

## The Circumstances Where the Quantum of Punishment Prescribed by Islam for Certain Crimes Can Be Reduced or Enhanced

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### **Abstract:**

*The crime of theft if committed in unavoidable circumstances like extreme hunger or famine, Hadd punishment shall remain suspended. A crime of Zina if committed in a situation where the life of a woman is in danger because of hunger or thirst and she committed Zina to acquire food items or drinking water to save her life, she will be exonerated from the charges of Zina. In the light of Quranic injunctions, the punishment of a slave girl, if she committed Zina, is half as compare to independent women and the punishment for the wives of the Holy Prophet for committing the crime of fawahish or disobedience (Nushuz), is double as compare to other women. 4. Contrary to this principle, if a respectable person committed crimes under Tazir, he deserves lesser punishment or mere admonition in the light of tradition of the Holy Prophet: (Pardon the wrong done by the nobles of the society". 5. For awarding the punishment of Rajm, if the condition of Ihsan is fulfilled, he/she will be killed by stoning. According to Shiah Imamiah, Allama Rasheed Raza and others, when a person who is once married but due to divorce or separation, is living alone or miles away from his wife and not in a position to enjoy her company. If such person committed Zinā, he or she will not be awarded the punishment of stoning. 6... In the light of tradition, it is not allowed to award death punishment except the following three circumstances. Firstly, if a person, being a Mohsan, committed Zina, .Secondly, after accepting Islam, if a person converted to other religion. Thirdly, death punishment can be awarded in retaliation of murder committed*

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It is in human nature to break the law under the influence of Nafs-e-'Ammārah, which incites a person to commit a crime in violation of

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commandments of Islām or laws of the land. Islām being Dīn Fiṭrat corresponds to human nature and in this respect, every arrangement has been made to promote peace and tranquility in the society and curb the crimes of various natures ranging from minor to heinous one.

It must be borne in mind that it is not the policy of law giver to award his servant stringent punishment of Ḥadd at all cost rather there seems to be tacit inclination on part of the law giver to ward off punishment from a person if he, as a human being, committed any crime that comes within the purview of Ḥadd, if there is slightest reason to do so. Secondly, the conditions prescribed for proving Ḥadd crimes are so hard that compel a person to think for a while that whether fulfillment of these conditions are possible to prove any crime if there is no confession on part of a person involved. Thirdly, it has been emphasized not to propagate and give publicity of the commission of these heinous crimes in public. This principle becomes evident from the following traditions of the Holy Prophet (SAWW) that:

It was narrated from ‘Amr bin shir’aib, from his father, from his grandfather, that the Prophet said: “Pardon matters that may deserve a Ḥadd punishment, before you bring it to my attention, for whatever is brought to my attention, the Ḥadd punishment becomes binding”.<sup>1</sup> The meaning of this tradition is that: Ḥudūd crimes if committed, it should not be publicized in society rather it is preferable to resolve the matter before reaching to the court of Justice. If it is reached there, then there will be no compromise, no relaxation and no recommendation, rather it will be decided on merit. On proving the crime beyond a shadow of doubt, the fixed punishment will be awarded. This principle has been specifically mentioned in the Holy Qur’ān in the context of the crime of Ḥirāba. It also appeared in another tradition that as reported by Ḥaḍrat ‘Āisha (R.A) from the Holy Prophet that: “Ward off Ḥadd punishment from the Muslims as much as possible. If there is any way to acquit him, let him be freed without and punishment. It is better for the man in authority to err in giving pardon to an accused than making error in awarding Ḥadd punishment.”<sup>2</sup> In Ma’iz Aslami and Ghamidiyyah cases, the Holy Prophet persuaded them to retract from confession made by them. This also signifies that there are strong arguments in favor of complete acquittal or reduction in the quantum of punishment.

The human nature and mind varies. There are peoples, for them, mere admonition is sufficient to reform them, yet there are peoples who never reform and commit crimes time and again, till you exterminate them. For such type of people, stringent punishments have been prescribed by the lawgiver. The justification of such severe punishment is based on public interest. (مصلحة عامه) The Shariah gives top priority to protection of lives, Religion, Sense, Property and progeny and it has been termed as Maqṣid al Shari’ah or objectives of Islamic law. It is inevitable to fulfill these Maqāṣid to secure the interest of the society.

