أثر غياب القاتل المتعمد على كفارته في فقه الإمامية بالنظر الى المادة ٤٣٥ من قانون العقوبات الإسلامي

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The Effect of the Absence of a Premeditated Murderer on the Punishment in Imamieh Jurisprudence (With a View on Article 435 of the Islamic Penal Code)

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Abstract

One of the issues that have been raised in jurisprudence texts for a long time is the non-execution of qisas for the lack of the murdered due to his escape or sudden death. In this case, some believe in turning qisas into Diya and they have resorted to the principle of respect for Muslim blood, Authority verse and hadiths; however, these reasons have been criticized by others because according to these reasons, the avenger of blood are entitled to the murderer's soul not his possessions. Therefore, they cannot be a reason for the necessity of Diya and the narrations are exempt from the assumption of their authenticity. Others reject qisas and Diya because the compromise of the parties is a prerequisite for converting qisas to Diya, which would not be possible if the murderer is absent. However, since the traditions of proof of the Diya have the necessary authority, they cannot be ignored and the Diya is not rejected. Therefore, in accepting the distinction between escape and sudden death because the conversion of qisas into Diya is contrary to the principle and in cases of contrast to the principle, it is necessary to refer to the subject of the hadith i.e. the escape of the murderer. Many of the jurisprudents might be considered in agreement with this statement because proponents of the Diya, affirm the Diya in the event of an escape and those who believe in voiding Diya, reject Diya in the event of death. However, since the Diya is intervening substitute, if the murderer comes back, the right to qisas is reserved for the avenger of blood. Finally, Article 435 of the Islamic Penal Code can be criticized and amended for the lack of distinction between escape and natural death as well as for the transmission of qisas to Diya for intentional non-murder crimes.

Key words : qisas , premeditated murder , murderer escape , murderer death , Diya

المستخلص

واحدة من القضايا التي أثيرت النقاش في النصوص الفقهية لفترة طويلة هو عدم تنفيذ أمر القصاص لغياب القاتل وقد يكون هذا بسبب هروب القاتل أو موته المفاجئ. يري البعض يجب تحويل القصاص إلى الدية اعتمادا على احترام دماء المسلمين وبناءا علي الآية الملكية و الروايات الموجودة في هذا الجانب، لكن هذه الحجة تعرضت للانتقاد. يرى آخرون أن القصاص و الدية باطلان رأسا، لأن تحويل قصاص إلى ديات يتطلب موافقة الطرفين ، وهذا ليس هو الحال.

لكن بما أن أحايث إثبات ديات لها الحجية اللازمة، فلا يمكن تجاهل الديات و سقطها أيضًا. لذلك، ويمكن القول بانفصال بين الهروب والموت المفاجئ ولا تمكن الاستعاضة عن القصاص بالدية.وفقًا لنتائج هذا التحقيق، يمكن انتقاد وتعديل المادة ٤٣٥ من قانون العقوبات الإسلامية لفشلها في الانفصال بين الهرب والموت الطبيعي وكذلك لتحويل القصاص إلى الدية في الجرائم العمدية غير القتل.

الكلمات المفتاحية : القصاص ، القتل العمد ، هروب القاتل ، موت القاتل ، الدية .

1- Problem

Since qisas is one of the definite issues of the justice-based religion of Islam, which has been emphasized in many verses, sometimes the sentence cannot be enforced because of the lack of murderer. This lack is sometimes due to the murderer's escape and his inaccessibility and sometimes because of his death before the execution of qisas. The present study examines the punishment for such a murderer. There are three theories in this problem:

1.1. Converting Qisas to Diya Absolutely (whether it was due to the escape of the murderer or his natural death, whether the murderer has the capacity to pay Diya by his property or he is poor that the mature person is liable.) This theory was mentioned for the first time by the late Sheikh in his fatwa book (Tusi, 1980, p. 736). Then jurists such as Ibn Boraj (Ibn Boraj, 1986, p. 2, 457) Abu Salah (Abu Salah, 1983, P. 395) and Ibn Hamzah (Ibn Hamzah, 1988, p. 437) presented their fatwas. To the extent that Ibn Zohreh has claimed consensus (Ibn Zohreh, 1997, p. 413).

