,606,500.00 • Borne by ` <i>aqilah</i>

7. *Diyat* is borne by the murderer

The *diyat* that is agreed must be settled by the offender himself in the case of intentional murder/injury. Contemporary scholars think that the burden of paying the *diyat* should be borne by the offender himself in full due to his guilt.⁵⁶ Taking a person's life intentionally is the most grievous offense. Life is priceless and the quantum of *diyat* based on the Prophet's (peace be upon him) hadith shows how high the value of life is. If the offender had the means and can afford to pay, he should offer an apology and pay the huge sum. The concept of *diyat* is parallel with the restorative justice. Campaigners for restorative justice have suggested that those responsible for a criminal behaviour should repair the harm they have caused. Meanwhile, those who suffer harm should be at the centre of deliberation and decision making.⁵⁷

The next question is how these aspects of *diyat* will make their way into the Malaysian legal system.

SETTING THE CONTEXT FOR *DIYAT* UNDER MALAYSIAN LAW

Within the framework of the existing dual-legal system, the supreme law of Malaysia is the Federal Constitution. It provides Islam as the religion of the country with civil and Islamic laws operating in parallel. Civil laws are statutes for general application, while Islamic law has a specific application regarding matters related to Muslims. Shariah law is governed by the state religious authority with Shariah court as the court to settle disputes and adjudicate offences against the religion of Islam. It is important to clarify that *diyat* will not be able to make its way to the Shariah court due to its limited jurisdiction.⁵⁸ The prospect of *diyat* would be highly likely to be posited under the criminal law framework, due to its nature as punishment *in lieu* of a death sentence under section 300 of the Penal Code. In theory, *qisas* and *diyat* is located in the domain of private law. The victim's heir

⁵⁶ Abdul Qadir Awdah, *al-Tashri' al-Jina'i al-Islami Muqaranan bi al-Qanun al-Wad'i* (Cairo: Maktabah Dar al-Turath, 2003).

⁵⁷ Gerry Johnstone, "Restorative Justice for Victims: Inherent Limits", *Restorative Justice*, 5/3: (2017): 382-395

⁵⁸ Shariah Courts Act (Criminal Jurisdiction) 1984 provides the maximum sentences that can be granted by the Shariah court are RM5000 fine, three years' imprisonment and 12 strokes of whipping.

has the right to initiate the legal process. If an intentional murder has been proven, the heir has the right to ask for retaliation (*qisas*) or to arrive at an amicable solution of *diyat*. In practice however, dispute over homicide is dealt with by the office of the public prosecutor, not by the heir's own hand.

1. Incorporating *Diyat* into Penal Code and Criminal Procedure Code

The main statute of criminal law are the Penal Code and Criminal Procedure Code. All capital crimes and punishment are provided under the Penal Code including offences against life and limb. In theory, *diyat* can only be an alternative punishment for murder if its provision were inserted under the Penal Code and Criminal Procedure Code, provided the following conditions are met:

1. The offender is convicted of murder and sentenced to death. *Diyat* cannot be negotiated or brokered beforehand, because it is a post-conviction and post-sentencing matter. The judges will have the opportunity to call the victim's next of kin to a reconciliation process.
2. The next of kin will be allowed to give their statement on the impact of the crime against them and their what is their position on that matter. The options are, either:
 - a. Forgive and demand *diyat* as an alternative; or
 - b. Refuse any forgiveness and demand the court to uphold the death penalty; or
 - c. Forgive without *diyat* and leave it to the court to impose any punishment.

Inevitably, amendments to some legal provisions are necessary, particularly certain provisions under the Penal Code and the Criminal Procedure Code. The most important thing is that the Judge must first convict the offender under section 300 of the Penal Code for murder. The provisions of section 300 are as follows:

Except in the cases hereafter excepted, culpable homicide is murder –

- (a) if the act by which the death is caused is done with the intention of causing death;
- (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to who the harm is caused;

- (c) if it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient, in the ordinary course of nature to cause death; or
- (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

The punishment for the offence of murder is provided under section 302, which states: Whoever commits murder shall be punished with death.

Section 277 of the Criminal Procedure Code describes the execution method:

“When any person is sentenced to death, the sentence shall direct that he be hanged by the neck until death, but the place and time of hanging shall not be specified”.