In classical books of Jurisprudence, we find instances where a punishment for certain crimes are either reduced or enhanced keeping in view the circumstances of the crime, criminal and the specific situation which

compelled him to commit a crime. This includes all crimes whether come within purview of Ḥudūd, Qiṣāṣ, Ta'zīr or punishment awarded under the doctrine of Siyasat al Shar'īyyah. For example, in a crime of Sariqa or theft, if a person committed theft is needy or destitute and in extreme hunger or such other situations compelled him to commit a crime of theft to save his life, he will not be awarded the prescribed punishment of Ḥadd or imputation of hand rather lighter punishment is awarded or exonerated completely. Likewise, if the worth of the stolen property is less than one forth of a prize of Dinār, or less than the required quantity or Nisāb, the person will not be awarded the prescribed punishment. During the era of Ḥaḍrat 'Umar (R.A), a person committed a crime of theft by stealing a camel of another person. When he slaughtered the camel, the matter came into the kind notice of Ḥaḍrat 'Umar (R.A). First of all, Ḥaḍrat 'Umar decided to implement the prescribed punishment of theft that is the imputation of hand but soon after reconsidered/reviewed his previous decision and awarded him the punishment of fine by doubling the price of camel on the grounds that the circumstances might have compelled him to commit this crime. He firstly asked the actual price of the camel and then doubled it.<sup>3</sup>

Secondly, the sayings of the holy Prophet (SAWW) for such circumstances are well known. It is reported from the Holy Prophet to have been said that: "لاقطعة في مجاعة المضطر" "There is no imputation in unavoidable circumstances of extreme hunger."<sup>4</sup> During famine, Ḥaḍrat 'Umar had suspended the punishment of Ḥadd for the crime of Sariqa. The detail of this incident adorns the books of history.<sup>5</sup> Likewise, if a crime of Zinā is committed in unavoidable circumstances, like a woman faces extreme hunger or thirst and she asks for food or water but a person becomes ready on a condition that she agrees to provide him an opportunity of sexual intercourse. If the circumstance is that her life is in danger if she consumes no food or water and thus she agrees on a commission of Zinā to protect her life, the principle of compulsion will apply here and she will be awarded no Ḥadd punishment and the circumstances of mitigating will arise here.<sup>6</sup>

In the holy Qur'ān, the punishment of slave girl as compare to free woman, is half if they commit a crime of obscenity. It appeared in the holy Qur'ān that:

فَإِذَا أُحْصِنَ فَإِنَّ أَتَيْنَ بِفَاحِشَةٍ فَعَلَيْهِنَّ نِصْفُ مَا عَلَى الْمُحْصَنَاتِ مِنَ الْعَذَابِ ذَلِكَ لِمَنْ خَشِيَ الْعَنَتَ مِنْكُمْ وَأَنْ تَصْبِرُوا خَيْرٌ لَكُمْ وَاللَّهُ غَفُورٌ رَحِيمٌ

"So, once they have been bound in marriage, then, if they commit a shameful act, they shall be liable to half of the punishment prescribed for the free women. That is for those of you who apprehend to indulge in sin. But that you be patient is better for you. Allāh is Most-Forgiving, Very-Merciful"<sup>7</sup>

As mentioned above, the punishment of slave girl as compared to free woman is half in crimes of Ḥudūd including Zinā. Likewise, the punishment of high profile free women is double as compared to a slave girl. The holy Qur'ān

has discriminated between them in terms of punishment while kept them at par in matters of belief, performance of religious obligations, cleanliness of body, prayers and fasting but again discriminated them in performing religious obligations like paying Zakat and performing Hajj. Allāh almighty says that:

يُنْسَاءُ النَّبِيِّ مَنْ يَأْتِ مِنْكُنَّ بِفَاحِشَةٍ مُبَيَّنَةٍ يُضَاعَفُ لَهَا الْعَذَابُ ضِعْفَيْنِ وَكَانَ ذَلِكَ عَلَى اللَّهِ يَسِيرًا-

“O wives of the Prophet, whoever from amongst you will commit a clearly shameful act, the punishment will be double for her; and it is easy for Allāh to do so”<sup>8</sup>

It also appeared in the holy Qur’ān about double reward for doing righteous acts.

وَمَنْ يَقْنُتْ مِنْكُنَّ لِلَّهِ وَرَسُولِهِ وَتَعْمَلْ صَالِحًا نُؤْتِهَا أَجْرَهَا مَرَّتَيْنِ وَأَعْتَدْنَا لَهَا رِزْقًا كَرِيمًا-

And whoever of you stays obedient to Allāh and His messenger, and acts righteously, We shall give her twice her reward, and We have prepared for her a prestigious provision.<sup>9</sup> In the light of this verse, the concept of double reward for righteous act and less punishment for committing a crime in adverse circumstances is a hot topic of Islamic jurisprudence and the jurists have discussed this issue in detail and the commentators of the Holy Qur’ān have derived arguments from these verses in their respective commentaries. ‘All-ḥ ma Qur=ub<sup>1</sup> writes about the double punishment for the wives of the Holy Prophet and other high profile women that they have been blessed with every facility of the world and has higher status in the society.