Among the scholars after him, Mohaghegh Helli (Mohaghegh Helli, 1992, Vol 3, p: 365) and Allameh Helli (Allameh Helli, 1990, Vol 14, p: 419 and Allameh Helli, 1993, Vol 9, p: 299) and Ibn Fahad Helli (Ibn Fahad, 1987, Vol 5, p.226), Fazel Meghdad (Fazel Meghdad, 1984, vol. 4 p 447) and Mohaqeq Karaki (Mohaqeq Karaki, 1994 , vol. 5 p 394) have all accepted the necessity of paying Diya. Contemporary jurists such as Ayatollah Marashi Najafi (Marashi, 1995, Vol. 2, 467) and Ayatollah Khoei (Khoei, 1990, Vol. 41, p. 155) are supporters of this theory.

1.2. The waiver of Qisas and Diyas in name: The first person who put forward this theory is apparently the late Sheikh in his book of Jurisprudence (Tusi, 2008, vol. 7, p. 65). In his comparative jurisprudence, he first hesitated between this theory and the first theory and then introduces this theory (Tusi, 1987, vol. 5, p. 184).

After him, Ibn Idris Helli introduced the first theory as opposed to consensus, books, consecutive reports and principles of religion and believes in this theory (Ibn Idris, 1990, Vol. 3 p. 330). After him, some jurists such as Fazel Abi (Fazel Abi, 1997, vol. 2 p. 622), Sabzevari (Sabzevari, 1993, vol. 28 p. 329) and Sahib Javaheri (Najafi, 1984, Vol. 42, p. 329) by rejecting the argument of the first quote have tended to this theory. The contemporary jurists including the late Tabrizi (Tabrizi,

2006, p. 271), Fazel Lankrani (Fazel Lankrani, 2002, p. 353) and Rouhani (Rouhani, 1992, p. 26, p. 129) are the proponents of this theory.

1.3. Distinction: qisas turns into Diya if the murderer has escaped and Diya is waived in the event of his death. Fazel Meghdad was the first one who discussed this distinction (Fazel Meghdad, 1984, vol. 4, p. 448). However, he was a proponent of the first theory. After him Shahid Thani (Shahid Thani, 1993, Vol. 15 p. 260), Mohaghegh Ardebili (Ardebili, 1983, Vol. 13 p. 418), Seyyed Javad Ameli (Amali, 1999, Vol. 16 p. 608) Sheikh Ahmed Kashif al-Ghatta (Kashf al-Ghatta, 1423, Vol. 3 82) and Seyed al-Tabatabai (Tabatabai, 1998, vol. 16 p. 309) all point to the difference between escape and death.

2. The root of the dispute and its reasons:

Shahid Awwal considers this difference to be based on the difference in the principle of premeditated murder (Shahid Awwal, 1994, vol. 4, p. 317) that whether the principle in punishment is premeditated murder and the Diya is established with contempt and peace between the avenger of blood and the murderer. Is the avenger of blood is allowed to choose or between Qisas and Diya and if the Diya is chosen does the murderer have a right to refuse? According to Allameh Helli, most jurists believe that the principle for premeditated murder is Qisas and that the Diya is fixed only by peace between the avenger of blood and the murderer. However, Ibn Jonayd al-Askafi and Ibn 'Abi Aqil Omani consider the avenger of blood as free to choose between Qisas and Diya (Allameh Helli, 1993 (various), vol. 9, p. 286).

Of course, the Shahid Awwal considers Ibn Jonayd in agreement with the famous jurists in this issue (Shahid Awwal, 1994, vol. 4, p. 317), which is criticized by some jurists that if the basis of disagreement is on the subject matter of which Ibn al-Jonayd disagrees with the famous jurists, how he agrees with famous jurists them in principle? (Ardebili, 1983, Vol. 13, p. 418).

In addition to what the Shahid Awwal has suggested as the basis of the dispute, Shahid Thani introduced the origin of the dispute as the qisas substitutability (Shahid Thani, 1993, vol. 15, p. 261). This has also been criticized by some jurists that how it is necessary to pay Diya according to the famous principle based on qisas as the punishment of premeditated murder. However, the necessity of Diya is according to Ibn Jonayd(Ardebili, 1983, Vol. 13, p. 419).

2.1. Arguments for the Diya confirmation

2.1.1. The first reason that jurists rely on to prove the Diya is the principle of respecting Muslim blood (لا يبطل دم الامراء المسلم) prudents La Yabal al-Amra'a Muslim). (Allameh Helli, 1993 (various), Vol. 9 p. 298; Tusi, 1987, Vol. 5 p. 185) (Ibn Fahad, 1987, Vol. 5 p. 226) (Shahid Thani, 1993, Vol. 15 p. 261) (Shahid Awwal, 1994, J 4 p. 318 |) that some scholars like Mohaghegh Helli have cited this principle as the main reason for this rule. And others see the reasons as the confirmation (Mohaghegh Helli, 1992, vol. 3 p. 365).

