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## The Offence of Abetment Liable to Capital Punishment under the Islamic Criminal Law and the Pakistan Penal Code

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### Abstract:

*This Article critically examines the offence of abetment liable to Capital Punishment under the Islamic Criminal law and the Pakistan Penal Code. Under Islamic Criminal law no one can be awarded Capital punishment for the abetment made in the offences of Hudood (Arabi: حدود Hudūd, plural of hadd, حد) while in circumstances of Qisas, there are differences among the jurists; Abu Hanifa (رحمه الله تعالى) is on the opinion that like the Punishment of Hudood, Punishment of Qisas shall also not be awarded to the abettor, While Imam Shafie, Imam Malik and Imam Ahmad Bin Hanbel (رحمهم الله تعالى) are on the opinion that Punishment of Qisas shall be awarded to the abettor. offence of abetment for which the punishment of ta'zir is awarded; there is consensus of the Islamic Scholars i.e, Imam Abu Hanifa, Shafie, Malik and Ahmad bin Hanbel (رحمهم الله تعالى) that the Participant by abetment (Arabic: الاشتراك بالتسبب) may be awarded the same punishment as awarded to the Participant by Action (Arabic: الاشتراك بالمباشر). Under the Pakistan Penal Code there are many offences mentioned therein for the abetment of which capital punishment may be awarded.*

*For awarding of punishment, the commission of crime for an abetment is not required under the Pakistan Penal code, while under the Islamic criminal law, it is required. In case where an offence for which an abetment has made is not committed there shall be no commission of an offence under the Islamic criminal law while under the Pakistan penal code an offence is said to be committed and the abettor will be awarded punishment.*

*Keywords: Participant by Action (Arabic: الاشتراك بالمباشر), Participant by abetment (Arabic: الاشتراك بالتسبب), Capital Punishment, Hudood, Qisas, Ta'zir, Abetment of Mutiny, An abetment to wage war.*

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### Introduction:

A person may be said to have committed an offence, although, he does not directly be a part of it. To encourage, order, assist another person for the commission of an offence is considered an offence as the act or omission of principal offender is considered. To encourage, order, assist another person for the commission of an offence in legal terminology is called Abetment. Hence assistance, aids, helps of a third person for the commission of an offence come under the ambit of an offence of Abetment. The using of term abetment in criminal law specifies distinguish between an abettor and the principal offender. Under the Pakistan Penal Code, in many cases an abettor is not awarded the same punishment as awarded to the principal offender. There are few cases in which the abettor is awarded the same Punishment as awarded to the principal offender. While under Islamic Criminal law it is consensus among the Jurists that capital punishment shall not be awarded in the case of abetment for Hudood<sup>1</sup>, while in case of Ta'zir<sup>2</sup>, it may be awarded. In the case of Qisas<sup>3</sup>, awarding of capital Punishment to the abettor is differentiated among Jurists.

The offence of Abetment liable to Capital Punishment under the Islamic Criminal law:

Under the Islamic Criminal law an abettor shall not be punished until the offence for the commission of which an abetment is made, has been not committed.<sup>4</sup>

According to Majority of Jurists Hudood punishments will be awarded only in cases where Hudood offences are committed by Participant by Action (Arabic: الاشتراك بالمباشرة)<sup>5</sup> in case where these are committed by Participant by abetment (Arabic: الاشتراك بالتسبب)<sup>6</sup>, Hudood punishments shall not be awarded to them rather ta'zir Punishment may be awarded to them.<sup>7</sup>

Abu Hanifa (رحمه الله تعالى) is on the opinion that like the Punishment of Hudood, Punishment of Qisas shall also not be awarded to the participant by abetment<sup>8</sup> While Imam Shafie<sup>9</sup>, Imam Malik,<sup>10</sup> Imam Ahmad Bin Hanbel<sup>11</sup> (رحمهم الله تعالى) thought that punishment of Qisas shall be awarded to the Participant by abatement.