If the *diyat* element were to be incorporated into the criminal law system, the proposed amendment that can be included is to extend section 302 of Penal Code as mentioned above. Below are the propositions for amending section 302:

- (a) Whoever commits the crime of murder shall be punished with death or imprisonment for life.
- (b) In a situation where the offender is sentenced to death, if the next of kin of the victim forgives the offender, the death sentence can be replaced by paying **compensation** of any amount determined by the Government. If the next of kin refuses to forgive or if the offender does not agree to pay **compensation**, the judge can decide on a suitable sentence.
- (c) In a situation where the offender agrees to pay **compensation**, the judge may order that the amount of **compensation** charged be paid in full or in installments as stated in the List (a List must be created that explains the payment rate, mechanism and so on).
- (d) As long as the **compensation** has not been fully paid, the offender can be imprisoned and will only be released after the full amount of **compensation** has been paid.
- (e) For the purposes of (b) above, the Attorney General may call the victim's heirs or representatives of the victim's heirs to appear in court

to give victim impact statement including to express their wishes after the offender is convicted.

(f) Heirs are immediate relatives including parents, sons, and daughters.

Regarding the method of payment of compensation, reference can be made to the general provision of section 283 of the Criminal Procedure Code concerning provisions as to sentences of fine. Section 283 states that:

(1) Where any fine is imposed under the authority of any law for the time being in force, in the absence of any express provision relating to the fine in such law contained, the following provisions shall apply –

(a) where no sum is expressed to which the fine may extend the amount to which the offender is liable is unlimited, but shall not be excessive;

(b) in every case of an offence in which the offender

As such, the compensation ordered by the court is to be paid either to the government or to the victims. It is proposed that the method also applies to compensation for the offense of killing people with the addition of new provisions that clarify this aspect.

2. Victim Impact Statement (VIS) and Its Role in *Diyat*

Families of the murdered are the hidden victims. A victim impact statement is simply a statement of the harm suffered by the victim, and includes an expression of opinion on the suitable sentence for the offender. This mechanism can be used to ask the victim's family to give opinion on verdict and sentence by the court. During the process, the court seeks information that would be useful to determine the suffering of the victim. Section 183A of Criminal Procedure Code provides:

(1) Before the Court passes sentence according to law under section 183, the Court shall, upon the request of the victim of the offence or the victim's family, call upon the victim or a member of the victim's family to make a statement on the impact of the offence on the victim or his family.

(2) Where the victim or a member of the victim's family is for any reason unable to attend the proceedings after being called by the Court under subsection (1), the Court may at its discretion admit a written statement of the victim or a member of the victim's family.

It is difficult to determine whether a judge would be affected by such a statement, unless it is stated in the grounds of judgement as a substantive reason for the sentence. Some are of the view that it does not affect in any other way.⁵⁹ However, the chance of aggravation is highly likely after listening to the pain and suffering borne by the victim's family. If *diyat* were to use the VIS position, it must be done after the death sentence is pronounced by the court. Only then can the forgiveness for death take place, and *diyat* is relevant as a substitute for death penalty (*qisas*).

3. The Pardons Board and Its Implication on *Diyat*

A Pardons Board is a separate entity altogether, and extends beyond the framework of criminal trial. As it is, the victim's family has no involvement in the Pardons Board. Established under the purview of article 42 of the Federal Constitution, it provides the power and role of the pardon unto the respective Head of State. While it is the prerogative of the Pardons Board to grant pardon, there are suggestion made that the power to pardon for murder is given to the *wali* of the victims.⁶⁰

Article 42(1) states that The Yang di-Pertuan Agong has power to grant pardons, reprieves and respites in respect of all offences which have been tried by court-martial and all offences committed in the Federal Territories of Kuala Lumpur, Labuan and Putrajaya; and the Ruler or Yang di-Pertuan Negeri of a State has power to grant pardons, reprieves and respites in respect of all other offences committed in his State. The Pardons Board consists of the Attorney General of the Federation (or his representative), the Chief Minister of the State/the Federal Territories Minister, and not more than three other members appointed by the Yang di-Pertuan Agong. The three members cannot be members of the Legislative Assembly of the State or the House of Representatives. Application for pardon can be initiated by the offender according to Regulation 113 of the Prisons Regulations 2000.