In contrast, some scholars such as Sahib Jawaher criticize the reason that the assumption is not covered by the rule because there is a judgment of qisas against the murderer, which is sufficient to prevent the loss of Muslim blood and secondly, the Diya is taken from the murderer's property, which belongs to the heiress and the principle is their release from this obligation (Najafi, 1984, vol 42, p. 329).

2.1.2. The second reason given for proving the Diya is the Authority verse "and whoever is slain unjustly, We have indeed given to his heir authority, so let him not exceed the just limits in slaying; surely he is aided" (AL-ISRA:33) (Allameh Helli, 1993, Vol 9 p 298) (Ibn Fahad, 1987, vol. 5 p. 226) (Shahid Thani, 1993, vol. 15 p. 261) (Shahid Awwal, 1994, vol. 4 p. 318), with the assertion that the avenger of blood have an authority over the murdered and with his death this authority about qisas is transferred into his property.

However, some have criticized the arguments that the avenger of blood have the authority on the qisas of the murderer, not on the payment of Diya(Najafi, 1984, vol. 42, p. 329) and on the transfer of the authority from the qisas to the Diya and property, a reason is required that such a kind of reason is missing.

2.1.3. The third reason that has a raised to prove Diya is Ababasir's narration of Imam Sadiq (as): سَأَلْتُ أَبَا عَبْدِ اللَّهِ ع عَنْ رَجُلٍ قَتَلَ رَجُلًا مُتَعَمِّداً- ثُمَّ هَرَبَ الْقَاتِلُ فَلَمْ يُقْدَرْ عَلَيْهِ- قَالَ إِنْ كَانَ لَهُ مَالٌ أُخِذَتِ الدِّيَةُ مِنْ مَالِهِ- وَ إِلَّا فَمِنَ الْأَقْرَبِ فَالْأَقْرَبِ- فَإِنْ لَمْ يَكُنْ لَهُ قَرَابَةٌ أَدَّاهُ الْإِمَامُ- فَإِنَّهُ لَا يَبْطُلُ دَمُ امْرِئٍ مُسْلِمٍ. (Al-Hurr al-Amili, 1989, p. 29, p. 395). Ababasir says, I asked Imam Sadeq (pbuh) about a man who deliberately killed another and then escaped and no one could take him. The Prophet (peace be upon him) said: If he has money, the Diya will be removed from his money, otherwise, his relatives will pay it based on their relationship. If he has no relatives, the Imam is obliged to pay his

Diya because Muslim blood is not wasted (Allameh Helli, 1993 (various), ibid) (Ibn Fahad, 1987, Vol. 5 p. 226) (Khoei, 1990, Vol. 42 p. 155) (Shahid Thani, 1993, Vol. 15 p. 261) (Shahid Awwal, 1994, Vol. 4 p. 318).

Some have cited this narrative as a confirmation (Mohaghegh Helli, 1992, vol. 3, p. 365). This may be due to the weakness of the document that some have suggested because Hassan ibn Muhammad ibn Sama'a and Ahmad ibn Hassan Meysami are known and there is disagreement about Aban ibn 'Uthman among the scholars and Ababasir is common between Ababasir Moradi and Ababasir Asadi (Ardebili, 1983, vol. 13, p. 415).

2.1.4. Another narration cited by the Diya in this regard is the correct narration of Ahmad ibn Muhammad ibn Nasr, who asked Imam Jawad (peace be upon him) about a man who intentionally killed and escaped and he was not found until he was killed. He replied: إِنْ كَانَ لَهُ مَالٌ أُخِذَ مِنْهُ- وَ إِلَّا أُخِذَ مِنَ الْأَقْرَبِ فَالْأَقْرَبِ (Al-Hurr al-Amili, 1989, Vol. 29, p. 395). That is, if he has money, the Diya will be removed from his money, otherwise, his relatives will pay it based on their relationship (Allameh Helli, 1993 (various), vol. 9, p. 298) (Ibn Fahad, 1987, Vol. 5, p. 226) (Khoei, 1990, Vol. 42, p. 155) (Shahid Thani, 1993, Vol. 15, p. 261).

