19. Islamic tort law

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1. INTRODUCTION

Islamic tort law is not too different in general from Western tort law in its scope, liability and discussion. It is a body of law concerned with civil injury or wrong. Civil injury means any injury, for which a legal action is brought before a civil court by the injured party himself, not by the state. Any injury or wrong which is designed to punish the defendant and for which the legal action or legal proceedings are taken and conducted in the name of the state, is called a crime.

Islamic tort law recognizes misdeeds or wrongs committed against individual members of the public, while crime is considered in terms of a violation of the public interest as a whole. In more elaborate terms, it could be said that in the case of violation of the public interest, the ruler, or as commonly referred to in the modern time by current lawyers – the state – has the absolute power to prosecute and inflict the punishment upon the criminal on behalf of the public. These cases in Islamic law are named as divine prescribed punishments (hudud). They are categorically stipulated by the verses of the Qur’an (the Book of God) and the texts of the traditions of the Prophet, and they are called and recorded, in the writings of the Muslim jurists, as the fixed punishments. In these kinds of punishment, no remission, emendation or reconciliation can be granted by anyone, not even by the state or the ruler when the case has been brought to the notice of the authority. For instance, in the case of theft (one of the hudud cases), the person whose property is stolen cannot free the thief from the divine punishment of amputation of his hand – ‘if all the elements of the crime are proven’. Even after the owner of the property has collected the stolen property from the thief, the punishment for theft remains the public right ordained by the Law-Giver, God.

Regarding the cases of tort against a person (private rights), the injured or the relative of a dead person has the full power to sue and bring the case to court to claim retaliation (qisas). Besides, he or his relative has the right to go into reconciliation with the defendant or wrongdoer, or to renounce the right to retaliation (which could be a possible punishment) or death with blood money (diyah) or compensation (arsh) or discretionary punishment (hukumat al-‘adl). However, in the case of transgression against a man’s property, the man has only the option of claiming compensation or remission.

In Islamic law, the criminal cases have been analysed and discussed by the Muslim scholars in their manual texts in the topic of hudud (pl. of hadd, i.e. limits/fixed

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1 The cases under divine prescribed punishments or fixed punishments are adultery, theft, robbery, drinking wine, false accusation of adultery, waging war against the Muslim ruler and apostasy.
punishment for certain crimes as mentioned above). Cases other than hudud which are treated in the topic of jinayah (offence), or of gisas (retaliation), or of diyat (blood-money/blood-wit), or of arsh (compensation), or of siyal (assault), or of ghasb (usurpation), or of sulh (compromise), are dealt with as torts.

The most important fact to record here is that the early Muslim jurists such as Abu Hanifah (d. 767), Malik bin Anas (d. 795), al-Shafi‘i (d. 820) and Ahmad bin Hanbal (d. 855) do not make any distinction between the terms ‘civil’ and ‘criminal’, and do not explain the division between civil and criminal cases in their manual texts. They, in general, use the popular term ‘al-jinayah’ or ‘al-jarimah’, which means ‘crime/offence’, in dealing with both cases.

2. SOURCES OF ISLAMIC TORT LAW

The foremost and most eminent sources of the Islamic law of torts, of course, are the Quranic verses and the traditions of the Prophet. Other than these two sources, the major books which were written and compiled by jurists of four major schools of Islamic jurisprudence have been essential material for the study of the Islamic law of torts. The four major schools of jurisprudence are those which have been followed throughout the sunni Islamic world during the past 15 centuries. They were founded respectively by Numan bin Thabit Abu Hanifah (699–767), who founded the Hanafi school; Malik bin Anas (712–795), who founded the Maliki school; Muhammad bin Idris al-Shafi‘i (767–820), who founded the Shafi‘i school; and Ahmad bin Hanbal (780–855), who founded the Hanbali school. Their opinions as well as the opinions of jurists who were their followers form the major source material for Islamic tort law.

In addition, secondary sources are also important reference points. Among them are the works which were written by the current and contemporary Muslim jurists. Their works are normally written by way of comparative approach among the Islamic schools of law. In particular, the works of Wahbah al-Zuhayli; Nazariyyat al-Daman; Muhammad Fawzi Fayd Allah; Nazariyyat al-Daman fi al-Fiqh al-Islami; Subhi Mahmassani; al-Nazariyyah al-‘Ammah li al-Mujibat wa al-‘Uqud fi al-Shari‘ah al-Islamiyyah; Ahmad Fathi Bahnsi; al-Mas’inliyyah al-Jina’iyyah fi al-Fiqh al-Islami; Muhammad Ahmad Siraj; Daman al-‘Udwan fi al-Fiqh al-Islami; ‘Ali al-Khafif; al-Daman fi al-Fiqh al-Islami; Jabbar Sabir Taha; Iqamat al-Mas’inliyyah al-Madaniyyah ‘an al-‘Aml Ghayr al-Mashru’ ‘ala ‘Unsur al-Darar; Fathi al-Durayni; Nazariyyat al-Ta’assuf fi Isti’mal al-Haqq fi al-Fiqh al-Islami; and ‘Abd al-Qadir ‘Awdah; al-Tashri‘ al-Jina’i al-Islami are essential reference materials for anyone wishing to explore Islamic tort law.

In the early 1960s, two Ph.D. dissertations were completed that focused in general on analysing cases related to Islamic civil wrongs. Those theses are al-Mas’inliyyah al-Taqsiriyah bayn al-Shari‘ah wa al-Qanun, written by Muhammad Fawzi Fayd Allah (unpublished Ph.D. Thesis, The University of al-Azhar, 1962) and al-Mas’inliyyah al-Taqsiriyah ‘an Fi’l Ghayr fi al-Fiqh al-Islami al-Muqaran, written by Sayyid Amin Muhammad (unpublished Ph.D. Thesis, The University of Cairo, 1964) – most parts of this thesis have been translated into English by Abdul Qadir Zubair and were published by the Islamic International Contact, Lagos, Nigeria.

One recent Ph.D. thesis written in English with the title of *Islamic Law of Tort* appeared in 1988. It is by Liaquat Ali Khan Niazi, who submitted it to the University of Punjab, Lahore, Pakistan. However, this thesis does not adequately cover the various opinions of the Muslim jurists of the schools. The references are very limited. The author prefers to use the precepts of the *Majallat al-Ahkam al-’Adliyyah* (Islamic Civil Law of the Ottoman Empire) for the opinion of the Hanafi school without any real regard for commentaries on it – neither that of Salim Rustam, nor that of ‘Ali Haydar, and so on. Another Hanafi school work the author prefers to use is *The Hedaya*, translated by Charles Hamilton. As to other schools’ books, the author uses *Muwatta’, translated by Muhammad Rahimuddin, and Minhaj-et-Talibin: A Manual of Muhammadan Law*, translated by E.C. Howard. Another Ph.D. thesis was completed in 1997, which was entitled *The Islamic Law of Tort* and was defended by Abdul Basir bin Mohamad at the University of Edinburgh, Scotland. In 2009, two books were published in Malaysia, in the Malay language, in the area of Islamic tort law, namely *Undang-undang Tort Islam (Islamic Tort Law)* and *Fitnah dalam Undang-undang Tort Islam dan Undang-undang Tort Malaysia (Defamation in Islamic Tort Law and Malaysian Tort Law)*. Both were written by Abdul Basir bin Mohamad.

In view of the fact that cases of tort are scattered over various subjects in the classical and contemporary books of Islamic jurisprudence, references to works on the principles of Islamic law (usul), Islamic legal maxims (al-qawa'id al-fiqhiyyah), legal opinions (fatawa) and history should also be made.

Islamic law, in its basic principle, insists that no person should interfere with the personal liberty of another without any legal right or deal with another’s properties without his permission. Thus a person should neither take, nor destroy, nor appropriate another person’s property without legal cause.

The Qur’an gives a general regulation about the matter by saying with its meaning:

> And in no wise covet those things in which God hath bestowed His gifts more freely on some of you than on others: to men is allotted what they earn, and to women what they earn: but ask Allah of His bounty: for Allah hath full knowledge of all things.

This thesis was published by Matba’at al-Sa’adah, Cairo in 1985.

A good explanation of the above meaning is put forward by al-Mawdudi (d. 1979) when he states:

Man is naturally inclined to feel uneasy whenever he sees someone else ahead of him. This is the root of jealousy and envy, of cut-throat competition and animosity, of mutual strife and conflict. When anyone attempts to obliterate all differences between human beings, he in fact engages in a war against nature and inflicts wrong of another kind.4

Islamic tort law acknowledges the rights of human beings from the following verses of the Qur’an, which mean:

1. The recompense for an injury is an injury equal thereto.5
2. And if ye do catch them out, catch them out no worse than they catch you out.6
3. O ye who believe! Eat not up your property among yourselves in vanities.7

In the traditions, the Prophet remarked in his last sermon about the sacredness of the body, property and honour of others by saying:

1. Your blood, your properties and your honour are as sacred as the sacredness on this day of yours, in this city of yours and in this month of yours.8
2. There should be neither harming nor reciprocating harm.9
3. Nobody among you should take a chattel of his brother with or without serious intention. If anyone takes it, he should return it to him.10
4. It is incumbent upon a person who takes a thing from another to return the thing to the rightful possessor.11
5. It is not allowed for a man to take his brother’s staff except with his goodwill.12

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5 Al-Qur’an, al-Shura:40.
6 Al-Qur’an, al-Nahl:126.
7 Al-Qur’an, al-Nisa’:29.
From the Quranic verses and the traditions, we can say that Islamic tort law preserves and protects the property and honour of people from any kind of tort, and then lays down and promotes justice in society as a whole.