The Hanafit (رحمهم الله تعالى) utter that the punishment of participant by abettor should be less from those who participated by action and said that Similarity is required under Islamic law for the punishment of Qisas while in case of abetment for murder there is no similarity, as the abettor did not kill the murderer directly rather abetted, However in awarding of punishment he will be punished as death directly. Besides, abetment in murder is itself a crime and under Islamic criminal law for that the Diyyat shall be paid to the legal Heirs of victim.<sup>12</sup>

In case of crime for which Punishment of ta'zir is awarded; there is consensus of the Islamic scholars, Imam Abu Hanifa, Shafie, Malik and Ahmad bin Hanbel (رحمهم الله تعالى) unanimously state that the Participant by

abetment (Arabic: *الإشتراك بالتسبب*) may be awarded the same punishment as awarded to the Participant by Action.<sup>13</sup>

According to Imam Abu Hanifa (رحمه الله تعالى) where two persons falsely testifies against a person in a result of which that person has been slanged, later on, witnesses revoked from their testification then they will be punished for paying Diyyat to the legal Heirs of the accused<sup>14</sup> and like it where a person dig a well and another person downfall therein then the digger will be responsible for paying Diyyat as he is not the actual doer, but his digging caused to his death. It is because in the Punishment of qisas similarity is required while in the above case there is no similarity. As in the case of participation by doer there is killing of a victim directly However on contrast in the case of participation by abetment, it is killing indirectly.<sup>15</sup> Imam Shafi, Ahmad bin Hanbel and Imam Malik (رحمهم الله تعالى) stated that in the case of abetment made for killing of a person, an abettor and the actual doer shall be awarded the same punishment, when the intention of the abetment is proved. It is because, the crime is committed due to the abetment, where there is no abetment there shall be no commission of crime. If the abettor is not punished, then the crimes will not be controlled and instead of decreasing they will be increased.<sup>16</sup>

Imam malik (رحمه الله تعالى) is on the opinion that where the intention of Murderer is comfort with the abetment then the abettor be will awarded the punishment of qisas and in case where it is discomfort, then the abettor will be liable for paying Diyyat.<sup>17</sup>

The Shafits (رحمهم الله تعالى) say that qisas will be awarded to the abettor as awarded to the real doer. According to them where two persons falsely testifies in a result an accused has been slanged, later on the witnesses revoked from their testification then they will be punished as a qisas as due to their testification the accused has been slanged.<sup>18</sup>

A case where a person murders a person and two or three others participated him in the commission of that murder by firing at the same time at the victim, altogether shall be liable for the punishment of death as a qisas. However, in the case of an offence liable to the punishment of Hadd, an abettor who has fulfilled all the conditions of such offence will be liable for punishment of Hadd, and he has not fulfilled such conditions individually, he shall not be awarded the punishment of Hadd but then again shall be liable to ta'zir.

Under the Islamic criminal law where two or more than two persons mutually cause death of another person by taking practical part in it, altogether will be responsible for intentional murder. It is grounded on the judgment made by Hazrat Omar (رضي الله عنه) . During the era of Hazrat Omar (رضي الله عنه) a person went missing in a San'a city and from a former wife he had a child. In the meantime, his wife made illegal relation with a third person. This lady urged her friend for killing of her stepson. Firstly,

he denied but later on due to the insistence of his girlfriend he agreed and one day she, her servant and her friend mutually killed her stepson, cut of his limbs and threw him in a well. After leaking and spreading the matter in the area, the governor of yaman apprehended her friend, and he unveiled the complete story and made an admission of an offence. The woman and her servant were also arrested. The governor of yaman conversant the entire story to Hazrat Omar (رضي الله عنه). Hazrat Omar (رضي الله عنه) made an order to the Governor of San'a 'award punishment to all of them and had state that if all of the residents of had made participation in it, I would have executed all of them.<sup>19</sup>

It is narrated from Hazrat Ali (رضي الله عنه) that He has made an order of awarding death sentence for the three persons, jointly murdered a person.<sup>20</sup> Hence, according to Imam Malik (رحمه الله تعالى) and some of the Hanafites (رحمهم الله تعالى), in case where two or more persons jointly murder another person, and the act of each of them is independently sufficient for the death of that person, all of them will be liable for intentional murder. By the same way, all of participants will be liable for intentional murder in case where their acts cannot be recognized, distinguished as to whose act is independently sufficient for the death of that person. However, Abu Hanifa, Shafii and Ahmad Bin Hanbal (رحمهم الله تعالى) are on the opinion that all of them will be not accountable for the intentional murder in the second case nevertheless shall be liable to the hurts caused to that person.