Some jurists have mentioned the meaning of Abi Ja'far in the narration as Imam Baqir (as) (Allameh Helli, 1993 (various), vol. 9, p. 298; Shahid Thani, 1993, Vol. 15, p. 261). However, since Ahmad ibn Muhammad ibn Nasr Bantzti is considered one of Imam Javad's companions, some consider Abi Ja'far as Imam Jawad (pbuh) (Ardebili, 1983, Vol. 13 p. 413). Some jurists have suggested either that he quoted hadith directly from Imam Jawad or that Mersla had quoted Imam al-Baqir (Najafi, 1984, v. 42, p. 330). The validity of this narrative is also unclear to some jurists because there is 'Ala' which is a common name among several persons; most of these are al-Thaqi and only al-ibn al-Masib has been introduced as non- Thaqi as Imam Sadiq companions. It is not related to this narrative because it was mentioned by by Muhammad ibn Ali ibn Mahbub while mentioning Ala that he did not narrate anything about Alaah ibn Masib (Ardebili, 1983, Vol. 13, p. 416). In addition to the mentioned documentary drawbacks, there is also a causal drawback that Diya's obligation to relatives is unlikely to be

determined by the method of calculation and it in contrast to rational and narrative laws (Ibid).

2.1.5. Another reason for the Diya's proof is that the murderer was supposed to execute what he was obliged to do (qisas) until the qisas ended, so he has to pay the substitute. If he dies, it is paid by his property and if he had no property, it will be taken from those who inherit the Diya (Allameh Helli, 1993 (various), vol. 9, p. 298) (Ibn Fahad, 1987, vol. 5, p. 226) (Tabatabai, 1998, vol. 16, p. 310). This is why some jurists have said that if anyone believes in in the case of the murderer being killed, first, he must believe in the Diya in the state of escape because the murderer has caused the waiver of obligatory qisas. So he is obliged to pay the Diya like the one who escaped the deliberate murderer is now obliged to pay in return for his qisas (Diya) (Ardebili, 1983, Vol. 13, p. 413).

However, the reason is also confusing in that it is true that escaping is forbidden for the murderer, this does not guarantee Diya because he has escaped, and this does not constitute the loss of soul to say that he is responsible for Diya due to the loss of qisas. (Ardebili, 1983, Vol. 13, p. 415)

Another drawback to the recent reason, which can be attributed to the above narrations, is that the reason is exempt from the claim because the claim to prove the Diya in all assumptions is the absence of a deliberate murderer while the subject of the narrator is the escape of the murderer. Furthermore, the recent reason is inappropriate for a murderer to die without refusing to go to qisas and to escape because he is not entitled to the qisas and cannot be held responsible for the Diyas arising from qisas (Tabatabai, 1998, vol. 16, p. 310).

There are two other reasons besides the above. One is the analogy of this problem with Diya for the one who has no hands and has amputated the hands of the one and he has to pay Diya(Shahid Thani, 1993, Vol. 15 p. 261) (Shahid Awwal, 1994, Vol. 4, p. 318) (Mohagheq Helli, 1992, Vol. 365) and another is the narrated consensus of Ibn Zohreh (Tabatabai, 1998, Vol. 16, p. 309). There is no doubt about the weakness due to the difference of analogy (Najafi, 1984, vol. 42, p. 329) and the lack of narrated consensus.

2.2. Reasons for the waiver of qisas and Diya in name

Since according to the traditions and consensus, the qisas is definitely fixed (Tabatabai, 1998, vol. 16, p. 309) and it turns into Diya during the

qisas and ceases based on the compromise between the murderer and the avenger of blood, it is not permissible to oblige the murderer to pay Diya. Therefore, with the lack of the murderer, the issue of qisas is waived and Diya has not been constant to stay and be determined with qisas. However, the condition of turning qisas into a Diya is subject to compromise, which cannot be fulfilled in the absence of the murderer (Najafi, 1984, Vol. 42 p. 329) (Tusi, 1987, vol. 5 p. 184).

That is why Ibn Idris considered the proof of Diyad to be contrary to the consensus and appearance of books, consecutive reports and principles of religion because, according to the conscience of the scholars, what qisas is necessary for premeditated murder rather than Diya. Therefore, when the place of qisas is the murderer who is killed, qisas is waived and converting it to Diya from the murderer or his heir property is a Shari'a decree that requires a Shari'a reason, which is missing. Then they make a judgment about the fatwa of the Sheikh to establish Diya in the Nahayat book that a rare report is brought in which Sheikh has raised the faults and does not believe in them. Therefore, he has rulled it out, which is a correct verdict (Ibn Idris, 1990, vol. 3, p. 330).