"الشرف منزلتهن و فضل درجتهن و تقدمهن على سائرالنساء"

Because of their higher status, honor and preference over entire women, their punishment has been enhanced as compared to others.<sup>10</sup>

‘Abu Bakar Jaṣṣāṣ writes about lesser punishment for those, not blessed with higher status and other worldly facilities that: “Since the blessing of God upon these less fortunate people is less as compared to others that is why their punishment for committing crimes under Hudūd is half. The punishment of women of higher status is double as compare to slaves because the blessings of God upon them are innumerable, that is why the punishment for committing crime by them, is severe.”<sup>11</sup>

About the lesser punishment for slave girls, Mawlānā Mawdūdī writes in his celebrated commentary, The meaning of Qur’ān that:”As regards the lighter punishment for adulterous slave girl than for a free Muslim woman, it is based on the fact that the latter enjoys double protection as compared with the former, the protection of the family (even though she is married). In contrast to a free woman, a slave girl does not enjoy any protection at all, if she is unmarried, even her marriage does not make her position equal to that of an un-married free Muslim woman, for the latter enjoys the protection of her status, her family, her clan etc. On the other hand, a slave girl still remains, to some extent, under the bondage of slavery and has no protection of the family, clan etc. Therefore her

punishment should be half of an un-married free woman and not half of a free married woman.<sup>12</sup>

About the enhancement or double punishment for the women of noble background as compare to slave girls, Mawlāna Mawdūdī says that: "The reason for giving double punishment for a sin and a double reward for a good work is that those whom Allāh honors with high rank in society generally become the leaders of men and the majority of the good people follow them for good or for evil. Thus, their evil does not remain evil but becomes the cause of a people's degeneration, and their goodness does not remain their own goodness but becomes the cause of the true success of many other people also. Therefore, when they commit evil they are punished for their own as well as for other's degeneration, and when they do good they are not only awarded for their own good works but also for this that they guided others also to do good."<sup>13</sup>

While awarding the punishment of Rajam, it is necessary that the man and woman who have committed Zinā must be married free Muslim. But the jurists of various schools of thought are not agreed on the definition of Iḥsān and Moḥsān. The general principle is that once a person got married, he or she becomes Moḥsān or Muḥṣana even if one of them died or a divorce took place. This is the view point of majority of the jurists. This rule is opposed by Shi'ah Imamia and even the renowned commentator of the Holy Qur'ān, 'Allāma Rashīd Raḍā has opposed this viewpoint. 'Allāma Rashīd Raḍā writes while explaining the word 'Iḥsān that the word Aḥsan is derived from Ḥasana which means protected place where entry is banned. It is also said that the word Ḥasanat al Mar'a (حصن المرأة) is used in the sense of pious woman. These words are used in relation to a woman who is married. Since she comes in the protective custody of a man (her husband) and it is said that as soon as she is married, her parents make her Moḥṣina. It is one of the characteristic of a married woman that she prohibits her husband from going other woman except his wife. 'Allāma has opposed the view that a woman becomes Moḥṣina when she is once married though she might have been divorced or becomes widow later. According to him, since she does not enjoy the requisite advantages of Iḥsān or being called Muḥṣan, if she has no husband who can protect her. Once she is separated in the manner aforesaid, she cannot be called Muḥṣina in the same manner as she cannot be called Mutazawijah (married), or a traveler who has just returned from the journey cannot be called a traveler or again a patient who regains his health can no more be known as patient.<sup>14</sup>

According to Shi'a Imāmiya, Muḥṣan and Muḥṣana means a person who is properly married and who is in a position to enjoy the company of the spouse. The Fiqh of Imāmiya does not consider a person as Muḥṣan or Muḥṣana whose spouse is not with him/her. The same view is supported by 'Allāma Rashīd Raḍā as mentioned earlier.<sup>15</sup>

Those who oppose the punishment of Rajam, are of the view that only hundred strips is the Ḥadd punishment both for married man and woman who commit fornication. According to them, the punishment of Rajm neither can be

doubled for the women of higher status as the wives of the holy Prophet nor can be halved for slave girls. it is pertinent to mention here the view point of acclaimed commentators about the word *faḥisha* as appeared in the verse regarding the wives of the holy prophet is that it is not permissible to derive the meaning of *Zinā* from this word or attribute the heinous crime of *Zinā* towards the wives of the Holy Prophet. Here it means “*Nushōz*” or disobedient and not following the high moral values prescribed for the wives of the Holy Prophet (SAWW).

The net result of this difference between various schools of thought is that mitigating circumstances arise when a person who is once married but due to divorce or separation or a person is miles away from his wife and not in a position to enjoy her company. If such person committed *Zinā*, he or she will not be awarded the punishment of stoning. This view point is not supported by the majority of the jurists.

In preceding pages, we have mentioned that if a respectable personality, specifically the wives of the holy Prophet, commit any crime of obscenity, they will be awarded double punishment because, their influence, honor and respect. Generally speaking a known personality has the capacity to shift or influence other peoples by his acts, life style and manners and thus his individual act does not remain mere an act of a single person but affect the whole society. The other people intentionally or unintentionally follow him. That is why double punishment has been prescribed. In *Ta‘zīr*, it is totally different and applied in a different way. If a respectable member of the society commits a crime other than *Ḥudūd* and *Qisās*, he will be treated differently as compared to an individual who is habitual and commits a crime time and again. For such type of people, i.e respectable members of the society, mere appearance before the S.H.O or mere admonition is sufficient to reform or deter them from committing a crime.