3. THE CONCEPT OF LIABILITY

In the Islamic law of tort, the Arabic term for ‘liability’ is *daman*. The term *daman* literally means responsibility, answerability, accountability, amenability, suretyship, guarantee-ship, security, warranty and the like. It is synonymous with *kafalah* (suretyship), but it is more common and wider in signification than *kafalah*. Sometimes, it signifies what is not *kafalah*, namely indemnification or restoration of the like, or the value, of a thing that has perished. *Daman mal* (liability for property) or *ghurm* (loss or damage) signifies responsibility to pay for property or for a debt, owed by another person.13

Sometimes, the term *daman* also means obligation (*iltizam*).14 *Iltizam*, however, is used in a wider sense, that is, as a synonym for private right, for mulct or fine, for obligating, for debt, for damages, and so on.15

In short, the application of the term *daman* by the Muslim jurists in their books could be divided into two aspects:

A. suretyship (*kafalah*);
B. compensation/fine/mulct/indemnity/damages/reparation/penalty/restoration (*ta’wid/gharamah*).16

However, there are illustrations of *daman* in legal practice, given by the Muslim jurists, which could be related to tort:

A. an obligation to replace the destroyed property, if the property is fungible or replaceable by a similar item, or to pay the value thereof, if the destroyed property is an infungible or irreplaceable thing.17

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B. a duty to pay a pecuniary reward against an injury incurred upon the tortfeasor;\(^{18}\)

C. compensation for destruction.\(^{19}\)

From the above definitions of *daman*, we understand that any injury committed by a person on another person is prohibited by law and the tortfeasor will be held liable for what he has done. He has to pay compensation (give the similar thing or its value) to the claimant (plaintiff) for any injury which the latter has sustained. However, there is no infringement of another person’s right, and no liability in tort, if the defendant caused the damage by exercising a legal right conferred upon him. If the damage occurred as a result of the exercise of a legal right within the limit of the law, and it accidentally happened that another person sustained injury to his life, or his land, or his chattels, the Muslim jurists negate tortious liability of a person who has exercised his legal right. For this reason, they propounded that if a person dug a well on his land or on the public road under the command of the authorities, and an animal of another person fell into it accidentally and died, the digger would not be held responsible,\(^{20}\) because the digger acted within his legal right. They, therefore, theorized a legal maxim that ‘legal permission negates tortious liability’.\(^{21}\)

This theory would necessarily warrant that ‘legal permission’ is unrestricted. It is then assumed that a person would be free within his legal rights. But, where this legal permission is subject to some restraints and limitations, the right-holder is not absolutely immune from liability. An example will elucidate this. If, for instance, a person in severe need finds another’s food and eats it in order to prevent himself from starving to death, would he be liable to make good the loss?

Eating another’s food under severe need is not only permissible but compulsory. It is based on a Quranic verse, which states: ‘[b]ut if one is forced by necessity, without wilful disobedience, nor transgressing due limits, then is he guiltless, for God is Oft-Forgiving, Most Merciful’.\(^{22}\)


\(^{18}\) Sayyid Muhammad Amin, *al-Mas’uliyyah al-Taqsiriyyah*, p. 69.


\(^{22}\) Al-Qur’an, al-Baqarah:173.

states: ‘[n]ecessity renders prohibited things permissible’.\(^{24}\) One of the Latin legal maxims gives the same meaning: ‘[n]ecessitas non habet legem’.\(^{25}\)

According to the Hanafi and the Shafi‘i schools, the person consuming the food should be liable and must make good the loss to the owner of the food. The Mejelle ruled: ‘Necessity does not invalidate the right of another’. Consequently, if a hungry person eats bread belonging to another, such a person will later be liable to the value thereof.\(^{26}\) Indeed, necessity gives legal permission to trespass upon another person’s rights, but it does not dissolve the compensation or liability and does not void the other’s rights.\(^{27}\) A Shafi‘i jurist, ‘Izz al-Din bin ‘Abd al-Salam said: ‘[a] person who in necessity eats another’s food, must be liable for its value, he and the owner of that food are regarded as debtor and debtee at that time’.\(^{28}\)

However, the Maliki and the Hanbali schools are reported to have ruled otherwise on this question. They refused to hold liable the person who eats other people’s food to ward off hunger on grounds of equality and the duty of preserving life.\(^{29}\)

With regard to the Hanafi and the Shafi‘i opinions, it could be said that the cause of this liability is that the legal permission is restrained with a condition of non-trespass on another’s right whether:

i. the necessity comes naturally, for example hunger or self-defence from an unruly animal, or

ii. the necessity comes unnaturally, for example from the act of coercion arising from a person either in the case of perfect coercion (which can cause death


\(^{26}\) Majallat al-Ahkam al-‘Adliyyah, article 33. Al-Idtirar la yubtil haqq al-ghayr. For detailed discussion of this maxim, see al-Zarqa’, Sharh al-Qawa’id al-Fiqhiyyah, pp. 213–214.

\(^{27}\) Al-Zarqa’, Sharh al-Qawa’id al-Fiqhiyyah, p. 213.

\(^{28}\) ‘Izz al-Din bin Abd al-Salam, Qawa’id al-Ahkam fi Masalih al-Anam, Cairo: Umm al-Qura, n.d. vol.2, p. 176; al-Nawawi, al-Majmu‘ Sharh al-Muhadhdhub, Maktabat al-Thaqafah, n.d. vol.9, p. 43. There is, however, a weak opinion, which considers that the person would not be liable. See also, ‘Abd al-Karim Zaydan, Majmu‘ah Buhuth Fiqhiyyah, Dar al-Fikr al-‘Arabi, n.d., p. 198.

or severe injury) or imperfect coercion (which can cause injury or damage other than in the case of perfect coercion). 30

Furthermore, the application of the legal maxim, ‘Legal permission negates tortious liability’ should charge the right-holder with a reasonable duty of care to preserve another person from injury in using public property. If a dangerous action emerges, even though in the exercise of a legal right, liability must be upheld. For instance, a passer-by or a rider of an animal or a driver of a car on a public highway should be held liable if he inflicts any injury on persons or chattels on the highway because his right to the public highway is limited to proper and reasonable care to safeguard the right of other users. 31

It should be remembered that the infliction of others’ rights could happen in two ways: either the victim comes in and then suffers damage or he is encroached by another and then suffers an injury. The above legal maxim puts no liability for a person in the case that the victim causes himself to suffer injury, as when the victim trespasses onto a person’s land and then sustains an injury in doing so. The victim may not claim damages to the owner of the land because the law gives to the owner the legal right to take whatever action so long as it is in the area of his legal right, and the victim should take the risk at his peril. Otherwise, if an action of the right-holder causes another to bear injury, whereas any person in his position in sight of law should take a reasonable care to another for avoiding damage as in the case of using a public highway, the right-holder should be held liable. This is because the injury has occurred by an action of the right-holder, even though the incident took place within the area of legal right or legal permission, as in the case of damage occurring in a public highway, which anybody has a legal right to use.

That, in addition to the discussion of the exercise of a legal right in his own property, the person who exercises it will not be held liable or restrained from its exercise when another is injured as a result, has been agreed by Abu Hanifah in the popular opinion of his school, as well as by al-Shafi’i and the Zahiris.

Abu Hanifah stated: ‘[a] person is free to exercise his legal right in his property and no one can prevent him from it in spite of the possibility that his neighbour [another person] may suffer injury’. The right-holder is not liable because, according to Abu Hanifah’s original opinion, legal permission negates tortious liability. However, according to Abu Hanifah, religiously it will not be valid to damage another’s property because it is prohibited by a tradition of the Prophet, which says: ‘[t]here should be neither harming, nor reciprocating harm’.