However, according to some scholars, this word has been introduced in many different ways. First, introducing Shaykh's fatwa as opposed to consensus is ignorance and error because he is aware of consensus positions more than Ibn Idris(Allameh Helli, 1993 (various), vol. 9, p. 299). Therefore, scholars find this consensus claim of Ibn Idris to be contradicted by the claim of Ibn Zohra's consensus in Ghania (Shahid Awwal, 1994, Vol. 4 p. 319).

Secondly, what successive hadith has come up in this regard that the Sheikh opposed? (Allameh Helli, 1993 (various), vol. 9, p. 299) However, some jurists have come to the view of Ibn Idris's theology that his intention of consensus and the appearance of the book and consecutive hadiths are the principle of the necessity of qisas in premeditated murder rather than consensus Specific (Najafi, 1984, Vol. 42 p. 331) (Ardebili, 1983, Vol. 13 p. 418).

Nevertheless, the consensus on the principle of the necessity of qisas for premeditated murder can also be criticized because some like Ibn Jainid and Ibn Abi Aqil are against it and argue for an option to choose between qisas and Diyah (Ardebili, 1983, Vol. 13, p. 418).

Thirdly, the fatwa to the Diya does not conflict with the necessity of qisas. Fourthly, there is a religious argument for proving the Diya, one of which is that strengthens consideration and wastes the exchange of the guarantor of the substitute. Fifthly, Sheikh in the book has not given up his view in Nahayat and mentioned the waiver of Diya is strong (Allameh Helli, 1993 (various), vol. 9, p. 299). Therefore, some jurists have stated that Ibn Idris thought that Sheikh had has not given up his view in Nahayat fatwa (Shahid Awwal, 1994, vol. 4, p. 319). However, according to Sahib Jawaher, the latter does not occur because Sheikh is hesitant or reluctant to waive Diya. However, the two assumptions in the two books are different because in Nahayat, Sheikh has provided his Fatwa on the approval of Diya and the discussion is beyond the escape of the murderer and, where he rules out Diya, there is a discussion on his death (Najafi, 1984, vol 42 p. 332).

It is noteworthy that Sheikh rules out Diya in Al-Mabsut (Tusi, 2008, vol. 7, p. 65). However, some scholars have mistakenly attributed the idea of establishing a Diya to Mabsut (Mohagheq Helli, 1992, vol. 3, p. 365), which has been criticized by some jurists (Shahid Awwal, 1994, vol. 4, p. 319). Therefore, it is said that if Ibn Idris would attribute Sheikh's reference from fatwa to the approval of the Diya to Mabsut, it would be more appropriate because the waiver of Diya is more explicit in Mabsut (Ibid) .

2.3. The reason for the accepting the distinction between escape and sudden death

As stated in the historical record, some jurisprudents elaborate on this issue that if the murderer escapes and deliberately impedes the execution of the qisas, so that his qisas should be averted by his death, Diya is payable by his property. However, if there is no escape, the murderer does not prevent executing qisas, and the murderer dies naturally, qisas and Diya are waived in name.

The reason for this is because on the one hand, the principle in intended murder is qisas and its turning into Diya is subject to compromise between the avenger of blood and the murderer, which is not possible due to the lack of the murderer. On the other hand, the traditions of this subject cannot be ignored and the only drawback to these narratives is their documentary weakness that is worthy of consideration because Abi Basir’s narration has been cited in two documents of two books of Arba’e books.

The late Koleini quotes this narration from Hamid bin Ziad (Koleini, 1987, Vol. 7, 365), who is a religious scholar, thus Najashi has included him in his Zoafa book (Najashi, 1987, p. 132). Al-Tusi (al-Tusi, p. 155), Ibn Dawood (Ibn Dawood, 2004, p. 135) and Allameh Helli (Allameh Helli, 2002, p. 59) have authenticated him and introduced him as Kathir-ol-Tasanif.

Hamid ibn Zayd quoted this narration from Hassan ibn Muhammad ibn Sama'a, who was also a religious scholar (Kashi, 1989, p. 469), but the scholars introduced him as Jayd-ol-Tasanif (with good writings) and Kathir-ol- Hadith (the carrier of many hadiths) (Tusi, Bi Ta, p. 133; Allameh Helli, 2002, p. 12) and have authenticated him. He also quoted the narration from Ahmad bin Hassan bin Ismail, who is a descendant of Maysam Tamar. Kashi declared him a scholar (Kashi, 1989, p. 468), but Najashi introduced him in his book as "in any case he was reliable and his hadiths are correct" (Najashi, 1987, p. 74).