In this respect, the following tradition of the holy Prophet is referred. The tradition says that: - اقبلوا ذوی الهیئات عثراتهم الا الحدود (Pardon the wrong done by the nobles of the society except the crime of *Ḥudūd* and *Qisās*).<sup>16</sup> In the above cited two cases, the circumstances compel to enhance or mitigate the prescribed punishment. If a respectable person of the locality, as a human being committed any crime which comes within the purview of *Ta‘zīr*, he deserves less punishment keeping in view his respect in the locality and excellent previous record but, if he repeated the same crime or committed any other crime for a second time, in a subsequent period, he deserves no such concession or relaxation being respectable person of the locality rather he will be awarded harsh punishment like others.<sup>17</sup> In the same manner, if a *Ḥadd* crime is committed in a war zone during war with enemy, *Ḥadd* punishment will not be implemented. In this respect, the case of *Khālīd bin Walīd* can be referred. The detail is that, in a war Zone, some captives were kept in a place and it was extremely cold weather. *Khālīd bin Walīd* told the guards of the arrested captives that: ادفؤوا أسراکم “keep your prisoners warm “The word “ادفؤوا” in some dialect of that area, this word was

also used in the meaning of killing. The guards of the prisoners presumed that the commander in Chief has ordered them to kill the prisoners. So they killed all of them. When the matter was brought into the notice of Ḥazrat Abu Bakar Siddiq, he did not order to punish the guards nor Commander in Chief.<sup>18</sup>

The vast majority of the jurists opine that if the criminal is incorrigible and his activities have created total unrest in the society and the life, properties and honor of the members of society is not protected, in such circumstances, the head of the State or Ulil 'Amr is empowered to award him death punishment under Ta'zīr. His extermination would result in peace in the society. However, this principle or verdict is criticized and opposed on the following grounds. Ta'zīr punishment is designed to reform the offender, as mentioned earlier. Therefore, generally, capital punishment is not allowed. If a criminal is exterminated, the question of reformation does not arise. Those who oppose the capital punishment, they place reliance on the following two traditions: In these two traditions of the Holy Prophet it has been held that: لا يجل دم امرأ مسلم إلا بأحد ثلاثة كفر

بعد إيمان، زنا بعد إحصان، قتل نفس بالنفس

“It is not permissible to take the life of any person except in the following three situations: (1) Converting to other religion after accepting Islām..(2)Committing adultery after marriage fulfilling the conditions of Iḥsān. (3) Execution by way of Qiṣāṣ for unlawful killing of innocent person. In a situation other than these, it is impermissible to take the life of other.<sup>19</sup>

In the above cited tradition, two other situations have not been mentioned. In the holy Qur'ān, we find the detail of death punishment in Ḥudūd and Qiṣāṣ which are as under: There are four cases where death punishment can be awarded in Ḥudūd and Qiṣāṣ in the light of commandments appeared in the Holy Qur'ān and Sunnah of the Holy Prophet. Three of them relate to Ḥudūd and one of them relates to Qiṣāṣ and Diyat laws. The first one is Zānī Moḥsan or Moḥsana, who is a Muslim, sane, free and adult if commits zinā, shall be killed by stoning provided that the crime is proved in the way as provided by the shari'ah. Secondly, whoever being an adult is guilty of Ḥirābah, in the course of which he commits murder also, he will be given death punishment by way of Ḥadd in the light of Qur'ānic commandments. Thirdly, if a Muslim who is not insane becomes apostate or converts to other religion, he will be awarded death punishment in the light of sayings of the holy Prophet (pbuh) that” Kill the person who after accepting Islām, converted to other religion. Lastly, the rebels who come out revolting against the rightful Imām, shall be killed if they refuse allegiance. Allāh almighty says that:

وإن طائفتان من المؤمنين اقتتلوا فأصلحو بينهما فإن بغت إحداهما على الأخرى فقاتلوا التي تبغي

حتى تفتنى الى امرالله فان فآءت فأصلحو بينهما بالعدل واقتطوا إن الله يحب المقسطين -

And if two parties of the believers fall to mutual fighting, then make reconciliation between the twain. Then if one of them rebelled against the other, fight that party which rebelled till it returned unto the affair of Allāh; then if it

returned, make reconciliation between the twain with justice and be equitable; verily Allāh loveth the equitable.<sup>20</sup>

Though the punishment for the crime of Baghawāt بغاوت has been prescribed in the holy Qur‘ān but this law is not included in the list of Ḥuddūd laws enforced in Pakistan but there are certain provisions in Pakistan Penal Code where the death punishment has been prescribed for similar crimes, under Sections 121, 132 of Pakistan Penal Code 1860. Those who oppose death punishment by way of Ta‘zīr, derive arguments from the following tradition. من بلغ