The implementation of this tradition is to all human beings without differentiating whether a person is a neighbour or not. 32 As al-Shafi’i argued:

30 Al-Zarqa’, *Sharh al-Qawa’id al-Fiqhiyyah*, p. 213.
[a] person has a legal right in exercise of his property to do whatever he wishes even though it inflicts [or most likely to cause] injury upon another or himself. If he commits injury by himself and causes damage to his neighbour [or another person], his action in his property is a legal right and no liability should arise.\textsuperscript{33}

Ibn Hazm of the Zahiri school of law argued: ‘[n]o one can be prevented from exercising his legal right in his property even though his neighbour [another person] may sustain an injury’.\textsuperscript{34}

However, in contrast to the above opinions, there are opinions on this case which stipulate that tortious liability would be imposed on the tortfeasor even in the course of exercising a legal right. This view is based on the public interest (\textit{maslahah}) and the juristic preference (\textit{istihsan}). Among those who held this are Abu Yusuf (one of the Hanafi jurists),\textsuperscript{35} al-Ghazali (one of the Shafi’i jurists),\textsuperscript{36} a group of the Maliki jurists\textsuperscript{37} and the rule enacted in the \textit{Mejelle}.\textsuperscript{38} They remarked that if a person in the course of exercising his legal property inflicts an obvious and grave injury on his neighbour, the neighbour has the right to ask the person to stop the injury. This is because they follow the legal maxims: ‘[t]here should be neither harming, nor reciprocating harm’; ‘injury is removed’; ‘repelling an evil is preferable to securing a benefit’; and ‘any person may

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\textsuperscript{33} Al-Shafi’i, \textit{al-Umm}, Beirut: Dar al-Kutub al-‘Imliyyah, 1413H/1993M, vol.3, p. 222. Al-Mawardi said: ‘If the owner of a house builds an oven in it and its smoke molests the neighbour, then the \textit{muhtasib} [public inspector] may not oppose him in this and may not prevent him from doing so; likewise, if someone installs a mill or a forge or fuller’s machinery, then the \textit{muhtasib} may not stop them, as people may deal with what they own as they wish, and people cannot prevent them from doing so.’ See al-Mawardi, \textit{al-Ahkam al-Sultaniyyah wa al-Wilayat al-Diniyyah}, Cairo: Shirkah Maktabah wa Matba’ah Mustafa al-Babi al-Halabi wa Awladuh, 1960, p. 255.


\textsuperscript{38} See articles 1192–1197.

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exercise his property so long as it does not incur injury to another’. The Mejelle explains what grave injury is in article 1199:

> grave injury consists of anything that makes it impossible to put an object to the use for which it was originally intended, for instance, a dwelling house or anything which causes damage to a building which weakens it and causes it to collapse.

The Maliki jurists substantiated their stand with a Quranic verse, which says:

> and do good to parents, kinsfolk, orphans, those in need, neighbours who are near, neighbours who are strangers, the companion by your side, the way-farer (ye meet), and what your right hands possess: for Allah loveth not the arrogant, the vainglorious.\(^39\)

And they cite the Prophet, who said: ‘[n]one amongst you believes [truly] until he likes for his brother [or he: the Prophet said] for his neighbour that which he loves for himself.’\(^40\)

The Maliki jurists concluded that the Quranic verse and the tradition ordain kindness to some group of people including the neighbour. It can be perceived that ordering an act means prohibiting its opposite. The opposite here is an offence and is prohibited. Every person is forbidden from doing anything which may be a source of trouble to his neighbour. Anyone is encouraged not only to lead a peaceful life himself, but also to create a social atmosphere where every man feels secure from injury. Whoever, consequently, transgresses the legal prohibition will be liable before the law. When a person injures his neighbour by any act, with or without intent, he has infringed the rule of law and thus becomes liable.\(^41\) This approach focuses upon \textit{the result rather than upon the intention} of the person exercising the right. If the result is fraught with grave danger, the exercise of the right is prohibited regardless of the intention.\(^42\) As a theory of liability in the Islamic law of tort, it could be ruled as follows:

\begin{itemize}
\item i. liability based on damage in the case of direct torts, and
\item ii. liability based on transgression/negligence in the case of indirect torts.
\end{itemize}

The descriptions of act, tort and liability in the Islamic law of tort might easily be summarized as follows:

\begin{itemize}
\item i. \textit{intentional act for direct cause} (e.g., beating, kicking and the like) \textit{→} injury \textit{→} liability for retaliation (\textit{qisas}) or blood money (\textit{diyah}) or compensation (\textit{arsh}) or damages (\textit{ta’wid}). Damages here are based on discretionary judgement;
\item ii. \textit{unintentional act for direct cause} (e.g., shooting an animal but injuring a person [error in the act] or shooting an enemy but he is actually a public man
\end{itemize}

\(^{39}\) Al-Qur’an, al-Nisa’:36.


\(^{41}\) Muslim, \textit{Sahih Muslim}, vol.1, p. 31.

[error in intention] or a sleeper falls upon a person)→injury→liability for diyah or arsh or compensation based on discretionary judgement;

iii. intentional act for indirect cause (e.g., a father commands his son to destroy another’s property)→damage/injury→element of transgression (ta’addi)/intentional (ta’ammad)→liability for damages/compensation;

iv. unintentional act for indirect cause (might be said as negligence, for example a person lays a fire while the wind is blowing)→injury→element of transgression/trespass to another’s right→liability for compensation.

According to the Maliki and the Hanbali schools, a person can use his property in the course of exercising his legal right so long as he does not intend to injure his neighbour or to cause injury to another. If the element of intentional or deliberate injury to neighbour (animus nocendi) could be proved in exercising the legal right, the right-holder could be restrained from exercising his legal right and be held liable to make compensation. In effect, these schools carry out a tradition of the Prophet, which says: ‘[t]here should be neither harming, nor reciprocating harm’.43

Their opinions are based on intention as a measure. So, the owner of a property will be liable for any injury which arises from the use of his property within the limit of his legal right, such as in the case he failed to block up a window in his house which overlooks the women of an adjoining neighbour;44 to close down a well which causes great injury to the well belonging to his neighbour; to refrain from constructing a baking oven or a bath-house or a forge, and so on, so that it becomes impossible for the neighbour to dwell therein by reason of the great quantity of smoke; to remove a threshing floor because the dust coming therefrom makes it impossible for the neighbour to dwell in his house; to pull down any interference intended to prevent the neighbour from the entire amount of benefits of air, sunlight or light.45


44 Al-Kasani said: ‘[i]ndeed, to remove any injury which incurs harm to the neighbour is compulsory’. It is based on a tradition: ‘Verily, all actions of human beings are according to their intentions.’ Al-Kasani, Bada‘i‘ al-Sana‘i‘, vol.6, p. 264.

4. KINDS OF PUNISHMENT AND COMPENSATION

**Qisas (retaliation)** means making a thing equal to another thing, and when it refers to punishment, it means making the punishment equal to the tort action: death to death and injury to injury. The subject of qisas could be classified into two main categories: first, qisas as to occasions affecting life, for instance as wilful murder, and secondly, qisas as to occasions affecting body, for instance as wilful injury so long as it is possible to retaliate in equality. If it is impossible to preserve a perfect equality, no retaliation will be imposed, and, in that case, **diyah or compensation is necessary.** In case of wilful murder, without doubtful evidence, the murderer must be punished to death by order of the court. However, the relative of the dead person may forgive the murderer with or without claiming a full diyah. If they would like to claim a compensation of diyah instead of qisas, the diyah will be under the diyah mughallazah (diyah on the heavier scale). This kind of punishment and compensation is according to a few specific texts from the Quranic verses. The first is the saying of God with its meaning:

46 [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.

The second, God says again with its meaning:

47 [n]ever should a believer kill a believer, but [if it so happens] by mistake, [compensation is due]: if one [so] kills a believer, it is ordained that he should free a believing slave and pay compensation to the deceased’s family, unless they remit it freely. If the deceased belonged to a people at war with you, and he was a believer, the freeing of a believing slave [is enough]. If he belonged to a people with whom ye have a treaty of mutual alliance, compensation should be paid to his family, and a believing slave be freed. For those who find this beyond their means, [is prescribed] a fast for two months running: by way of repentance to Allah: for Allah hath all knowledge and all wisdom.

The third, God says again with its meaning:

48 [w]e ordained therein for them: life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal. But if anyone remits the retaliation by way of charity, it is an act of atonement for himself. And if any fail to judge by [the light of] what Allah hath revealed, they are [no better than] wrong-doers.

46 Al-Qur’an, al-Baqarah:178.
47 Al-Qur’an, al-Nisa’:92.
48 Al-Qur’an, al-Ma’idah:45.
According to tradition, the Prophet Muhammad ordered: ‘[w]hoever kills [another]intentionally, he must be punished by retaliation’. 49

**Diyah (blood money/blood wit)** means compensation which is payable in cases of homicide and of injury for which the sentence is a full diyah. There are two kinds of diyah, namely diyah on the heavier scale (diyah mughallazah) and diyah on the lighter scale (diyah mukhaffafah). In diyah on the heavier scale, the diyah is one hundred camels:

a. 30 *hiqqah* (three-year-old female camels),

b. 30 *jadh’ah* (four-year-old female camels) and

c. 40 *khalfah* (pregnant female camels).

The diyah on the lighter scale is also one hundred camels, namely:

a. 20 *hiqqah*,

b. 20 *jadh’ah*,

c. 20 *bint labun* (two-year-old female camels),

d. 20 *ibn labun* (two-year-old male camels) and

e. 20 *bint makhad* (one-year-old female camels).