Ahmad ibn Hassan ibn Suleiman narrated this narration from Aban ibn 'Uthman al-Ahmar, who is one of the companions of Imam Sadiq and Imam Kazim al-Islam (Najashi, 1987, p. 13) and introduced Kashi as a companion (Kashi, 1989, p. 375). He quoted this narration from Abi Basir as a great companion of Imam Sadiq that he one of the companions of the consensus (Kashi, p. 238).

The second document of this narration is quoted in the book "Man La Yahzrah al- Faghih" (Saduq, 1993, Vol. 4, p. 167) that the late Sheikh Saduq quoted this narration from Hassan ibn Ali ibn Qaddal. He is a Fathian and believes in the Imamate of Abdullah Aftah (Kashi, 1989, p. 565). However, before he departed, he abandoned his idea and accepted Imamiyah religion (Ibn Dawood, 2004, p. 441). Therefore, the deceased Kashi introduced him as the companions of the consensus (Kashi, 1989, p. 556) and the scholars honored him (Allameh Helli, 2002, p. 37) (Tusi, p. 123). He quoted the narration from Zarif ibn Naseh that the late Ibn Da'ud (Ibn Da'ud, 1383, p. 130) quoted him by Kashi as Muhmal [1]. However, Najashi (Najashi, 1987, p. 209), Ibn Dawood himself (Ibn Dawood, 2004, p. 192) and Allameh (Allameh Helli, 2002, p. 91) have described him as "authentic in unfailing Hadith" signifying his authenticity among such great men. He quoted this narration from Aban ibn 'Uthman and he narrated it from Abi Basir and Abi Basir from Imam Sadiq (PBUH).

From what has been said, it is concluded that this narrative is credited with the document mentioned by the late Koleini. However, it is true by the document mentioned by the late Saduqشود چك . Nevertheless, the narrative of the late Koleini has two advantages. First, it is more complete and clarifies the task of the steps in the absence of relatives. Secondly, it is explicit in the principle of respect for Muslim blood based on which the principle of respect for Muslim blood is fulfilled.

The only documentary drawback of Baznati narrative is the presence of "Ala" in the document that most of them are "Seqa" and only Ala bin Musayeb is not Seqa that he is one of the companions of Imam Sadiq (as) and is not related to this narrative because Muhammad bin Ali ibn Mahbub, who narrated this narration from Ala has never narrated from Ala ibn Musayeb (Ardebili, 1983, Vol. 13, p. 416). It is concluded that the above narrations are credible and have the necessary authority to confirm the rule of Sharia. And according to some jurists, some of these narratives are valid and the weakness of the rest of them is resolvable by fatwa's reputation (Tabatabai, 1998, vol. 16, p. 309; Najafi, 1984, vol. 42, p. 330). So one cannot ignore these narratives, but since the verdicts of these traditions are contrary to the original, one should simply take the position of the verse and go beyond the subject. This narrative is not generalizable to subjects beyond this issue (Tabatabai, 1998, vol. 16, p. 310).

On the contrary, it can be argued that the subject in the narrations was the question of the narrator, not the answer, so the rule of Diya can be held constant in case of murderer's death. However, the answer states that the question is not separate from the answer, thus specific question specifies the answer as well (Najafi, 1984, Vol. 42, p. 332).

Another objection to this answer is the commentary given in the narration by Abi Basir, who considers the reason for the Diya as a principle of respect for Muslim blood (Mabani Takmalah Al-Minhaj, vol. 42, p. 155), but the answer may be that this is the reason for Imam's payment of the Diya, not the principle of the sentence (Najafi, 1984, vol. 42, p. 332). This answer is confirmed by the fact that this reason is only quoted in the narration of Abi Basir quoted by Koleini that paying Diya by Imam is only mentioned in this narrative. Therefore, many jurists have relied on the issue of escape, but perhaps they have attached other forms of refusalto it; however, based on the abridgement, it is necessary to rely on escape, which is certain.