“The person who while awarding punishment in crimes other than Ḥuddūd, if raised the quantum of punishment equal to Ḥuddūd, he is the transgressor”.<sup>21</sup> The jurists of Islām have discussed this issue also and it transpires from their discussion that: Where the whipping or stripe have been fixed as Ḥadd punishment, the punishment of whipping under Ta‘zīr cannot exceed ḥadd punishment. In ‘Umdah al Qārī, Badruddīn ‘Aīnī has mentioned this tradition as abrogated by the Qur‘ānic verse <sup>22</sup>ومن قتل نفسا بغير نفس أو فسادا الخ

The jurists of various schools of thought have fixed death punishment under Ta‘zīr for various crimes with minor differences. The detail is as under:

1. The Muslim spy shall be awarded death penalty as a Ta‘zīr punishment when it becomes necessary for public good. This opinion is supported by Imām Mālik and Imām Aḥmed bin Ḥanbal and there are instances and precedents in Islāmic history.
2. The person calling upon the Muslims to accept innovation in their faith. (الداعى الى البدعة) shall be awarded death punishment under Ta‘zīr. ‘Umar bin ‘Abdul ‘Azīz had awarded death penalty to one Ghilānūl Qudrī who used to call upon the Muslims to accept innovation in their faith. This viewpoint is supported by Imām Mālik, Imām shāf‘ī and Imām Aḥmed bin Ḥanbal.
3. The third one is the person who is incorrigible and cannot be reformed by applying other tactics. In Arabic, such person is called (من لا يزول فساد ) “The person one cannot get rid of his mischievous activities unless he is killed” When It becomes absolutely essential and the offender is so incorrigible that all endeavor to reform him proves futile and it become also necessary to exterminate him in order to safeguard the society against the evil effects of his acts, such person shall be eliminated. Imām Abu Ḥanīfā opposed this view point.<sup>23</sup> A jurist was asked that is it permissible to kill a person if one finds a person with his wife in objectionable condition? The Jurist replied that if it is possible to stop the rapist by mere intimidation and warning from committing zinā, then the killing of such person is not allowed, otherwise the husband is authorized to kill him. From this kind of permission, it reveals that in certain circumstances, extraordinary steps are taken to counter or eradicate the crimes.<sup>24</sup> There is divergence of opinion amongst the Jurists about death penalty by way of Ta‘zīr. The offences for which Ḥanafī award death punishment by way of Ta‘zīr or chastisement, are



treated differently by the Jamhūr (Majority of jurists). They regard such penalty as Qisās or Ḥadd. According to Hanafi jurists, the person who kills another person by using some heavy thing (القتل بالثقل) shall be executed by way of Ta'zīr. Likewise, the one who commits sodomy, shall be awarded death punishment by way of Ta'zīr. While according to Jamhūr, the one who commits murder by using some heavy thing or commits sodomy, the former shall be awarded punishment by way of Qiṭṭ ṭṭ while the later shall be awarded punishment by way of Ḥadd.<sup>25</sup>

According to Mālikī, Ḥanbalī and Shāf'ī Jurists, the person who calls upon Muslims to accept innovation in their faith shall be punished by way of Ta'zīr while Ḥanafi consider such person as Murtad (مرتد) and propose to award him punishment by way of ḥadd. The person who commits blasphemy or utter, derogatory remarks against the Holy Prophet peace be upon him shall be killed by way of Ta'zīr. Likewise, sorcerer or Zindīq (زنديق) or the person who repeatedly commits theft shall be killed by way of Ta'zīr.<sup>26</sup> Most of the Jurists maintain that Imam is empowered to award death punishment by way of Ta'zīr when public good require it or the life of the offender poses the danger of perpetration of evil caused by him which can only be eradicated by his execution.

In this respect, 'Abd al 'Azīz 'Āmir, the author of (التعزير في شريعة الاسلامية) writes that: I say, death punishment by way of Ta'zīr is permissible, because to depend only on Ḥudūd and Qisās, not only tantamounts non adherence to law giver's object of punishment but is also considered to be irrational and against sense. There are offences more heinous than those for which death punishment has been prescribed by way of Ḥadd and Qisās. There are also some habitual offenders, they not only commit crimes but also try to commit more heinous crimes in horrifying manner. No punishment how severe and stringent it may be, will deter them from committing crimes. So to save the society from their evil effects, it becomes necessary to exterminate them. Some of the offences are of such nature which not only destroy the peace and security of the country but become detrimental for religion and faith also; therefore, to eradicate the evil effect of such crimes and to protect the society, it becomes necessary to award death punishment by way of Ta'zīr.<sup>27</sup>

The jurists of Islām have prescribed no specific conditions for the person spreading corruption in the land like freedom, number, sex, displaying arms or belonging to a specific nation or tribe etc. A single individual, even a female, if acted in a manner which are detrimental to the interest of public good, or come within the purview of فساد في الارض, the man in authority is empowered to bridle the culprit towards the right path. The jurists of Islām are of the view that a person spreading corruption on earth (فساد في الارض) can be awarded death punishment by way of Ta'zīr. The jurists have not confined Fasād fil 'ard to specific crimes but it encompasses all types of sins even comparatively minor crimes like jealousy, cheating, bribery, misappropriation, corruption etc, which normally affect the

peace and tranquility of the society. Fasād fil 'ard is very comprehensive word and includes any crime that, in the opinion of the legislative body of the Islamic state, upset social structure of the society and causes disruption. Commotion, moral degradation, corruption and indiscipline in its rank and file" The apex Courts in Pakistan, including Federal Shari'at Court and Peshawar High Court have also held that the person involved in Fasād fil 'ard will be given death punishment.<sup>28</sup> The jurists have discussed this issue with specific reference to the following Qur'ānic verses:-