The above classifications of the heavier scale and the lighter scale are according to the Shafi’i school of law. 50 However, according to the Hanafi and Maliki dan Hanbali schools of law, the diyah on the heavier scale consists of: 51

a. 25 *hiqqah*,

b. 25 *jadh’ah*,

c. 25 *bint labun* and
d. 25 *bint makhad*.

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For the *diyah* on the lighter scale, it seems that the opinion of the Maliki school of law is similar to the Shafi‘i school of law. The Hanafi and the Hanbali schools of law may agree with the Shafi‘i and the Malik schools of law as to such kinds of camels, but require *ibn makhad* instead of *ibn labun*.

The payment of *diyah* is not merely dependent upon the camel. It may also be paid by dinar (gold money), dirham (silver money), cow, sheep or clothing. Its rate or amount is as follows:

- a. a dinar is 1,000 dinar.
- b. a dirham is 12,000 dirham according to the opinions of Malik, Ahmad and al-Shafi‘i, or 10,000 dirham according to Abu Hanifah.
- c. a cow is 200 cows.
- d. a sheep is 2,000 sheep.
- e. clothing is 200 full clothing.

It would be easy if the dinar could be used as a basis for the calculation of *diyah*. This is because the fluctuation of a current value for the dinar is not too great compared with cow, sheep and clothing. So, in rough calculation, 1 dinar is equivalent to 4.25 gram of gold, 916.1 gram of gold may be expected to have a value of RM60.00. 4.25 \times RM60.00 = RM255.00. 1000 dinar is equivalent to 4250 gram of gold. Then 4250 gram of gold \times RM60.00 = RM255,000.00. In brief, it could be said that a full *diyah* amounts to RM255,000.00.

*Arsh* means the blood money or compensation which is payable in the case of injuries. The amount of blood money for *arsh* is already fixed for specific injuries by the traditions of the Prophet and it is less than a full *diyah*.

*Hukumat al-'adl* means the compensation or *arsh* for injuries which is not prescribed by law, and which is left to the discretion of a judge to fix after due consideration.

5. KINDS OF RIGHT

The yardstick to measure tort liability is the infringement or transgression of a rule conferring a right. The rule of right which is related to liability in Islamic law will be discussed as follows. The rule of right can mean:

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A. The right of the public, and therefore it is linked with no specific person. It involves benefit to the community at large and not merely to a particular individual. It is understood that this right is not any benefit to God because he is above everything. This right is referred to God because of the magnitude of the risks involved in its violation and of the comprehensive benefit which would result from its fulfilment. In cases of public rights which affect some particular individuals, the latter will not be entitled to condone the acts of the offender. For instance, on the infliction of the punishment of a fixed punishment (hadd) for theft, the person from whom the property is stolen is not entitled to condone the act. This right accommodates no remission. Even emendation or reconciliation is not permitted and the law has to take its course.

B. The right of individual interest, called ‘private right’, such as the right to enforce contracts and protect property, rights in family law between husband and wife as well as their children, rights in trust law and the like. Enforcement of such rights is entirely at the option of the individual whose right is infringed. This right, differently from the right of God, accommodates emendation and remission. The injured person affected by the infringement of a private right may either sue for compensation or pardon the tortfeasor.

C. An example of the rule of right is false accusation (qadhf) in the Hanafi school of law. The right of the public is infringed by reason of depreciation of the honour of one of its members, and the right of the individual defamed is violated by the defamation which tends to destroy one’s prestige. According to the Hanafi school of law, the right of God preponderates in this matter by reason of the attack made on the honour of one of the public and the person defamed is not entitled to compound the offence. The Shafi’i school, the Hanbali school and the popular opinion in the Maliki school (according to Ibn Rushd), however, hold a contrary view. They opine that the person defamed is entitled to exonerate the defamer.

D. Another example of the rule of right is retaliation (qisas), which is the punishment for murder. The right of the public here consists in putting a stop to disturbances and breaches of the peace on this earth. The private right in a case of murder arises from the fact of the offence having caused loss and sorrow to the heirs of the person murdered. The private right preponderates in this case because the heirs of the murdered person may pardon the murderer or accept blood money (diyah) or enforce punishment, there being specific texts of the Qur’an and traditions. The right of the individual is here subsumed into the right of God by reason of the text.
From the classifications of the rule of right above, we can see that tort liabilities are of two kinds:

i. liability for specific punishment;
ii. liability for unspecific punishment.

When the punishment is unspecific, the judge is empowered to freely adjudicate such cases. These cases could, in general, be put in the class of ‘civil wrong’, and the most popular term for cases under unspecific punishment which is submitted for discretionary power of a judge is that of ‘discretionary punishment’ (ta’zir). Liability of this kind implies that the tortfeasor is liable to indemnify the victim of his wrongful act. However, there are cases of ‘civil wrongs’ (in terms of authorization of the victim himself or his heirs to determine the kinds of punishments) whose punishments have been specified, as in the case of qisas and diyah.

Generally, the civil wrong is divided into two types, namely:

i. contract;
ii. tort.

Contractual liability emerges when there is a breach of one of the conditions of the contract. It will not feature as a subject of tort. In the discussion of tort, tortious liability will arise from the breach of duty primarily fixed by the law. Such a breach of duty mainly arises through an action or omission which is unauthorized by law and which infringes either some absolute right of another, or some qualified right of another, or some public right. Tort or tortious liability is of various types. In general, they are strict liability, vicarious liability, assault, battery, false imprisonment, trespass to land, conversion, destruction, usurpation, liability for premises, liability for animals, liability for chattels, nuisance, liability for fire, liability for water, negligence, medical negligence, deceit, malicious prosecution, nervous shock, and so on.

6. GENERAL CONCEPTS AND PRINCIPLES

One of the functions of tort law is to regulate and govern the rights of individuals. An infringement of a private right recognized by the law of tort is known as a civil wrong. In this area, a few concepts, principles and legal maxims should be known. These terms and aspects are fundamental in order to understand the Islamic law of torts. This section attempts to highlight the discussion as to the above spheres as follows:

A. One of the basic principles of the Islamic law of tort is that no one should hurt another by word or deed. The principle exists for the purpose of preventing people from hurting one another, whether in respect of their property, their persons, their reputations or anything else which is theirs. This principle is based
on the Prophet’s sayings in his tradition, which states: ‘[a] Muslim is he from
whose hand and tongue the Muslims are safe’. 56

The principle could also be referred to a fundamental and celebrated tradition
which has become a basic Islamic legal maxim: ‘there should be neither harming,
nor reciprocating harm’. 57 The tradition means that no one can commit any
offence or tort against another, and likewise the other cannot reciprocate or
respond the same.

B. In the Islamic law of tort, the rights of another must be protected, including the
right of life, body, fame, property and others. The principle stands that where
one’s right is invaded or destroyed, the law gives a remedy to protect it or
reparations for its loss. It means that wherever a right exists, there is at the same
time a remedy. Remedy here is not just in the form of compensation or damages,
but also includes a right of action in the frame of injuction and self-defence.
This is based on a celebrated tradition, where the Prophet remarked in his last
sermon about the sacredness of the body, property and honour of others, which
could be translated as: ‘[y]our blood, your properties and your honour are as
sacred as the sacredness on this day of yours, in this city of yours and in this
month of yours’. 58

Based on the above tradition, it could be said that the rights of others must not
be encroached in any way. If it so happened, the plaintiff could claim remedy.
Any infringement of another person’s right is prohibited by law and the tortfeasor
will be held liable for whatever he has done. Others’ rights must be protected in
whatever situation, even in necessitous situations. For example, in the case a
person eats another’s food under severe need, eating another’s food in that
situation is not only permissible, but compulsory. This is based on a Quranic
verse which could be translated as: ‘[b]ut if one is forced by necessity, without
wilful disobedience, nor transgressing due limits, then is he guiltless, for God is
Oft-Forgiving, Most Merciful’. 59

Even though a person has been permitted by the divine revelation to consume
the food of another under severe need, according to the principle of Islamic law
of tort, that person should be liable and must make good the loss to the owner
of the food. This is based on a legal maxim: ‘[n]ecessity does not invalidate the right
of another’. 60 Consequently, if a hungry person eats bread belonging to another,
such a person will later be liable to the value thereof. 61

C. The fundamental principle in the Islamic law of tort is that the rights which are
violated in an action for pecuniary compensation will be remedied against

56 Muslim, Sahih Muslim, Kitab al-Iman, Bab Bayan Tafadul al-Islam, vol. 1, p. 65. See
also al-Bukhari, Sahih al-Bukhari, Cairo, 1314–1315H, original Arabic and its translation into
59 Al-Qur’an, al-Baqarah:173.
60 Al-Idtirar la yabtul haqq al-ghayr. See Wahbah, Nazariyyat al-Daman, p. 220.
61 Wahbah, Nazariyyat al-Daman, p. 220.
the wrongdoer. The payment of money (diyah (blood money) or arsh/ta’wid (compensation/damages)) is the legal remedy for a tort action as well as the punishment of retaliation.62