According to Imam Malik (رحمه الله تعالى), an abettor will be subject to intentional murder in case where he is existent on the spot of the occurrence of the offence and is in an active position.<sup>21</sup>

In reply to the Shafit it is stated that saying of Hazrat Omer (رضي الله عنه) and Hazrat Ali (رضي الله عنه) was about the participant by action and was not about the participant by abetment. Imam Abu Hanifa (رحمه الله تعالى) thought that the punishment of participant by abetment should be less from those who participated by action and said that Similarity is required under Islamic law for the punishment of Qisas while in case of abetment for murder there is no similarity, as the abettor did not kill the murderer directly rather abetted, However in awarding of punishment he will be punished as a death directly. Besides, abetment in murder is itself an offence.<sup>22</sup>

If a person seizes another person without having the intention to cause him death and in the meantime a third person causes his death through a fatal attack, the first person will not be liable for the punishment of Qisas, rather will be liable for seizing the victim and will be penalized with tazir, while the second person will be liable for the punishment of Qisas.

where a person compels another person for the killing of a person by threatening him with death e.t.c and the person being compelled kills that person, there is a deference of opinion among the jurists in this case. Imam Abu Hanifa (رحمه الله تعالى) is on the opinion that the compeller will be said

to commit an intentional murder and not one who has been compelled, as a compelled person has no liability. He based his opinion on the saying of the Holy Prophet (صلي الله عليه وسلم) who has said my Ummah has been exempted from what they do by mistake, forgetfulness or under compulsion. The compelled offender in such a case, however, will be liable to ta'zir to be fixed according to the situations of the case. However Ahmad, Malik and Shafii; (رحمهم الله تعالى) are on the opinion that both the compeller and who has been compelled will be said to commit intentional murder as the compeller is the actual origin for the murder of the victim and actually kills the victim in order to save himself which is not allowed in a murder case. In such a case an offender will be punished with ta'zir because compulsion creates doubt which removes the punishment of qisas as a death. However, compulsion is effective in offences other than intentional murder and it removes punishment from the person under compulsion.<sup>23</sup>

Capital Punishment of an abetment of serious offence as a Ta'zir:

Jurists are differed as to whether death punishment can be awarded to the offender as a ta'zir or not. According to some Shafeis and Hanbalis, death punishment cannot be awarded as a ta'zir because ta'zir cannot be more than Hadd and further its primary object is the reformation of culprit which cannot be achieved where death punishment is awarded. On the other side Imam Abu Hanifa and Malik (رحمهما الله تعالى) said that the kind and quantum of the punishment of ta'zir have not been fixed by shariah and is left at the desecration of the legislators and the judges. It is their discretion to fix it accordance to the situation of the case, with respect to the crime, culprit and society and as such if a legislator or judge think fit, he can prescribe or give death punishment to the culprit as a ta'zir, based on the gravity of the crime, with respect to society. In case of a professional offender who cannot be restrained from the commission of grave crimes by other than capital punishment, he may be awarded death punishment. Nonetheless according to some Shafies and Hanbalis death punishment can be given as a ta'zir to the culprit who commits a grave offence like a spy who leaks out the secrets of the state to its enemy.<sup>24</sup> similarly the jurists opine that death punishment can be given to an offender who commits a crime which is dangerous for lives of other human being. However, generally awarding of death punishment has discouraged by the jurists and has only allowed where it is completely required in the circumstances of a specific case. It is because the blood of a human being is sacred in Islam. Holy Qur'an says; "Whoever killed a human being for other than manslaughter or exploitation in the earth, it shall be like where he killed all mankind".<sup>25</sup>

In short we can say that death punishment may be awarded to the abettor as a ta'zir as there is consensus of the Islamic scholar, Imam Abu Hanifa, Shafie, Malik and Ahmad bin Hanbal (رحمهم الله تعالى) that in the punishment of ta'zir, the Participant by abetment shall be awarded the same punishment

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as awarded to the Participant by Action.<sup>26</sup>

The offence of Abetment liable to Capital Punishment under the Pakistan Penal Code

The abetment of following offence is liable to capital punishment under the Pakistan Penal Code;

Capital punishment for Abetment of Mutiny:

Any person who made an abetment for the commission of mutiny by sailor, soldier or airman in Navy, Army or Air force, and in a result of that abetment mutiny is committed, he will be awarded penalty of death or with imprisonment for life or imprisonment for a period may extending to ten years, and fine.<sup>27</sup>

Section 132 concerns where offence of mutiny is committed in a result of abetment. Applying Section 107 of the code abetment is said to be constituted by-

- (a) Instigation to commit the offence
- (b) Engaging in conspiracy of an offence, and
- (c) Aiding the commission of an offence.

So various shades, which the offence of abetment has couple with its jurisprudential scope, do form part of this section. Section 132 of the code simply enhances sentence to penalty of death or with imprisonment for life or imprisonment for a period extending to ten years, and a fine.<sup>28</sup>

In short, we can say that if a person has committed an abetment for the commission of mutiny and in a result of that abetment mutiny is committed, then that abettor may be awarded capital punishment.