The Pardons Board and its procedures lie outside the framework of pardon where the *diyat* application is concerned. The process of *diyat* as

⁵⁹ Shahrul Mizan Ismail, Zainal Abidin, Halila Faiza & Abdullah, Apnizan, "Victim Impact Statement in Criminal Sentencing: Success or Setback for the Criminal Justice Process?", *Current Law Journal*. 8 (2017):xv-xxxii

⁶⁰ Syed Ahmad al-Sagoff, *Al-Diyah as Compensation for Homicide, Wounding in Malaysia*. (Kuala Lumpur: ILBS,2020) at p.366.

the rights of the victims' family, is exclusive to them, not the authority. Pardons Board can be consulted by the offender as the last resort. This means that in the event the victim's family refuses to either get involved with the procedure, forgive the offender, or leave it to the court to decide on the appropriate sentence - whether it be death or imprisonment for life - the offender still has the opportunity to seek a pardon from the Pardons Board. This suits the function of Pardons Board as the last resort opportunity for death row prisoners. Amnesty International (2021) reports that a total of 165 death row prisoners in Malaysia have been pardoned in the period between 2007-2017. With the suggestion of forgiveness and *diyat*, the family would be in a better position to get involved with the criminal justice system.

DISCUSSION: THE WAY FORWARD

By all indications, the concept of *diyat* can make its way into the existing legal system with a few amendments to be inserted into the criminal legal framework. Under the criminal law framework, the accused for murder would be charged, tried, convicted and sentenced according to the law. That sentence cannot be changed unless appealed to the higher court. *Diyat* as a concept of "blood money" is as a replacement for loss of life itself, payable as an alternative for offender's life. For intentional murder, once the offender is found guilty, and sentenced to death, the victim's heirs must be given the opportunity to state their "grief", which can be used through Victim Impact Statement mechanism. The role of VIS can be expanded to include an opportunity for the heirs to state their stance on the (death) sentence imposed on the offender. The term *diyat*, compensation or Islamic compensation can only be used if all elements of *diyat* and its jurisprudential aspects are fulfilled. Although it is suggested that the term compensation be used rather than the original term *diyat* in the Malaysian law, it is the Islamic principle underpinning it that is blended into the language and decorum of the law that is more important. As an Arabic word, *diyat* is quite foreign to be used in the Penal Code. With the existence of quantum recommendations based on established sources of reference in the hadith of the Prophet Muhammad (peace be upon him), it is easier to make calculations based on the current value of gold.

In an effort to abolish the mandatory death penalty and replace it with *diyat*, it must be understood that *diyat* cannot stand alone, partly because it is related to *qisas*, which is the original punishment for intentional murder. Therefore, the death sentence must be retained as punishment for murderer under the existing section 302 of Penal Code. *Qisas* cannot be executed when the heir, call upon the court after conviction is secured, and choose to

forgive the killer and wants to demand *diyat* as compensation. *Diyat* is not the judge's choice, rather, it is the right of the victim's family who enormously suffer from losing their loved ones. It is the judge's duty to decide whether an accused is found guilty or otherwise. The implementation of *diyat* requires forgiveness by the heirs of the deceased. If an amendment is made to section 302 and the element of forgiveness is ignored, then it will only be ordinary compensation, not *diyat*. Forgiveness is the right of the victim's family and it is not within the scope of the Pardons Board that exists in each state and headed by the King as enshrined under Article 42 of the Federal Constitution.

Another important thing is that, since the act of killing is intentional, the payment of the *diyat* must be from the killer's own money. In reality, only affluent murderer can afford to pay the large amount of money. If the offender cannot pay the *diyat*, then the victim's family can either choose the death sentence or forgive him/her altogether. Without forgiveness and *diyat*, the offender's only option would be to petition for appeal to Appeal Court and subsequently to Federal Court. In the end, as death row prisoner, he can also apply for pardon from the King or Head of the State. A petition with appropriate reasons must be submitted to the State Legal Adviser's Office as stipulated by Rule 114 of the Prison Regulations 2000. As a summary, even though the calculation of the amount of *diyat* and the payer has been made according to the existing formula, the interpretation and recommendations presented here are of a purely suggestive in nature. This would require religious verdict and *fatwa* from the Mufti who has the authority in Islamic law in Malaysia.