D. There are certain actions of injury and wrong of which the law takes no account. This was known as ‘damage without legal wrong’, that is, harm is actually caused, but the person who suffers damage has no right of action. Or it could be said that harm is caused by a person exercising his own rights of property or by trade competition. In neither case will such harm be a tort. As such, it is not wrongful if a person causes a damage by using his own property.63 This rule is derived from a more general rule, that legal validity negates payment of damages.64 This means that if an act is lawful under Islamic law, damages cannot be claimed in respect of it. For example, if a person digs a trench or a well or a drain on a piece of land owned by him, and another person or some animal belonging to another person happens to fall into it and is killed, the owner of the land will incur no liability.65 Another example is that of a trustee who returns a deposit in his custody to the owner through an agent. Before the trust reaches the person who was to receive it, it is destroyed on the way without any fault or wrongful act on the part of the agent. No liability will be incurred by the trustee.66 In the case that a borrower deposits the thing borrowed for safe keeping with another person, no liability would be incurred by the keeper if the thing is destroyed while in his possession without any fault or negligence on his part. For example, a person borrows an animal for the purpose of going to and returning from a certain place. When he reaches his destination, the animal is found to be tired and unable to make the return journey. Therefore, the man leaves it in the safe keeping of another person. While in the latter’s safe keeping, the animal dies due to natural causes. In this case, no liability would be incurred.67

E. In some cases, there may be a legal wrong of conduct of a person but no loss, injury or damage has occurred. This is called ‘legal wrong without damage’. Trespass and libel are among torts which are subjected to this legal maxim. The tort of trespass on land, for instance, is committed by entry on the land of another

66 Majallat al-Aham al-‘Adliyyah, article 795.
67 Majallat al-Aham al-‘Adliyyah, article 824.
without lawful authority. The act of trespass on land is actionable per se, which means that an action may be brought against the trespasser even though the latter has not caused any actual damage to the land. In other words, in such cases we have a tort without proof of actual damage. For instance, whoever cultivates trees of date palm or fruit trees or any plant on the land of another, may be ordered to take them out. If a man digs a well or a trench or a canal in the land of another without his permission, the owner of the land has a legal right to prevent the digger from his act and he can claim from the digger or the trespasser the expenses required to level such a digging and also the pecuniary compensation for any damage sustained by his land by the act of the digging.

F. The harm done to an individual may be more than counterbalanced by the benefit accruing to the public at large, as in the case of loss inflicted on individual traders by competition in trade. The individual loss is not taken into consideration on account of the public good. The Muslim jurists opine that it is something permissible to cause loss or destruction to the individual for the good of society as a whole. A jurist of the Shafi’i school, ‘Izz al-Din bin ‘Abd al-Salam, has specified two kinds of such loss:

1. loss or destruction for the protection of life or the improvement of physical condition;
2. loss or destruction for the purpose of avoiding a public mischief.

The principle observed in this connection is that liability may not arise if a particular loss has been inflicted in order to avoid a general harm. In the words of al-Hidayah: ‘[s]ometimes a harm to a particular person may be permitted to avoid loss to the community in general’. This is based on the more fundamental principle, that is, ‘a private injury is tolerated in order to ward off a public injury’. A few illustrations are stated below to elucidate these general rules:

1. Anything which causes injury to passers-by on the public highway must be removed, even though it has been there for a long time.
2. It is for this reason that quacks are not allowed to practise.76
3. It is prohibited to hoard food to control the price in time of need. The government can force a hoarder to sell his stock at the ordinary price.77 Abu Yusuf theorizes: ‘detaining something is considered as hoarding where the detainment may produce injury [bad consequences] to the public, be such a thing gold, silver or cloth’.78 Ibn Hajar al-Haythami in his writings has classified the action of hoarding as one of the grave sins.79

It is clear that in all such cases a person should suffer damage in his individual capacity. As a result, for the good of the whole society, it becomes necessary to allow the individual to suffer. The majority of jurists thus permit the state or the persons in authority to interfere in the life of individuals if such interference is required by the public interest.80

G. In common practice, the law of tort lays down that ‘damage may be done by a person to another under necessity to prevent a greater evil’. This principle is taken from legal maxims: ‘[a] greater injury may be prevented by a lesser injury’81 and ‘in the presence of two evils the one whose injury is greater may be avoided by the commission of the lesser’.82 The following illustrations will make the rule clear:

1. If a ship with passengers on board were in danger of capsizing, it would be legitimate to throw overboard all goods or animals with a view to saving human life, because the evil resulting from the loss of property is less than the evil resulting from the loss of human lives.83
2. A father may be imprisoned if he refuses to support his son. The injury resulting from imprisonment is less than the injury of unwillingness to support his son.84

79 Ibn Hajar, al-Zawajir ‘an Iqtira fi al-Kaba’ir translated by Nuh Ha Min Keller and printed with his translation of ‘Umdat al-Salik wa ‘Uddat al-Nasik, Ta Ha Publisher, p. 977.
84 Ibn Nujaym, Ashbah, p. 88; Salim Rustam, Sharh al-Majallah, vol.1, p. 31.
3. If a hen swallows a pearl, attention will be paid as to which is more valuable, and the owner of the more valuable will pay the value of the less.85

4. If the usurper of a piece of land has cultivated trees on it, and then returns the land to its owner, the latter shall pay the value of the trees, because taking the trees out of the land will cause great injury to the land itself.86

5. Islamic law has sanctioned the usurpation of a thread to stitch up the wound of a human being. The usurpation of the thread is not permissible if it is for the purpose of sewing clothes.87 The wound of a human being is a greater injury than the sewing of clothes.

H. In a case not supported by sufficient evidence, the action can be discarded. This might happen when the harm which is complained of may appear to be too trivial, too indefinite or too difficult to prove; litigating it will not be expedient or effective. An instance of this principle is the question of the imposition of damages where the legal validity of such an imposition of damages is doubtful. In such a case it is desirable not to award damages, because the principle is that in doubtful cases damages cannot be imposed.88

I. No act is actionable as a tort at the suit of any person who has explicitly or implicitly assented to it. This principle can be used as a defence by a physician or surgeon for an act done in the course of medical or surgical treatment, accepted as proper by a responsible body of professional opinion. If the practice of the medical profession is disputed, then the court must decide on the standard of care. The defendant must establish that the plaintiff’s consent was fully and freely given.

An example of this principle is that of a person who, fearing the incidence of disease, permitted a physician to bleed him or operate on him and the physician accordingly carried out the operation or the bleeding and this caused the death of the person. The effect of that is that the physician will not be liable either for the retaliatory death punishment or for the price of blood money on the condition that he acted according to the normal practice in the field of medical treatment. The reason for this is that the work was done with the permission of the deceased, as if the latter himself did the work.89

A few illustrations can be highlighted to show the effectiveness of this principle, namely:

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1. A person dug a well outside his premises on a public street. Another person wilfully threw himself into it. No liability would be incurred by the first person on this account.\textsuperscript{90}

2. A person constructed a bridge, and another person wilfully tried to walk on it, causing harm to himself. The person who constructed the bridge will not be liable for his action, because the injured person was guilty of an intentional act.\textsuperscript{91}

7. THE ROLE OF TORT LAW IN ADMINISTERING THE SOCIETY: PROTECTIONS

A. Protection of Tort to the Person

Islamic tort law thoroughly protects the concept of human rights. In its application, there are formulae of laws of social culture, group conduct and also a list of rights of society as well as rights of individual conduct. Thereby, theft, murder, blood-spilling, spreading of mischief, back-biting, tale-bearing, slandering, calumniation, taking away of life or property of other people merely for personal gain or gratification, and encroaching upon the rights of others so upsetting the relationship between men and ruining the very culture and social fabric of society, are banned.

Islamic tort law bases its protections on the saying of the Prophet, who has given for the first time in the history of mankind the glorious concept of universal brotherhood of mankind:

\begin{quote}
[o] ye people! Verily your God is one and your father [Adam] is one, there is no prominence for an Arab over a non-Arab, nor for a non-Arab over an Arab, nor for a fair person over a black, nor for the black over the fair one, except on account of piety.\textsuperscript{92}
\end{quote}

This tradition of the Prophet has elucidated that the people have their rights and equality. No one can transgress against another without lawful reason. Islamic tort law strictly prohibits all offences against life and soul. Then, the Qur’an says with its meaning: \textquoteleft[d]\textquoteleft do not take away life, God has wholly prohibited it, except when the law so requires’.\textsuperscript{93}


\textsuperscript{92} Al-Shawkani, \textit{Nayl al-Awar}, vol.5, p. 88.