Abetment of an offence for which no punishment is provided in the Code: section 109 of the Pakistan Penal Code 1860/2015 said, Any person who do abetment, in a result of that abetment an act is committed for which there is no provision of punishment is described, shall be penalized by way of the penalty described for that offence. An offence is committed in a consequence of abetment, where it has been committed in a result of conspiracy, instigation or with the aid.<sup>29</sup>

A person who merely says, "Beat", but does not take any part in the beating, can be convicted of abetment. Where death is caused because of beating given to the accused or assassination is committed during beating of a person, abetting it would be punishable under the section. Thus, where a person orders his men to beat the other partly and in consequence of that order the people of that party are and some men are killed, the person who mad an order is guilt-ridden for the abetment of murder.<sup>30</sup>

In case whereas the abettor has made an order to his nephew to beat the deceased and he was an old and respectable man and the nephew gave only one blow with a *dhao* to the deceased, then the abettor will be considered guilty for an offence under Section 304, Part I read with Section 109, P.P.C. Where the accused conspired to commit theft and to commit murder for

facilitating the theft. It was held that all the accused have guilt-ridden for making an abetment of murder under Section 302 read with Section 109. In case a person procures murderers, he is liable to the same punishment as the murderers. Similarly, instigation of a raid or leading a raid in which death is caused amounts to abetment of murder.<sup>31</sup>

An abetment to wage war against Pakistan:

Anybody who wages war against Pakistan, or make an attempt to wage such war, or make an abetment for the waging of such war, will be awarded penalty of death or life imprisonment, and may also be liable to fine.<sup>32</sup> Section 121 of Pakistan Penal Code, deals with offences of waging war against Pakistan. This section includes attempt to Wage war and the abetment thereof. As observed by Bentham, all States have the same right of self-preservation as their subjects, and State like men have, from time immemorial enacted safeguards for them on preservation and practice. In monarchical forms of Governments, the right was exalted into a sacred right.' In common law, this Diem is spoken of as 'treason'. The "treason" does not find its use in ss. 120-A to 130 of the Penal Code, the word "High Treason" is used in High Treason Ad, 1973 but it is not synonymous with the word "treason".<sup>33</sup> Under the English law, the using of words may be orally or written. While under the Pakistan Penal Code make an attempt to wage such war or make an abetment for the waging of such war, is an offence punishable under this code. There are no needs of number of persons for the constituting an offence under this code. The spirit of the offence of this section lies in the violation of the allegiance that is owed to the Government of Pakistan and that is clue from all the citizens whoever they may be.<sup>34</sup> The offences described in this section correspond to the offence of treason by levying war under the English law.<sup>35</sup> Nevertheless, in enacting this section, it was not the intention of the framers of the Code to make a replica the English law of treason in its entirety, that is to say, the law of statute and its interpretation placed upon it by the case.<sup>36</sup>

The expression "waging war" has been neither discussed in this Code nor in the General Clauses Act, 1897. It is therefore it should be understood within the ordinary dictionary meaning of carrying on war". It shall be substitute for the expression "levying war" used in the English Statutes relating to treason. Acts such as collection of men, arms and ammunition, to wage war do not mean 'waging war'. Such acts indicate preparation to wage war and constitute a separate offence under the Code. The phrase, "wagging war" imports use of force and violence and hence, where a society is formed with the object of putting an end to capitalism and private ownership and bring about a change in the existing Government by peaceful means, it cannot be said that it is guilty of waging war as it is right of every citizen to entertain and propagate his political theories and ideas and work for their establishment without use of force and violence.<sup>37</sup>



“Abets the waging of war”. The word ‘abets’ includes intentional aiding under clause (3) of section 107. Hence, an accused omitting to report to the nearest Magistrate or to the officer of police under Section 44 Cr.P.C, 1898 about the conspiracy to wage war cannot be said to abet the waging of war in the absence of proof that his intention in omitting to do so was to aid the waging of war. Since the word ‘abet’ in this section does not mean something less than what it means in Section 107. The abetment thinks of by this section means that it should not be made during the progress of war or rebellion it should be made earlier to it, instigation mentioned in this section means instigation for abetting of the waging war. Under this section the waging war in a result of abetment is not required, while the core object of instigation must be the waging of war. The person cannot be saved from the operation of this section, on the plea that he was trying to do it by indirect or in a distinguished way, it is the responsibility of the court to come to the conclusion where he has made an instigation for the waging of war or not.<sup>38</sup>

There is a difference between men who plan and execute a raid and those who, swept along in the mainstream of events and sudden frenzy, participate in an offence of that kind it was understood that the latter cannot be held liable under this section.<sup>39</sup> Where, in a village which was a hotbed of rebellion, an influential man who was also the president of an association which was formed for resisting payment of capitation taxes by way of a rebellion, recruited rebels and assisted them after battle with the tax authorities, it was understood that he was guilt-ridden of the offence of waging war.