CONCLUSION

This article analyses the possibility of *diyat* being integrated into the criminal law system in Malaysia. What the Islamic law offers through *diyat* is the alternative to spare the life of the murderer by way of pardoning and compensation. *Diyat* may provide important financial and emotional benefits to victims' family and rehabilitate offenders as well, and above all would provide for justice, balance and equality. In Islamic law, the victim's family holds the right to decide whether to accept *diyat*, demand retribution or pardon the offender entirely. The emphasis on pardon ensures that the family has the ultimate say. The option of pardon ensures that the offender is not immediately subjected to capital punishment, allowing for a more humane approach. The availability of *diyat* as an alternative provides a way to balance justice and compassion.

Forgiveness for a heinous crime committed against a family member is not easy. However, with a huge compensation, it might reduce the pain and suffering. In cases where the offender shows genuine remorse, forgiveness allows for a more restorative form of justice. It avoids harsh punishment if the offender is willing and able to compensate the victim's family through *diyat*. As a conclusion, *diyat* is possible to be implemented within the criminal law framework provided that all stakeholders are willing to amend the law. Malaysia could initiate further studies and discussions, engaging legal experts, Islamic scholars, and policymakers. Public education campaigns could also help increase awareness and acceptance of *diyat* as a restorative justice mechanism. By addressing these challenges, Malaysia can move toward a more equitable and humane criminal justice system that aligns with its cultural and religious values. In conclusion, the implementation of *diyat* offers an opportunity to balance justice, mercy, and societal harmony. With careful planning and broad stakeholder engagement, *diyat* could serve as a meaningful alternative to the death penalty in Malaysia.

ACKNOWLEDGEMENTS

The research that lead to this article was conducted during my sabbatical leave at the Institute of Advanced Islamic Studies Malaysia in 2022. Many thanks to Dato Dr Mohamed Azam Mohamed Adil, the then Deputy CEO of IAIS Malaysia, Prof Mohamad Hashim Kamali and to all staff of IAIS Malaysia for their warm hospitality.

REFERENCES

- Alaoudh, Abdullah Sulaiman, 'Saudi judiciary: from the unpredictable unwritten to codified authoritarianism', *Arab Law Quarterly* 36:4-5(2022): 536-540
- Amnesty International, *Fatally Flawed: Why Malaysia Must Abolish The Death Penalty*.(2019), (<https://amnesty.org/en/wp-content/uploads/2021/05/ACT5010782019ENGLISH.pdf>) (retrieved 11/1/2024)
- Amnesty International, *Amnesty International Global Report: Death Sentences and Executions 2020*. (2021), Retrieved from <https://www.amnesty.org/en/documents/act50/3760/2021/en/> (12/1/2024)
- Anti-Death Penalty Asia Network. <https://adpan.org> (retrieved 11/1/2024)

- Awang, Abdul Rahman, 'Diyah (blood money) as substitution to capital punishment: An Attempt Towards Harmonisation Between Shariah and Malaysian Penal Code', *Australian Journal of Basic and Applied Sciences*, 6/11(2012): 106-112
- Awdah, Abdul Qadir, *al-Tashri' al-Jina'i al-Islami Muqaranan bi al-Qanun al-Wad'i* .(Cairo: Maktabah Dar al-Turath,2003).
- Awdah, Abdul Qadir, *Criminal Law of Islam* . Karachi: International Islamic Publishers,1987).
- Aziz, Amir Abdul, *al-Fiqh al-Jina'i fi al-Islam*. (Cairo: Darussalam,1997).
- Aziz, Shamrahayu, 'The Continuing Debate on the Death Penalty: An Exposition of International Instrument, Malaysian and the Shari'ah Perspectives', *IJUM Law Journal*, 23(2015): 61.
- Bakhos,Carol and Cook, Michael. (eds.), *Islam and Its Past: Jahiliyya, Late Antiquity and the Quran*, (Oxford: Oxford University Press,2017).
- Barnwell, P.S., 'Emperors, jurists and kings: law and custom in the late roman and early medieval west', *Oxford Journals: The Past & Present Society* .168 (2000):6-29.
- Bayhaqi, Muhammad al-, *Al-Sunan al-Sughra*. (Beirut: Dar al-Ma`rifah,1999).
- Browne, M., S. Kandelia, S., Reddy, R., and Hodgkinson, P., 'Capital Punishment and Mental Health Issues: Global Examples', *St Louis University Public Law Review*, 25/2(2006):383-407
- Burton, William C., *Legal Thesaurus*, (New York: Macmillan,1990).
- Cao,Yulong, Hongbo Yu, Yanhong Wu, Zhou Xiaolin, 'Can money heal all wounds? social exchange norm modulates the reference for monetary versus social compensation'. *Front.Psychol* . 6(2015):1411.
- Cropper, M.,N. Simon, A. Alberini, Arora S., *Valuing Mortality Reductions in India: A Study of Compensating Wage Differentials* (2022). Retrieved from <http://www.documents1.worldbank.org> 11/12/2023
- Cropper, M.,N. Simon, A. Alberini, Arora S., *Valuing Mortality Reductions in India: A Study of Compensating Wage Differentials*.(2022) Retrieved from <http://www.documents1.worldbank.org> 11/12/2023