\textsuperscript{93} \textit{Al-Qur’an}, 17:33.
Commenting on this Quranic expression, Syed Qutb (a modern Muslim expert in Quranic exegesis) mentioned that Islam prohibits murder and transgression against human life. This prohibition is strict unless an exception is created by the law.94

The Qur’an prohibits the action of infanticide with the meaning:

[k]ill not your children for fear of want, We shall provide sustenance for them as well as for you, verily the killing of them is a serious offence.95

Islamic law also prohibits the tort or wrongful action to anew-born female. It ensures her right to life by protesting in strong language against the malpractice of burying her alive. The Qur’an says: ‘[w]hen the female infant buried alive will be questioned for what crime she was killed’.96

From the Quranic verses, we know that Islamic tort law guarantees the fundamental rights and freedoms of human beings. This foundation is based on the conception that all human beings are equal and belong to one universal brotherhood. It announces that all men in the world have sprung from the same parents (Adam and Eve)97 and, therefore, are equal in their status as human beings. The Islamic law rejects all distinctions of birth, class, race, colour and language.

Men, however, have energy, power, strength and bravery. However, they still cannot transgress or do any wrongful action against women. It is because Islamic law places women at the same level as men with respect to right to property, honour, marriage, education and so on. This description is based on the Quranic exhortation, with its meaning: ‘[l]et the women live in the same style as you live’.98

Islamic tort law also protects the child in the womb of its mother. So, there was a case where the Prophet once postponed execution of capital punishment of a convicted woman in order to protect the life of the child in her womb.99 Therefore, whoever causes any pregnant woman to abort, must pay compensation. All Islamic jurists agree that the compensation which must be paid is five camels or an equivalent amount in money, either gold or silver or sheep.100

The Islamic law of tort looks at human beings equally. Its protection discards all discrimination between men on the ground of nationality, nobility of descent and racial distinction. The Qur’an proclaims with its meaning:

O mankind! We created you from a single [pair] of a male and a female, and made you into nations and tribes, that ye may know each other (not that ye may despise each other). Verily the most honoured of you in the sight of Allah is (he who is) the most righteous of you. And Allah has full knowledge and is well acquainted (with all things).101

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95 *Al-Qur’an*, 17:31.
96 *Al-Qur’an*, 81:8–9.
In another verse, the Holy Book ordained absolute equality of the rich and the poor in the eyes of law and justice.\textsuperscript{102} The poor may not trespass on the rich person’s rights and the rich person should protect the poor. They are supposed not merely to practise justice in their own dealings but to strive for its triumph. They have to do all within their power to ensure that tort action is eradicated and replaced by equality and justice.\textsuperscript{103}

The Prophet, too, warned the people against wrongful actions on the ground of nobility in the matter of enforcement of the legal code by declaring that even if his own most beloved daughter Fatimah (later the mother of Husayn the Martyr of Karbala’) committed theft he would award her the same punishment as was prescribed for an ordinary thief.

The Islamic law of tort asks people to seek their fulfilment in such a way that the rights of other people are not violated. It tries to strike a balance between the rights of men and the rights of the society so that no conflict may arise between the two and all co-operate in establishing the law of God.\textsuperscript{104}

Islamic tort law recognises the right of privacy of every man. It forbids undue interference in a person’s private life. The Prophet instructed his followers that a man should not enter another person’s house suddenly, but rather should indicate to the dweller of the house that he is coming.\textsuperscript{105}

Peering into the houses of other people has been strictly prohibited. There is a saying of the Prophet that if a man finds another man peering secretly into his house and then blinds his eyes, he will not be called in question nor will he be liable to prosecution.\textsuperscript{106}

In another tradition, the Prophet prohibited people from reading the letters of other people, so much so that if a man casts sidelong glances in order to see a letter of another person while it is being read his conduct becomes reprehensible.\textsuperscript{107}

Also, the Prophet specifically asked his people not to intrude into the personal affairs of others, not to listen to confidential conversations between others and not to glance through what was being written for or by others.\textsuperscript{108}

The state, too, is prohibited from intervening in the private affairs of citizens. The Prophet has said: ‘[w]hen a ruler begins to search for wrongs among his people he wrongs them’.\textsuperscript{109} Caliph ‘Umar once heard a man singing inside a house; he suspected some mischief, and started peering into the house, where he saw a woman and some wine with the man. He stared curiously at them but on being reminded of the fact that he was violating their right of privacy he gave up his idea of punishing the man and

\textsuperscript{102} Al-Qur’an, 4:135.
\textsuperscript{106} Shaukat Hussain, \textit{Human Rights in Islam}, p. 46.
\textsuperscript{107} Shaukat Hussain, \textit{Human Rights in Islam}, p. 46.
accepted his own fault. He let the man free after taking an oath from him that he would live a pious life in future.\textsuperscript{110}

Islamic civil law protects the people from the practice of insulting each other, sarcasm, libel, slander and back-biting. All were prohibited in Islam by one stroke of Quranic legislation. Islam has firmly forbidden the telling of a lie in every way. In the civil law of tort, it is called ‘deceit’, and in some cases it could be ‘defamation’. It causes harm and menace to other people. Islamic civil law has totally forbidden assault, battery, nuisance, defamation, usurpation, destruction and so on, because they cause loss and injury to others. This is how Islam protects the dignity of individuals and their right to self-respect and honour.

The extent to which a person’s right is protected by Islamic tort law can be gathered from the treaties and ordinances of the Prophet, and various Muslim Caliphs and their governors, granted on various occasions. The treaty which was made by the Prophet to the people of Najran is as follows:

Najran and their followers are entitled to the protection of God and to the security of Muhammad the Prophet, the Messenger of God, which security shall involve their persons, religion, lands and possession, including those of them who are absent as well as those who are present, their camels, messengers and images.\textsuperscript{111}

The significance of this treaty is that it provides a clear protection to life as well as religion, lands and so on. They should not injure life and transgress against each other.

The treaty made by ‘Umar Ibn al-Khattab on the conquest of Jerusalem contains: ‘this is what the servant of God ‘Umar, Commander of the Believers, has guaranteed to the people of Ilia’ [Jerusalem]; he guaranteed their lives, property, churches, and crosses.\textsuperscript{112}

The treaty on the conquest of Azarbaijan by the army of Islamic state during the Caliphate of ‘Umar states: ‘their lives, properties and religious law are all safe’.\textsuperscript{113}

Another treaty concluded by Khalid bin al-Walid with the inhabitants of Damascus defines the nature of the relationship between the two parties and the way of protection of their lives. The text of the treaty is as follows: ‘[i]n the name of God, the Compassionate, the Merciful. This is what Khalid would grant to the inhabitants of Damascus, if he enters therein, he promises to give them security for their lives, property and churches’.\textsuperscript{114}

Similarly, ‘Amr bin al-‘As says in his treaty with the Egyptians: “Amr bin al-As gives this pledge to the Egyptians for the protection of their lives, their religion, their properties, their churches, their crosses, their land and their sea.”\textsuperscript{115}

\textsuperscript{110} Mawdudi, \textit{Tafhim al-Qur’an}, vol.5, p. 89.
\textsuperscript{113} Al-Tabari, \textit{Tariikh al-Umam wa al-Muluk}, vol.4, p. 155.
\textsuperscript{114} Baladhuri, \textit{Fatuh al-Buldan}, p. 128.
\textsuperscript{115} Al-Tabari, \textit{Tariikh al-Umam wa al-Muluk}, vol.4, p. 109.
Legally, the treaties refer to the status of the peoples of a country, the acquisition of which entitles the person to absolute rights which must be protected by the individual, society and the state. They provide for a clear protection of life as well as religion, lands and so on. The people should not injure life and transgress against each other. From the treaties above, we can conclude:

i. the treaties do not differentiate between human beings in terms of class, caste, status, rank or skin colour;
ii. they give comprehensive protection to Muslims and non-Muslims;
iii. the protection concerns lives, properties, religion, churches, crosses, land, sea, and so on.

To sum up, we know that the Islamic law of tort protects human rights. It introduced a system of compensation for tort to the person. For instance, committing assault, battery, murder, injury and so on. Thus, it saved society from the curse of blood-feud and murder for the sake of vengeance.

B. Protection of Tort to Property

Islamic tort law not only established the right to life, but also guaranteed security to wealth (property), prestige and honour. The Qur’an states:

[a]nd do not eat up your property among yourselves for vanities.116
[o] ye who believe! Eat not up your property among yourselves in vanities.117

The significance of both verses above is:118

i. all property must be held in trust, whether it is in our name or belongs to the community or to the people with control over it;
ii. we must be careful of our own and other people’s properties;
iii. an honest man is content if he refrains from robbery, theft or embezzlement;
iv. we can merely use the property which we gain within, and under the protection of, the law;
v. we must avoid violence and trespassing to another’s properties and must protect them together.