"إِنَّمَا جَزَاءُ الَّذِينَ يُحَارِبُونَ اللَّهَ وَرَسُولَهُ وَيَسْعَوْنَ فِي الْأَرْضِ فَسَادًا أَنْ يُقَتَّلُوا أَوْ يُصَلَّبُوا أَوْ تُقَطَّعَ أَيْدِيهِمْ وَأَرْجُلُهُمْ مِّنْ خِلَافٍ أَوْ يُنْفَوْا مِنَ الْأَرْضِ"

(The only reward of those who make war upon Allah and His messenger and strive after corruption in the land will be that they will be killed or crucified, or have their hands and feet on alternate sides cut off, or will be expelled out of the land)<sup>29</sup> من قتل (Whosoever killeth a human being for other than manslaughter or corruption in the earth, it shall be as if he had killed all mankind)<sup>30</sup>

Regarding death punishment for creating mischief on earth, the view point of some acclaimed commentators of the Holy Qur'ān have also been discussed in detail. They have used the word "Fasād" in a wider sense not confined to dacoity or highway robbery. Mischief on earth includes the aggressions and invasions of the Non-Muslims, the mischief of apostasy, highway robbery, murder, criminal plotting, and subversive propaganda. Every crime is liable to punishment as follows: (i) Execution (ii) Crucification (iii) Cutting of right hand and left foot (iv) Imprisonment somewhere else as held by the great Imām Abu Ḥanīfā".<sup>31</sup> 'Allāma Abū Bakar Jaṣṣāṣ and Ṭabarī are also of the view that the person involved in spreading mischief on earth will be awarded death punishment in the light of Qur'ānic commandments.<sup>32</sup>

Amin Aḥsan Islāhī, a prominent commentator of this sub-continent while elaborating verse Al-Mā'idā-33 writes that:

"حالات کی نوعیت کے لحاظ سے حکومت کو مناسب اقدام کا اختیار ہے۔ قرآن حکیم کے الفاظ صاف اس بات پر دلیل ہیں کہ حکومت حالات کی نوعیت اور بدامنی اور قانون شکنی کے موجود اور متوقع اثرات کے لحاظ سے، ان میں سے جو اقدام بھی مناسب سمجھے کر سکتی ہے۔ عربی زبان میں "أو" کا استعمال اسی مفہوم کو ظاہر کرتا ہے۔ اس وجہ سے مجھے ان لوگوں کی رائے صائب معلوم ہوتی ہے۔ جو حکومت کو اختیار دیتے ہیں کہ قیام امن و اشتعال فتنہ کے نقطہ نظر سے ان میں سے جو کسی شکل بھی اس کو مفید و موثر اور مطابق مصلحت نظر آئے اس کو اختیار کر سکتی ہے۔"<sup>34</sup>

'Allāma Qurṭubī has the same view that the commandment contained in the Quranic verse about Hirbah, as quoted above,

should not be confined to Hīrabah only, rather it encompasses all other crimes which have the tendency to destabilize the foundation of Islāmic State. He has referred the case of two tribe 'Akal and 'Arnyīn, who were awarded severe punishment by the order of Holy Prophet for their involvement in killing, robbery, and other subversive activities.<sup>35</sup>

In this respect it is appeared in *العقوبته البدئية في فقه الإسلام* written by Egyptian scholar that:

لا يشترط في المفسد في الأرض عدد ولا حرية ولا جنس ولا ملة معينة ولا سلاح يشهر  
إمام الناس فالواحد ولو كان انثى إذا ما عرض مصالح المسلمين للخطر أو فعل كل ما  
يندرج تحت مفهوم الفساد في الأرض كان واجب السلطان اخضاعه الى شرع الله -

"No specific conditions have been prescribed for the person spreading mischief on land, like freedom, number, sex, displaying arm or belonging to any specific nation or tribe. A single individual, even a female, if acted in a manner which are detrimental to the interest of the public good, or come within the purview of فساد في الأرض, the man in authority is empowered to bridle the culprit towards the right path. This writer further stated that:

"لولى الأمر أن يصل بعقوبة الجرائم المضرة بالصالح العامة كالرشوة والغش والتزوير إلى القتل -  
لكن بعد أن تطبق عقوبة الجلد البدنية على الجاني فإن عاد إلى جنائته فهذا يعنى أنه مجرم تاصل فيه  
الاجرام وطابت نفسه بالجريمة ويحتاج الأمر إلى موازنة دقيقة. أمالبقاءعلى أمثاله يعيشون في الأرض  
الفساد. وأما تطهير الأرض من فسادهم وراحة الناس جميعا -ولاجدال في ان حق الجماعة اولى  
بالرعاية - ----- أن التعزير بالقتل جائز عند أكثر الفقهاء- ولكن هل تنفذعقوبة القتل تعزيراً  
في المرتشين ؟ الجواب كل المفسدين في الأرض تنفذ فيهم. فهذه العقوبة اذا لم يتخلوا عن فسادهم  
واصروا عليه وحسبنا بالرشوة فسادا والداعون إلى البدعة ومن يتكرر الجرائم الحدييه التي لاقتل فيها"

The head of the State is empowered to award death punishment in offences like bribery, cheating and other matters which are detrimental to public interest. In doing so, it is necessary to apply firstly lighter corporeal punishments like flogging or, lashes on the offenders. If he does not reform, but continued to commit the same crime again and again, it means that he is a hardened criminal and totally inclined toward crimes. There is a need to opt between two choices either to let him and other criminals to continue subversive activities and spreading mischief on land or to stop them from spreading Fasād on the land and protect all other peoples from the evil effects of their activities.

There is no controversy on the point that that the rights of the people have precedence over other things. He further stated that: According to majority of jurists, death punishment by way of Ta'zīr is permissible but the question arises whether death punishment by way of Ta'zīr can be awarded to a person

guilty of giving bribes? The answer is that: "This punishment can be awarded to all those spreading mischief on earth (مفسدين فى الارض) if the society is not ensured. It is thus concluded that the person involved in the crime of bribery, the person who calls upon the people towards innovation or the person who commits heinous crimes of Ḥudūd repeatedly, where no death punishment has been prescribed, death punishment can be awarded under Ta'zīr by bringing these crimes within the purview of Fasād fil 'Arḍ.<sup>36</sup>

There are circumstances where death punishment can be awarded by way of Ḥadd, for which, no death punishment has been prescribed for that crime, like drinking wine, theft etc. The question arises whether the decisions of acclaimed companions of the Holy Prophet still remain in place and applicable? The answer is in positive. These punishments are still applicable and can be awarded on the basis of common I'llat or (legal cause). 'Allāma Ibn al Qayyim and other jurists have enumerated the circumstances where enhanced punishment can be awarded in the light of these decisions. Ibn al Qayyim has derived arguments from the tradition of the Holy Prophet reproduced below: It is reported from the Holy Prophet that:

من شرب الخمر فاجلدوه ، فان عاد فاجلدوه، فان عاد فى الثالثة أو الرابعة فاقتلوه

"A person involved in drinking wine for the first time, he will be awarded the punishment of whipping or stripes. If he repeated the same crime for the second time, he will face the same punishment of whipping or stripe but if he repeated the same crime third or fourth times, award him death penalty.<sup>37, 38</sup>

However, in the case of Abū Maḥjan Thaqaḥī, who was caught red handed more than four times, was not awarded death penalty rather he was arrested and tied in a chain and kept with Muslim army when they were in expedition of Qādsiyah war. During the course of fierce fight, when he saw the muslim army retreating and meeting casualties, he requested the wife of S'ad bin abi Waqqās to give him permission to participate in a war by providing him a horse and sword. The wife of S'ad bin Abī Waqqās provided him all facilities including horse. The Muslim army had so far met heavy casualties. He fought gallantly and played a heroic role in defeating the enemy. When the war came to an end, he tied himself in a chain. For his heroic role in the war, he was released by Ḥaḍrat 'Umar the then Khalīfa or head of the State.<sup>39</sup> From the following tradition, the punishment of death penalty can be awarded for drinking wine in utter violation of Islamic commandments. The tradition is as under:

عن ويلم الحميرى أنه سئل رسول الله -يا رسول الله أنا بأرض بارد نعالج فيها عملا شديدا - وإننا نتخذ شرابا من هذا القمح نتقوى به على أعمالنا وعلى برد بلادنا- قال رسول الله هل يسكر قلت نعم- قال فاجتنبوه- قلت فإن الناس غير تاركيه- قال فان لم يتركه فقاتلوههم.

Wailum-Al-Ḥumairī asked the Holy Prophet regarding wine that "Our home town is located in an area where the weather is extremely cold and we have to work very hard to earn our livelihood. So to counter the adverse circumstances, we squeeze and prepare a drink from wheat which gives us

energy to face cold weather and in doing hard work. The Holy Prophet asked whether it is intoxicant. He said "Yes" the Holy Prophet said: "avoid its use". Wailum Al-Ḥumairī said that the people are not in a position to give it up. The Holy Prophet said "If they refuse to give it up, then kill them"<sup>40</sup> There are many traditions where death punishments have been prescribed for other crimes, which are enumerated below:

عن ابن عباس عن النبي صلى الله عليه وسلم قال ومن وجدتموه يعمل عمل قوم لوط فاقتلوا الفاعل والمفعول قبه

Reported by Ibn ‘Abbās from the Holy Prophet to have been said that If you found any one committing sodomy, kill both of them, the person committing this crime and with whom, it is committed.<sup>41</sup> During the era of Ḥaḍrat Abū Bakar Siddiq, Khālīd bin Walīd reported about the incidences of homosexuality in the region. Ḥaḍrat Abū Bakar Siddiq with the consultation of acclaimed companions including Ḥaḍrat ‘Alī, directed Khālīd to burn both of them alive. In later period, ‘Abdullāh bin Zubair and Hishām bin ‘Abdul Mālīk also awarded death punishment to those involved in sodomy. According to Ibn ‘Abbās, a punishment for the crime of homosexuality is dropping upside down from the top of the hill.