- Darimi al-, *Sunan al-Darimi*. Tahqiq: Husayn Salim Asad al-Darani (Riyadh: Dar al-Mughni li al-Nasyr wa al-Tauzi' 2000)
- Death Penalty Abolition (<https://www.amnesty.my/abolish-death-penalty/> (11/12/2023))
- Georges, Nael, *The process of abolishing the death penalty in member states of the Organisation of Islamic Cooperation*. Paris: ECPM (2020) (<https://www.ecpm.org/app/uploads/2022/10/rapport-OCI-2020-GB-191120>) retrieved 9/1/2023)
- Ginat, Joseph, *Blood disputed among bedouin and rural arabs in Israel: revenge, mediation, outcasting and family honour*. (Pittsburgh: University of Pittsburgh Press,1987).
- Hanafî, Mohd Shukri, 'From jahiliyyah to islamic worldview: in a search of an Islamic educational philosophy', *Int.J of Humanities and Soc Sci* . vol.3/3(2013): 213-221
- Hardy, Michael J.L, *Bloodfeuds and the payment of the blood money in the Middle East*. (Leiden: Brill,1963).
- Hasanain, Izzat, *Jara'im al-i`tida' ala salamah al-aqsam baina al-shariah wa al-qanun*. (Riyadh: Dar al-Ulum,1984).
- Hassanein, Ahmed Samir, 'The Impact of Islamic Criminal Law on the Qatari Penal Code', *Arab Law Quarterly*. 32(2018):60-79
- Heidari, Mohammad Ali, 'Study of Restorative Justice and Distributive Justice from the Perspective of Islamic Law and Jurisprudence'. *New York Science Journal* (2015): 80-85
- Hood , Roger & Hoyle, Caroline, *The Death Penalty: A Worldwide Perspective*. (Oxford: Oxford University Press,2015).
- Mohammad Hashim Kamali, 2000. *Principles of Islamic Jurisprudence*. (Cambridge: Islamic Texts Society,2000)
- Ismail, Paizah, 'Pelaksanaan Diyat dalam Kerangka Perundangan di Malaysia: Cabaran Fiqh Semasa', *Jurnal Fiqh*, vol.9(2012):1-20.
- Ismail, Shahrul Mizan, Zainal Abidin, Halila Faiza & Abdullah, Apnizan. 2017. Victim impact statement in criminal sentencing: success or setback for the criminal justice process?. *Current Law Journal*. 8:xv-xxxii