The Prophet declares: ‘[y]our properties, your lives and your honour must be respected by one another like the sacredness of this day of yours, in this town of yours, in this month of yours’.119

116 Al-Qur’an, 2:188.
117 Al-Qur’an, 4:29.
In another tradition, the Prophet says: ‘[y]ou must not act oppressively, and a man’s property may not be taken except with his goodwill’.\textsuperscript{120}

At the same time, Islamic tort law ensures the protection of tort of privacy. No one may enter another’s private properties like house, land, chattel and so on. In the Qur’an, God says: ‘[e]nter not houses other than your own until ye have asked permission and saluted those in them’.\textsuperscript{121} In regard to this matter, it was also reported that the Prophet said: ‘[t]his will not enter any people’s house without God causing ignominy to enter it’.\textsuperscript{122}

The Prophet says in another tradition: ‘[i]f anyone were to look into your house without receiving your permission and you were to throw a pebble at him and put out his eye, you would be guilty of no offence.’\textsuperscript{123}

The Prophet says again: ‘[p]ermission to enter the house should be taken three times. Enter if permission is granted, otherwise retire.’\textsuperscript{124}

In another tradition: ‘[i]f anyone removes a curtain and looks into a house before receiving permission and sees anything in those within which should not be seen, he has committed an offence which it is not lawful for him to commit.’\textsuperscript{125}

Islamic tort law recognizes that every person is entitled to the protection of his privacy. Therefore, scanners, electronic surveillance, telephone tapping and other methods of eavesdropping make this a very modern problem. The Islamic texts cover these situations as well, for it is not only physical entry that is prohibited.

The Islamic law of tort gives security of ownership of property to each and every human being. The protection of property is available only with respect to property which has been acquired by lawful means. This protection includes the right of enjoyment and consumption, investment in business, and transfer and occupation of property.\textsuperscript{126}

Islamic law firmly prohibits someone to enter upon another’s land by wrongful means. The trespasser cannot use and consume the land without the owner’s permission. This prohibition has been reported in a tradition that ‘if anyone sows in other people’s land without their permission he has no right to any of the crop, but he may have what it cost him’.\textsuperscript{127}

Offences against property such as theft,\textsuperscript{128} fraud\textsuperscript{129} and extortion are unlawful in Islam. Tampering with these rights is considered ‘prohibited’ and it is the paramount duty of the state to respect private property, for the principle provides ‘property has sacredness’.

\textsuperscript{120} Mishkat al-Masabih, vol.2, p. 630.
\textsuperscript{121} Al-Qur’an, 24:27.
\textsuperscript{122} Mishkat al-Masabih, p. 636.
\textsuperscript{123} Mishkat al-Masabih, p. 747.
\textsuperscript{124} Malik bin Anas, al-Muwatta’, p. 407.
\textsuperscript{125} Mishkat al-Masabih, p. 749.
\textsuperscript{126} Shaukat, Human Rights in Islam, p. 44.
\textsuperscript{127} Al-Tirmidhi, Sunan al-Tirmidhi, vol.6, p. 125.
\textsuperscript{129} Al-Tabari, Ikhtilaf al-Fuqaha’, Cairo: Dar al-Ma’arif, n.d., p. 146.
People are prohibited from intruding into or invading any other’s property. They cannot use and get benefit from it without lawful orders. This is because Islamic tort law acknowledges the right of ownership from the following verse of the Qur’an:

[O] ye who believe! Eat not up your property among yourselves in vanities, but let there be amongst you traffic and trade by mutual good-will. Nor kill (or destroy) yourselves, for verily Allah hath been to you Most Merciful.130

According to Muslim jurists, the verse above clearly indicates that ‘in vanities’ is meant all such means and methods which are forbidden by the law, like theft, embezzlement, usurpation, gambling and usury.131 The verse ‘nor kill yourselves’ makes clear the prohibition of destruction to another person’s property by unlawful means due to materialism.132

In regard to this discussion, every person has an inherent right of peaceful enjoyment of his possessions. Islamic law guarantees individual property rights and nobody shall be deprived of his possessions save in accordance with the law.

Islamic law permits the Muslim to acquire and gain as much as he desires, as long as he acquires it through lawful means and increases it through lawful investment. Since Islamic law sanctions the right to personal property, it protects it, both by means of moral exhortation and legislation, from robbery, theft, fraud, destruction, usurpation, trespass and so on.133

Islamic law has firmly secured freedom of ownership through established legislation:134

i. property ownership cannot be dropped and encroached, as Islam does not recognize lost property;
ii. ownership is an exclusive right and should be respected;
iii. the owner is absolutely free to manage the property.

The protection of property through tort is one of the fundamental human rights. The fundamental right of protection, acquiring, possessing and disposing of property, is for all persons of a country and protection against deprivation extends to all persons. The right, however, is not absolute and is subject to the limitation that property may not be so used to injure the rights of others or the safety, health, comfort or general welfare of the community.135

130 Al-Qur’an, 4:29.
If people have acquired wealth legally, they are the trustees and stewards of it, entitled to its usufruct and enjoyment without limits. No property may be expropriated without legitimate cause and equitable compensation. No one may prevent another from drawing benefit from his property. Property may be owned privately, corporately or publicly. It may not be destroyed or abused. Likewise, no one may make a misrepresentation in a business transaction, or cheat, steal or rob another of his wealth. None may hoard or monopolize any commodity for the purpose of ‘cornering the market’ and raising price artificially.\textsuperscript{136} No property may be expropriated except in the public interest and on payment of fair and adequate compensation.\textsuperscript{137}

The ownership of property is protected in each and every situation by Islamic civil law. It was implemented by the Prophet and the righteous Caliphs. Furthermore, the state cannot acquire the property of any person without his consent and without paying adequate compensation. The Prophet acquired the property of some persons of Medina for the construction of a mosque with their consent, and he paid compensation to the owner in accordance with the prevailing prices although the owners did not demand any price.\textsuperscript{138}

On the occasion of the Battle of Hunayn, the Prophet acquired helmets of Safwan bin Ummayyah. When he asked whether these were to be taken without compensation, the Prophet said: ‘[a]ll those helmets which will be lost during the battle will be compensated’.\textsuperscript{139} During the Caliphate of ‘Umar a Syrian cultivator once complained that the army had trampled down his crops. ‘Umar ordered payment of ten thousand dirhams to him as compensation out of the public treasury (bayt al-mal).\textsuperscript{140}

Muslim jurists also have declared that the state could not acquire the property of its subjects unlawfully. Thus, when the central mosque of Kufah was constructed during the Caliphate of ‘Umar, using the remains of some old forts which happened to be situated on the land of the non-Muslims (dhimmi), the amount of compensation to be paid by the state was adjusted in the accounts of their poll tax/head tax (jizyah).\textsuperscript{141}

According to article 13 of the Constitution of Medina, every person has an obligation to prevent acquiring property by way of coercion.\textsuperscript{142} The protection of property in the Constitution included all people in that time, whether Muslim or non-Muslim.

In this way, the Qur’an, the Prophet traditions and the Constitution of Medina provide protection from wrongful action to life, wealth and prestige and ensure a free society in which no one, even non-Muslims, shall be deprived of life, property or honour without due procedure of law. We can say, therefore, that the Islamic law of tort emphatically gives protection and security to ownership of property. No one is able to trespass, destroy, invade or damage another’s rights.

\textsuperscript{138} Shaukat, \textit{Human Rights in Islam}, p. 44.
\textsuperscript{139} Ibn Qayyim, \textit{Zad al-Ma‘ad}, vol.1, p. 186.
\textsuperscript{140} Abu Yusuf, \textit{Kitab al-Kharaj}, p. 239.
\textsuperscript{141} Shaukat, \textit{Human Rights in Islam}, p. 44.
C. Protection of Tort to Animals

The universal protection of Islamic tort law embraces not only human beings and properties, but all other living creatures of God. Accordingly, it prohibits cruelty to animals. That means that man has an authority over animals and enjoys the right to use them, but does not mean that law has given him unbridled liberty. The animals have certain rights upon him. He should not hurt them or harm them. When he uses them for his service he should cause them the least possible harm, and should employ the best and the least injurious methods of using them.

Killing an animal by causing continuous pain and injury is considered abominable in Islamic law. It allows the killing of dangerous and venomous animals and of beasts of prey only because it values man’s life more than theirs.

Animals, however, have been created for the benefit of man, who has duties towards them and is accountable to God for their proper treatment. The Qur’an says:

> and cattle He has created for you, from them you derive warmth and numerous benefits, and of their [meat] ye eat. And ye have a sense of pride and beauty in them as ye drive them home in the evening, and as ye lead them forth to pasture in the morning. And they carry your heavy loads to lands that ye could not reach except with souls distressed, for your Lord is indeed Most Kind, Most Merciful.143

The Qur’an says again in another verse: ‘[t]here is not an animal on the earth, nor a being that flies on its wings, but communities like you’.144

The above verses give some idea of the sanctity in which the life of animals is held in protection in Islam. It is in keeping with this spirit that Islamic law, as part of its comprehensive guidance, stipulates how animals are to be treated and protected.

There are special regulations concerning animals that are hunted. Animals and birds can only be hunted for the purpose of providing food, not for the purpose of injury and harm. It is not allowed to use animals for target practice or to hunt animals for trophies. It is compatible with the Prophet saying: ‘[d]o not make anything having life as a target’.145 In another tradition: ‘[t]he Prophet prohibited making the animals fight amongst each other’.146

The Qur’an says: ‘I will order them to slit the ears of cattle, and to deface the nature created by God, whoever forsaking God, takes Satan for a friend.’147

This verse condemned the Arabs of Jahiliyyah custom for slitting the ears of their cattle, calling this a practice inspired by Satan. ‘After a camel had given birth to five or ten young, its ears will be slit and let her go in the name of their deity.’148 This action causes suffering and pain. So, it is wrongful and prohibited according to Islamic law.