To confirm this distinction, one can turn to the reason brought by Allameh Helli to prove the Diya (Allameh Helli, 1993 (various), vol. 9, p. 298). As the murderer has prevented qisas by his escape to stop qisas, this qisas is obligatory on him, then he is considered a perpetrator of loss and he has to pay Diya to compensate the loss (Najafi, 1984, vol 42 p. 330). Therefore, some jurisprudents have opposed the inclusion of this problem in some jurisprudential texts because in these texts, the title is the issue of murderer's death, while the subject of the narrator is the escape of the murderer (Ibid. P. 332).

This problem can be seen as contradictory in the words of the Shahid Awwal because he discusses the necessity of Diya in the case of the murderer's death in Lam'eh (Shahid Awwal, 1990, p. 274). However, in the book of Ghayyat al-Morad, the rule of Diyas is attributed to the narrations and the words of the companions and considers it as probabale (Shahid Awwal, 1994, Vol. 4, p. 319)

By such distinction, it may be possible to consider the word of the Sheikh in Nahayat book consistent with Mabsut and Khalaf because the subject of Nahayat book is the verdict of Diya for the escape of the murderer (Tusi, 1400, p. 736) and in Mabsut and Khalafm the waiver of Diya is his extinction including escape (Tusi, 2008, Vol. 7 p. 65; Sheikh Tusi, 1987, Vol. 5, p. 184). Therefore, it is possible to attribute the contradictions to the word of the Sheikh by some jurists (Allameh Helli, 1993 (various), vol. 9, p. 299), and Sheikh's claim of his fatwa in Khalaf by others (Ibn Idris, 1990, vol. 3, p. 330) for the confusion and indifference between the two issues (Ardebili, 1983, Vol. 13, p. 417).

Perhaps this is why Mohaghegh Helli discusses the murderer's death and rules it as the waiver of qisas and Diya and then talks about Mabsut and Khalaf while excluding Nahayat because discusses the issue of escape. However, Abi Basir's narration that the reason for Diya for proving the murderer's escape, even though it refers to its document weakness, is not appropriate and it is not clear why Baznati narrative is excluded, while it is more credible (Ardebili, 1983, Vol. 13, p. 419).

3. After accessing the murderer

As on the one hand, the Diya's conviction for escape is suspended and this sentence is not conditional on the murderer's death and on the other hand, there is no valid reason to uphold Diya to the murderer's death, the sentence of Diya may also apply if the murderer is alive. Thus, the murderer's death constraint in Baznati is only applicable to the narrator's

question, which does apply for Imam's rule on death (Tabatabai, 1998, vol. 16, p. 310). Even in the narration of Abi Basir, there is no mention of death, let alone the Imam's response (Najafi, 1984, Vol. 42 p. 332). In Kafi book after mentioning two narrations it is said " ثمّ للوالي بعد حبسه و أدبه" (Al-Kafi, vol. 7, p. 365) i.e. after paying Diya the ruler can punish or imprison the murderer. Although this narrative may be res integra, it could be a confirmation of the invalidity of the murderer's death (Tabatabai, 1998, vol. 16, p. 310).

However, if the Diya is paid to the avenger of blood and then the murderer is arrested, then the avenger of blood would have the right to return the Diya and ask for qisas to the murderer because the Diya was not a choice for the avenger of blood and it is accepted inevitably (Najafi, 1984, vol. 26, p. 200). The Diya was thus taken as an inversion of substitute from the murderer's possessions, which is diminished in the presence of the murderer and the avenger of blood has the roght to qisas (Allameh Helli, 1994, vol. 14, p. 419). Some have even gone further and said that returning the Diya is an obligation of the avenger of blood and even if they do not ask for qisas, they are obliged to return the Diya (Allameh Helli, 1993, Vol. 2 p. 169).

4. Responsibility to pay Diya

According to the narrative context, the Diya is paid from the murderer's property and the relatives are obliged to pay the Diya if he does not have the financial capacity. Some jurisprudents have sought to modify this rule and have said: Since the murderer is killed, the mature heir will inherit his Diya when his qisas is waived (Allameh Helli, 1993 (various), vol. 9, p. 299). However, this reason has not been favored by some jurists (Ardebili, 1983, Vol. 13, p. 416).

The late Shahid Thani attributed this theory to most jurists (Shahid Thani, 1993, vol. 15, p. 262). This attribution shows that there are those among the jurisprudents who believe in paying Diya by relatives among them is Fakhr al-Muhaqiqin who rules to pay the Diya if the murderer escapes. However, if there is no financial capacity, paying Diya by relatives' property is weived (Fakhr al-Muhaqiqin, 2008, Vol. 4, p. 741). Some jurists have adjusted this theory and considered the Diya's obligation to relatives without mentioning the rules and the method of calculation contrary to rational and transactional laws (Ardebili, 1983, Vol. 13, p. 416).