- Ismail, Siti Zubaidah, 'The modern interpretation of the diyat formula for the quantum of damages: the case of homicide and personal injuries', *Arab Law Quarterly* 26(2012): 361-379.
- Ismail, Siti Zubaidah. (2017). *Pampasan bagi kecederaan fizikal akibat kecuaiian menurut perundangan Islam*. Kuala Lumpur: ILBS.
- Ismail, Siti Zubaidah. (2022). Debunking Myths About Diyat. *IAIS Bulletin* July-August 2022
- Johnstone, Gerry. (2017). Restorative justice for victims: inherent limits. *Restorative Justice*, 5(3). 382-395
- Kamali, Mohammad Hashim, *Principles of Islamic Jurisprudence*. (Cambridge: Islamic Texts Society,2000)
- Khan, Ayaz. (2013). Human Ignorance (Jahiliyyah) Past & Present. *The Dialogue*, 2013. Vol. 8(4):346- 359.
- Kovandic, Tomislav V., Lynne M.Vieraitis, Denise Paquette Boots. (2009). Does the death penalty save lives? new evidence from state panel data. *Criminology & Public Policy*, vol.8(4): 803-843
- Kramer, Matthew H. (2011). *The ethics of capital punishment: a philosophical investigation of evil and its consequences*. Oxford: Oxford University Press.
- Layish, Aharon. (2006). Interplay between tribal and shar'i law: a case of tibbawi blood money in the shari'a court of Kufra. *Islamic Law and Society* 13:1,63-75
- Lewbel, Arthur, Calculating compensation in cases of wrongful death (2022). (<https://www.fmwww.bc.edu/EC-P/wp523.pdf>)11/12/2023
- Lewis, Bernard, Ch. Pellat & J. Schacht. (1970). *Encyclopedia of Islam*. New Edition. London: Folios Limited.
- Majah ibn, Muhammad ibn Yazid. (2000), *Sunan Ibn Majah bi Sharh al-Imam Abi Hassan al-Hanafi* . Beirut: Dar al-Ma`rifah.
- Malaysiakini. "Azalina: Bill to abolish mandatory death penalty to be tabled in Feb 2023" 21 Dec 2022. <https://www.malaysiakini.com> (retrieved 29/12/2023)
- Mawla al- Bek, Muhammad Ahmad Jad, *Ayyam al-'Arab fi al-Jahiliyyah*. Cairo: Dar Ihya' al-Kutub al-'Arabiyyah, n.d).
- Md Asri, M. H., & Ruslan, M. K, 'The Crime of Hirabah: Approach, Justification and Significance', *Jurnal Syariah*, 28/3)(2020): 383–416.

- Meera, Ahmad Kameel Mydin, *'Islamic gold dinar'*, Subang Jaya: Pelanduk Publications, 2002).
- Mohamad, Abdul Hamid, *Hukuman Pilihan Mengganti Hukuman Mati Mandatori: Pandangan Awal* (2022) (www.tunabdulhamid.my)(retrieved 13/1/2024)
- Mohamed, Ashgar Ali, 'Should The Death Penalty Be Abolished?' *Malaysian Court Practice*, (2018):6.
- Mohammad Hashim Kamali, *Crime and Punishment in Islamic Law: A Fresh Interpretation*, (Oxford: Oxford University Press, 2019)
- Mohd Dali, Nuradli Ridzwan Shah, *The mechanism of gold dinar*. Kuala Lumpur: AS Noordeen, 2004).
- Mohd Noor, Azman & Ghazali, M. A., 'Penyalahgunaan Dadah dan Kewajaran Peruntukan Hukuman Mati Ke atas Penedgar Dadah di Malaysia: Satu Analisis', *Jurnal Fiqh*, 7(2010): 29-48.
- Mohd Noor, Azman, 'Mandatory Death Penalty: An Analysis According to the Practice of Law in Malaysia and Shariah'. *Journal of Law and Society* 12(2008):13-27
- Mokhtar, Nur Afizah Hanum, 'Should death sentence be abolished?', *Malayan Law Journal*, (2006): 3.
- Nellis, Ashley, 'Tinkering with life: a look at the inappropriateness of life without parole as an alternative to the death penalty', *U. Miami L.Rev.* 67(2012):439-457
- Neumayer, Eric, 'Death penalty abolition and the ratification of the second optional protocol', *The International Journal of Human Rights*. 12/1(2008a): 3-21
- Neumayer, Eric, 'Death penalty: the political foundation of the global trends awards abolition', *Human Rights Review*. 9(2008b):241-268
- Nicolson, R.A., *A Literary History of the Arabs*. (London: Curzon Press, 2003).
- Oliphant, Stephen N, 'Estimating the effect of death penalty moratoriums on homicide rates using the synthetic control method', *Criminology & Public Policy*, vol.21/4(2022):915-944
- Oswald, Andrew J., Powdthavee, Nattavudh, 'Death, happiness and the calculation of compensatory damages', *Journal of Legal Studies* (2008):37.