143 Al-Qur’an, 16:5–7.
144 Al-Qur’an, 6:38.
145 Muslim, Sahih Muslim, vol.3, p. 1079.
146 Akhlak Husain, Prophet Guidance for Social Life, p. 47.
147 Al-Qur’an, 4:119.
The Qur’an says, again with the meaning: ‘Pasture your cattle’.\(^{149}\)

This verse commanded that the owner of an animal must take care of it and feed it properly.\(^{150}\) There are several traditions which can be related to this discussion, namely:

\[\begin{align*}
a. & \quad \text{Some young men of the Quraysh had tied a bird (and thus made it a target) at which they had been shooting arrows. Every arrow that they missed came into the possession of the owner of the bird. So no sooner did they see Ibn ‘Umar, they went away. Thereupon, Ibn ‘Umar said: ‘Who has done this? God has cursed him who does this. Verily, God’s Messenger invoked a curse upon one who made a live thing the target.’}^{151}\text{ It is forbidden to use animals as a target for shooting or torturing. The word ‘curse’ is evidence that doing this is unlawful action.}^{152}

b. & \quad \text{A woman was tormented because of a cat which she had confined until it died and she had to go into Hell. She did not allow it either to eat or drink when it was confined, nor did she free it so that it might eat the insects of the earth.}^{153}\text{ This tradition is evidence of prohibition of the action of confinement or imprisonment of a cat and the like without giving food and water; Islamic law firmly prevents this being done.}^{154}

c. & \quad \text{In one case, a Prophet from among the Prophets of God encamped under a tree, and an ant bit him, and he commanded his belongings to be removed from underneath the tree. He then commanded it to be burnt, and God revealed to him: ‘Why one ant [which had bitten you] was not killed [and why did you burn the others]?’}^{155}

d. & \quad \text{Anas bin Malik (a Companion of the Prophet) passed a party of men who had made trouble for a hen and were shooting arrows at it. Thereupon, he said that the Prophet forbade that any beast should be harmed.}^{156}\text{ Al-Nawawi (a Shafi‘i jurist) stated that doing harm to an animal such as fastening it with a string alive and shooting arrows at it as a target is a wrongful deed and prohibited by law.}^{157}

e. & \quad \text{The Prophet prohibited beating an animal on the face and stamping a mark on it.}^{158}\text{ In pertaining to it, al-Nawawi said that the prohibition of beating and stamping a mark on the face of an animal includes domestic and undomesticated animals. This is because they are the creatures of God and have a right to live and to be respected.}^{159}
\end{align*}\]

\[^{149}\text{Al-Qur’an, 20:54.}\]
\[^{151}\text{Muslim, Sahih Muslim, vol.3, p. 1079.}\]
\[^{152}\text{Al-Shawkani, Nayl al-Awtar, vol.8, p. 88.}\]
\[^{153}\text{Muslim, Sahih Muslim, vol.4, p. 1381.}\]
\[^{154}\text{Al-Shawkani, Nayl al-Awtar, vol.7, p. 4.}\]
\[^{155}\text{Muslim, Sahih Muslim, vol.4, p. 1215.}\]
\[^{156}\text{Al-Shawkani, Nayl al-Awtar, vol.8, p. 87.}\]
\[^{157}\text{Al-Shawkani, Nayl al-Awtar, vol.8, p. 88.}\]
\[^{158}\text{Al-Shawkani, Nayl al-Awtar, vol.8, p. 88.}\]
\[^{159}\text{Al-Shawkani, Nayl al-Awtar, vol.8, p. 88.}\]
The judge has the power to take action against cruelty committed by an owner of animals and such a person should be punished by being humiliated. It has been reported that the Caliph ‘Umar had beaten an owner of an animal when he had compelled his animal to carry a heavy load on its back.\footnote{Mahmassani, \textit{al-Mujibat wa al-‘Uqud}, p. 233.}

Indeed, an animal is a valuable property, so it should be protected by general rule of destruction whether entirely or partly, which is called liability for value.\footnote{Fawzi Fayd Allah, \textit{Nzariyyat al-Daman}, Kuwait: Maktabah Dar al-Turath, 1983, p. 169.}

But, due to the availability of a tradition in which the Prophet judged an animal to be compensated by a quarter of its price,\footnote{Fawzi Fayd Allah, \textit{Nzariyyat al-Daman}, p. 169.} the Muslim jurists differ on their stands between following the analogy in liability of value or liability for a quarter of its price. Their opinions are as follows:

i. Some of them, such as the Hanafi\footnote{Al-Marghinani, \textit{al-Hidayah}, vol.4, pp. 148–149.} and Hanbali\footnote{Ibn Qudamah, \textit{al-Mughni}, vol.5, p. 386.} jurists, apply the signification of the Prophet tradition but they confine it to animals which are meant not only for meat but also for riding, carrying and being a pet, so a quarter of its price which is lost is compensated. As for other animals, like a goat belonging to a butcher which is only meant for meat, the decrease in its value is taken into consideration and the amount by which its value has decreased should be given as compensation.

ii. Others, like the Maliki\footnote{Ibn Rushd, \textit{Bidayat al-Mujtahid}, vol.2, p. 318.} and the Shafi‘i\footnote{Al-Ghazali, \textit{al-Wajiz}, vol.1, pp. 207–208.} jurists, follow the analogy that they compensate the parts of the animal which are damaged by paying the value of its decrease, without differentiating between various types of animal.

Furthermore, in the case that a person injures an animal, whether at the foot or at the mouth or at any part of the body, he is liable for the damage and compensation must be made to the owner.\footnote{This is the view of al-Shafi‘i, Ibn Abi Layla and Ibn Shubrumah. See in al-Sayyid Sabiq, \textit{Fiqh al-Sunnah}, Cairo: Dar al-al-Fath li al-I‘lam al-‘Arab, 1994, vol.2, pp. 569–570.}

On the other hand, compensation will not be inflicted on a person who strikes or harms an animal while riding or feeding it, because that act is considered as a common act while using or rearing the animal.\footnote{Al-Sayyid Sabiq, \textit{Fiqh al-Sunnah}, vol.2, p. 570.} As such, if an animal, accompanied by its owner or its caretaker, is injured by someone, he is responsible for paying compensation to its owner or caretaker. Once Caliph ‘Umar inflicted compensation on a person who had stolen his horse, and the horse had been subjected to sexual intercourse by another horse. The Caliph, therefore, imposed compensation on the person because that person was regarded as a tortfeasor of his action and he was liable for that action.\footnote{Al-Sayyid Sabiq, \textit{Fiqh al-Sunnah}, vol.2, p. 570.}
Likewise, when someone fires a gun with the intention of frightening animals, and, while the animals run away, one falls and is destroyed or suffers hurt on its foot, the man who fired the shot is liable for compensation.\textsuperscript{170} However, a person who kills a domestic animal in self-defence is not required to pay its owner any compensation.\textsuperscript{171} If a person causes any damage, intentionally or unintentionally, to another person’s animal, as a camel, a dog, a cat or a deer, he must pay the owner the value of depreciation. If such item is totally destroyed, the owner must be compensated by getting its full market price.\textsuperscript{172}

Furthermore, the Islamic law of tort provides protection for an animal’s owner when the animal is taken without his permission; the owner is protected by the law in every diminution of value before it is returned. So, if a person takes an animal, and then returns it to the owner thinner than it was, he is responsible for its thinness as well as for the diminution of value.\textsuperscript{173} Similarly, every increase in the animal’s value also belongs to its owner.\textsuperscript{174}

From the Quranic verses, traditions and the Muslim jurists’ opinions, we know that Islamic tort law has strictly prohibited to play with, to cause suffering and to harm the lives of animals and to inflict torture upon them just for the sake of fun. We also cannot cause injury and harm to any animal unless permissible by law. The animals are the sacred trust of God and no pain should, therefore, be caused to them merely for sport or the like. If there is a genuine need to slaughter them for the use of their flesh or skin, they should be properly slaughtered and in no way be allowed to die a lingering death.

8. CONCLUSION

To sum up, the discussion above shows that the Islamic law of tort firmly protects the lives of persons, as well as property and animals. This fact obviously can be seen in Quranic verses, Prophetic traditions and many Islamic legal literatures in which the Muslim jurists have elaborated and discussed them in their writings.

\textsuperscript{171} Ibn Hazm \textit{al-Muhalla}, vol.8, p. 145.
\textsuperscript{172} Ibn Hazm, \textit{al-Muhalla}, vol.8, p. 149.
\textsuperscript{173} \textit{Majallat al-Ahkam al-‘Adliyyah}, article 900 article 917.
\textsuperscript{174} \textit{Majallat al-Ahkam al-‘Adliyyah}, article 903.