To commit a crime of rebellion is most dangerous as soon as the rebels sabotaged the government. The penal system of the rebellions is strong but there is a need to insert such laws in it through which he person who design, instigate, or make conspiracy for rebellion may be awarded the same punishment as awarded to rebellions. For the reasons mentioned above we have not left the rebellions to be treated according to general law of the abetment but to enact a separate law for the abetment of rebellion, waging, abetting war against the state. The Succeeding abetment of such offences may, we consider, without troublesomeness, to be left-hand to be give out with according to the general law.<sup>40</sup>

It is not compulsory for the accused to clear what was the object of meeting of acts done was however, it is the responsibly of the prosecution to work out the case against the accused strictly in conformity with the established notions of criminal justice. Seriousness of charge by itself cannot absolve the prosecution from the basic responsibilities. Right of liberty of an individual would not be curtailed on presumptive grounds.<sup>41</sup>

It was held above that Under Islamic Criminal law no one can be awarded Capital punishment for the abetment made in the offences of Hudood while

in the circumstances of Qisas, there is difference among the jurists; Abu Hanifa (رحمه الله تعالى) is on the opinion that like the Punishment of Hudood, Punishment of Qisas shall also not be awarded to the abettor While Imam Shafie, Imam Malik, Imam Ahmad Bin Hanbel (رحمهم الله تعالى) are on the opinion that Punishment of Qisas shall be awarded to the abettor. Crime of abetment for which the punishment of tazir is awarded; there is consensus of the Islamic Scholars i.e, Imam Abu Hanifa, Shafie, Malik and Ahmad bin Hanbel (رحمهم الله تعالى) that the Participant by abetment (Arabic: الاشتراك بالتسبب) may be awarded the same punishment as awarded to the Participant by Action (Arabic: الاشتراك بالمباشر). Under the Pakistan Penal Code there are many offences mentioned therein for the abetment of which capital punishment may be awarded.

The commission of crime for which an abetment has made is not required under the Pakistan Penal code for awarding of punishment to the abettor, while under Islamic criminal law, it is required. In case where an offence for which an abetment has made is not committed there shall be no offence and punishment for the abettor while under the Pakistan penal code, he will be awarded punishment.<sup>42</sup>

### Endnotes:

1 Hudud (Arabic: حدود Hudūd, also transliterated hadud, hudood; plural of hadd, حد) is an Arabic word meaning "borders, boundaries, limits" In Islamic terminology, Hadd means Punishments Fixed by Almighty Allah, and is a right of Allah. See, Al Kasani, Abubaker Masud, Badai Al Sanai Fi Tartib-Sharai, Cairo, Almakhtabat ul Jamalia, 1328 A.H. Vol. VII, p. 33.

2 In Islamic Law, tazir (ta'zeer or ta'zir, Arabic: تعزير) refers to punishment for offenses at the discretion of the judge (Qadi) or ruler of the state. It is one of three major types of punishments or sanctions under Sharia Islamic law — hadd, qisas and ta'zir. See, Mark Cammack (2012), Islamic Law and Crime in Contemporary Courts, BERKELEY J. OF MIDDLE EASTERN & ISLAMIC LAW, Vol. 4, No.1, pp. 1-7.

3 Qisas or Qiṣāṣ (Arabic: قِصَاص, romanized: Qiṣās, lit. 'accountability, following up after, pursuing or prosecuting') is an Islamic term interpreted to mean "retaliation in kind", "eye for an eye", or retributive justice. In classical/traditional Islamic law (sharia), the doctrine of qisas provides for a punishment analogous to the crime. See Shahid M. Shahidullah, Comparative Criminal Justice Systems: Global and Local Perspectives, ISBN 978-1449604257, pp. 370-372 & <https://en.wikipedia.org/wiki/Qisas>. visited on 11.05.2021.

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5 See for detail of its meaning, Article on the title: The Offence of Abetment under the Islamic Criminal law, Authored by, Kamran Sarwar, published in, JOURNAL OF ISLAMIC CIVILIZATION AND CULTURE (JICC), Volume 3, Issue 1 (Jan-June, 2020) ISSN (Print): 2707-689X ISSN (Online) 2707-6903, Internet link, <http://www.ahbabtrust.org/ojs/index.php/jicc/article/view/103/81>.

6 See, Ibid. Footnote iv.

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