It is perhaps for this reason that Allamah in his other book has deviated from this theory and stated: If he escapes and is not available to die, the Diya is the responsibility of him and if he does not have the money, Diya is waived (Allamah Helli, 1990, vol. 2 198). Allameh's word is considered by the Shahid Awwal to be against the Imamiyah jurists (Shahid Awwal, 1994, vol. 4, p. 320) and in the view of Mohaghegh Ardebili the reason is that Allameh did not resort to traditions in issuing fatwas because if he uses the narratives for issuing this rule, he would have to take resort to all narratives and consider the Diya as the responsibility of the mature heir (Ardebili, 1983, Vol. 13, p. 416).

In any case, the theory of discharging from obligation is defensible if the narration is ruled out due to the Diya confirmation and this theory is not discounting the compound consensus because among the jurists some believe in Diya confirmation on the murderer and his relatives in his absence. However, others believe in the waiver of Diya on the murderer and his relatives. Therefore, the promise of Diya confirmation for the murderer alone constitutes discounting the compound consensus (Tabatabai, 1998, Vol. 16, p. 310; Najafi, 1984, Vol. 42, p. 332).

5. Review and criticism of Islamic Penal Code

The issue of the escaping murderer has been raised in Articles 1 and 2 of the former Islamic Penal Code and Article 3 of the present law. Article 2 of the former law, which was devoted to 'death', stated: 'Whenever a person committing a murder leading to qisas dies, Diya will be abolished". Article 5 of the former law also addressed the "escape and inaccessibility of the murderer" after committing premeditated murder and before the execution of the sentence. Whenever a person who commits a premeditated murder eascapes and is unavailable until he dies, after the death, qisas becomes a Diya, which shall be paid by the murderer's property and if he does not have financial capacity, it will be paid by the relatives in terms of their closenessand if he does not have any relative, it will be paid by Bayt al-mal. The Islamic Penal Code of 2013, while abolishing Article 4 of the former law, has sentenced the same rule for death and escape and stipulates as follows. Whenever the perpetrator of intentional crime is not accessible due to death or escape, Diya will be paid by his property and if he does not have the financial capacity, the avenger of blood can take the Diya from the heir. In the absence of the heir, lack of access to them or their lack of capacity, Diya

will be paid by Bayt al-mal and in the non-murder crimes, Diya will be paid by Bayt al-mal. If after obtaining Diya, access to the perpetrator of the crime, whether murder or non-murder, is possible, if Diya is not received as a substitute for qisas, the right of qisas is reserved for the avenger of blood; however, the collected amount of Diya must be returned before the qisas.

According to the investigations, this article can be criticized in some respects: Firstly, there is no difference between escape and natural death in this article, as it seems that the distinction between the two is rationally required. Secondly, this article of the law on non-deliberate murders considers Diya collectible by the property of the perpetrator and then by Bayt al-mal. Whereas, as stated above, the conversion of qisas into Diya in deliberate crimes without compromise is against the principle and should be confined to the narrative of the escape of a deliberate murderer and the conversion of qisas to Diya cannot be accepted in other intentional crimes.

6. Summary and Conclusion

Based on what has been discussed so far, the following is concluded:

1. Give the evidence presented among the three theories, accepting the distinction seems to be more powerful and elaborate. So if the murderer is missing because of his escape, the qisas turns into Diya, and if he dies suddenly, the qisas and Diya are waived.
2. Based on the distinction theory, a compromise could be made among many jurisprudents. Accordingly, the proponents of Diya's affirmation consider it as fixed in case of escape and proponents of Diya's waiver consider it waived in case of death.
3. Since the Diya is intervening substitute, if the murderer comes back, the right to qisas is reserved for the avenger of blood.
4. According to the content of the traditions and compound consensus, if Diya is approved, the Diya will be paid by the murderer’s properties and in the absence of property, the heir will be obliged to pay the Diya.
5. Article 435 of the Islamic Penal Code can be criticized for its failure in distinction between escape and natural death, as well as for the transmission of the qisas to Diya for intentional non-murder crimes and needs to be amended.

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1 In biographical evaluation, it refers to a narrator who is not confirmed or rejected in the biographical evaluation books.