- Otto, Jan Michiel.(ed.), *Sharia incorporated: a comparative overview of the legal systems of twelve muslim countries in past and present*. Leiden: Leiden University Press,2010)
- Pascoe, D., *Last chance for life: clemency in Southeast Asian Death Penalty Case*. Oxford: Oxford University Press,2019).
- Qudamah, Abu Abdullah ibn Muhammad ibn, *al-Mughni wa al-sharh al-kabir*. Beirut: Dar al-Kitab al-Arabi,1983).
- Sagoff, Syed Ahmad al-, *Al-Diyah as compensation for homicide, wounding in Malaysia*. (Kuala Lumpur: ILBS,2010).
- Samuri, Mohd al-Adib, ' Preventive theory as punishment justification: comparative analysis between civil and Islamic law', *Islamiyyat* , 34(2012):131-143
- San'ani al-, *Subul al-Salam Sharh Bulugh al-Maram*. Beirut: Dar al-Kutub al-Arabi,1987).
- Scott, Austin W., 'The Pardoning Power', *The Annals of the American Academy of Political and Social Science* 284(2016):1, 95
- Sharp, Susan F., *Hidden Victims: The Effects of the Death Penalty on Families of the Accused*. (New Jersey:Rutgers University Press,2005)
- Shawkani al-, Muhammad ibn Ali ibn Muhammad, *Nayl al-Awtar Sharh Muntaqa al-Akhbar*. (Cairo: Dar al-Turath Library,nd).
- Sijistani al-, *Sunan Abi Daud*. Tahqiq: Izzat Abid al-Da'as (Beirut: Dar Ibn Hazm 1997)
- Snellenburg, Sidney C. (1987). Is there a reasonable alternative to death penalty. *Judicature*, 7 (1987): 5.
- Stokes, Rachel, 'A Fate Worse than Death? The Problem with Life Imprisonment as an Alternative to the Death Penalty', in Jon Yorke (ed.), *Against the Death Penalty: International Initiatives and Implications*. (London: Routledge,2016).
- Tirmizi al-, *Al-Jami' al-Kabir*. Tahqiq: Basyar 'Awad Ma;ruf (Beirut: Dar al-Gharb al-Islami 1996)
- Tuna, Sedat, 'The effect of politics in the jahiliyyah period on the literature', *OSUBIAD* 12/2(2002) :1231 -1264.
- Uddin, M., & Faruqi, S. S., 'Power of Pardon in the Shariah and its Applicability in Common Law', *Jurnal Syariah*, 32/2(2024), 246–274.

- Utusan Malaysia, " konsep diyat sebagai ganti banduan hukuman mati sedia ada" accessed on 08 December 2022. <https://www.utusan.com.my/berita/2022/06/konsep-diyat-sebagai-ganti-banduan-hukuman-mati-sedia-ada/>
- Vadillo, Umar, *Fatwa on Paper Money*. (Granada: Medina Press,1992).
- van Zyl Smit, Dirk; Appleton, C; Vucong G. (eds). *Life Imprisonment in Asia*. Palgrave Advances in Criminology and Criminal Justice in Asia. (Palgrave Macmillan, Singapore,2023).
- Weatherly, Robert & Helen Pittam, Helen. (2015). Money for life: the legal debate in China about criminal reconciliation in death penalty cases. *Asian Perspective*. 39:277-288
- Wilson, Luke, 'Monetary compensation for injuries to the body, AD 602-1697'. in Jean Howard&Holly Dugan (eds.). *Early modern cultural studies 1500-1700*. (London: Palgrave Macmillan,2003):116-127
- Wood, Arthur Lewis, 'The alternatives to the death penalty', *AAPSS*. Vol.284, Issue 1(2016): 63
- Yorke, Jon. (ed.), *Against the Death Penalty: International Initiatives and Implications*. (London: Routledge,2016).
- Zaidan, Abdul Karim, *Introduction to the Studies of Islamic Law*. Beirut: Muassasah al-Risalah,2009).
- Zuan, Chua Ming, 'The appropriateness between the death penalty and murder offence under the Malaysian Penal Code', *Malayan Law Journal*, (2010)5.
- Zuhayli, Wahbah al-, *Nazariyyah al-Daman aw Ahkam al-Mas'uliyah al-Madaniyyah wa al-Jina'iyah fi al-Fiqh al-Islami*. (Damascus: Dar al-Fikr 1998)