For committing the crime of incest, there are precedents where death punishment was awarded during the life time of the Holy Prophet (SAWW). It is reported that:

عن برا بن عازب مر بى خالى أبوبردة بن نباد ومعه لواء اين تريد ؟ فقال بعثنى رسول الله إلى رجل تزوج امرأة أبنية آن آتية برأسه- و عن عبدالله بن عباس أن رسول الله صلى الله عليه وسلم قال من وقع على ذات محرم فاقتلوه“

"Reported by Bara bin Ghāzib, once my maternal uncle came across carrying a flag in his hand. I asked him about his destination. He said that the Holy Prophet has sent him to a person who has married with the wife of his father to bring his head. Reported by ‘Abdullāh bin ‘Abbās from the holy Prophet to have been said that: Kill the person who committed sexual inter course with the female of prohibited degree or committed incest."<sup>42</sup>

It is also appeared in the tradition that. In circumstances where one cannot get rid of mischievous activities of a person, he will be executed:

”عن عرفة الاشجعي رضى الله عنه قال سمعت رسول الله يقول من أتاكم وأمركم جميع على رجل واحد يريد أن يشق عصاكم أو يفرق جماعتكم فاقتلوه-“

It has been reported on the authority of ‘Arfajah who said: I have heard the messenger of Allāh saying that: Different people make their appearance in the near future. "Anyone who tries to disrupt the unity and affairs of the Muslim community in a situation when they are all united, you should strike him with the sword whatever he may be."<sup>43</sup>

In this respect ‘Allama Ibn ‘Ābidīn shāmī writes that: An offence, where no death punishment is prescribed for the offender for committing certain crimes, death punishment can be awarded in a situation where the offender commits these crimes repeatedly and it is in the interest of public good. Likewise, the number of Ḥudūd may also be increased if the situation is warranted. The person committing theft repeatedly or kills the citizen by strangulation, or becomes apostate or being a Muslim, acts as a spy for enemy, all of them shall be killed to protect the people from their evil effects and to promote peace and tranquility in the society.<sup>44</sup>

Mawlāna Salāmat ‘Alī, the author of Islāmī Faujdārī Qānūn, writes that:

تعزیر ا قتل، درے لگانے، قید کرنے، گھر سے نکالنے اور مجرم کے مال کی قرتی سے دی جاسکتی ہے۔۔۔۔۔ امام کے لیے جائز ہے کہ وہ عادی چور، جادوگر، خنایک موزی آدمی اور جو شخص زبردستی ظلم کرے یا ڈاکو ہو یا ظالم اور یا ان کے مددگاروں میں سے ہو اور یا زمین پر فساد پھیلانے والا ہو تو وہ اس کو قتل کی سزا دے۔<sup>45</sup>

A Muslim spy who provides secret information to the infidel will be killed because of facilitating non Muslims to spread disorder in the land. A person came to the court of Holy Prophet and discussed issues with the Holy Prophet and after a launch, disappeared from the scene. When it came into the notice of the Holy Prophet, he ordered to chase and kill him (اطلبوه فاقتلوه). In compliance, Ḥaḍrat ‘Ubay, who was a fast runner and other people chased and killed him and his belongings and properties were given to Ḥaḍrat ‘Ubay.<sup>46</sup>

A story of a woman, who was carrying a letter wherein information about the Muslim of Mecca had been provided, adorn in the books of tradition. The holy Prophet ordered Ḥaḍrat ‘Alī, Zubair and Maqdād to go towards “Rawza-al-Khakh” where they will come across a woman hiding letter somewhere in her body. Take this latter from her and let her go and if she refused to hand over the latter, then kill her on the spot. The original order of the holy Prophet was as under: “Take a letter from her and let her go and if she refused to hand over the letter, then kill her on the spot.”<sup>47</sup> From this order of the Holy Prophet, it transpires that a spy of enemy if refused to disclose the information he or she wanted to convey the enemy secretly, he will be killed.

From the above discussion, it transpires that Islām is a complete code of life and it covers every aspect of human life. The objective of Islamic law is the protection of the interest of the people individually as well as collectively. To achieve this objective, a strategy has been evolved to meet various situations likely to confront by a person during his life time. In this respect apart from Ḥudūd and Qiṣās, the head of the state or Qāḍī has been given vast power under Ta‘zīr and under the doctrine of siyasa al Shari‘ah to meet the circumstances which compel a person to commit a crime.

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