

# JOURNAL OF ISLAMIC CIVILIZATION AND CULTURE (JICC)

Volume 3, Issue 1 (Jan-June, 2020)

ISSN (Print): 2707-689X

ISSN (Online) 2707-6903

Issue: <http://ahbabtrust.org/ojs/index.php/jicc/issue/view/8>

URL: <http://ahbabtrust.org/ojs/index.php/jicc/article/view/103/81>

Article DOI: <https://doi.org/10.46896/jicc.v3i01.103>



**Title** The Offence of Abetment under the  
Islamic Criminal law

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**Received on:** 29 June, 2019

**Accepted on:** 29 May, 2020

**Published on:** 25 June, 2020

**Citation:** Kamran Sarwar, Dr. Muhammad  
Alam, "Construction: The Offence  
of Abetment under the Islamic  
Criminal law," JICC: 3 no, 1  
(2020): 11-18



**Publisher:** Al-Ahbab Turst Islamabad

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## The Offence of Abetment under the Islamic Criminal law

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### Abstract:

*A person may be said to commit a crime, although, he does not directly be a part of it. To encourage, order, assist another person for the commission of a crime is considered an offence as the act or omission of principal offender is considered. To encourage, order, assist another person for the commission of a crime in legal terminology is called Abetment. 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. Under Islamic Criminal law majority of Jurists are on the opinion that Hudood punishments will be awarded only in cases where Hudood offences are committed by Participant by Action (Arabic: الاشتراك بالمباشر) in case where these are committed by Participant by abetment (Arabic: الاشتراك بالتسبب), Hudood punishments shall not be awarded to them rather Tazir Punishment may be awarded to them. Thus, Participation in crime is either directly or indirectly. Participation by action (الاشتراك بالمباشر) and Participation by abetment (الاشتراك بالتسبب). Ingredients of Participation by abetment are Consensus (الاتفاق), Instigation: (التحريض) and An Assistance (الاعانة). Causes for the commission of abetment are Cause of Shariat (السبب الشرعي), Cause of usages for abetment (السبب العرفي) and Cause of common sense for abetment (السبب الحسي). Further division of Participation by action and participation by abetment: It is further divided into two forms: Tawafuq (توافق) and Tamalo (تمالو). In this reaserach article The Offence of Abetment under the Islamic Criminal law is discussed in detail.*

**Keywords:** Participation by action (الاشتراك بالمباشر), Participation by abetment (الاشتراك بالتسبب), Tawafuq (توافق), Tamalo (تمالو).

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## Introduction

A person may be said to commit a crime, although, he does not directly be a part of it. To encourage, order, assist another person for the commission of a crime is considered an offence as the act or omission of principal offender is considered. To encourage, order, assist another person for the commission of a crime in legal terminology is called Abetment. It has been defined in the corpus Juris Silundum in the following words:

"To abet has been defined as meaning to aid; to assist or to give aid; to command, to commit a crime, or to counsel; countenance; to encourage, counsel, induce, or assist, to encourage or to set another to commit a crime."<sup>1</sup>

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. Under Islamic Criminal law Majority of Jurists are on the opinion that Hudood punishments will be awarded only in cases where Hudood offences are committed by Participant by Action (Arabic: الاشتراك بالمباشرة) in case where these are committed by Participant by abetment (Arabic: الاشتراك بالتسبب), Hudood punishments shall not will not be awarded to them rather Tazir Punishment may be awarded to them.<sup>2</sup>

Abu Hanifa said that like Hudood, Qisas Punishment shall not be awarded to the participant by abetment<sup>3</sup> While Imam Shafie<sup>4</sup>, Imam Malik<sup>5</sup>, Imam Ahmad Bin Hanbel<sup>6</sup> said Qisas shall be awarded to the Participant by abatement.

### Definition:

Sometimes the crime has been committed individually while sometimes many persons participate or cooperate with each other in its commission. Further, sometimes participant in crime participate directly in the commission of the substantial part of crime while occasionally participant in crime only come to an understanding on its commission with his participant and does not participate directly within its commission. Nevertheless, sometimes participant in crime instigates or abets another accomplice for the commission of a crime by different means without taking active part in its direct commission. Thus, Participation in crime is either directly or indirectly, in any kind of participation in crime an accomplice/ participant will be said to be involved in the offence whether he has an active position in the commission of substantive part of crime or has no share in its material part. These all are concluded within two kinds:

- (I) Participation by action (الاشتراك بالمباشرة)
- (II) Participation by abetment (الاشتراك بالتسبب)

Both are deliberated below in detail.

**Participation by action** (الاشتراك بالمباشرة) is used for Arabic term (الاشتراك بالمباشرة). Al Ishtarak, means Participation, and Al Mubashir is from مباشر مباشر means a person who by action do something, while under Islamic law Participation by Action (Arabic: الاشتراك بالمباشرة) means participation of two or more persons; jointly, materially and having an active position in the commission of crime.<sup>7</sup>

There are two conditions, that institute Participation in crimes:

- (i) The Criminals should be in numbers.
- (ii) The act should be crime and punishable.

If the above-mentioned conditions are not available then there will be no Participation in crimes.<sup>8</sup>

There is a consensus of juristic opinion that punishments of Hudood are awarded only in the case of Participation by action. The abettor is neither subject to Hadd He would be awarded discretionary punishment whether he abetted a crime for Hadd punishment.<sup>9</sup>

Under the Islamic criminal law where two or more than two persons mutually cause death to another person by taking practical part in it, altogether will be responsible for Intentional murder. It is grounded on the judgment made by Hazrat Omer. During the era of Hazrat Omer a person in the city of San,a went absent and he had one child from his former wife. In the meantime his wife made illegal relation with a third person. This lady urged her friend for killing of her step son. Firstly, he denied but later on due the insistence of his girlfriend he agreed and one day she, her servant and her friend mutually killed her step son, cut of his limbs and threw him in a well. After leaking and spreading the mater 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 yeman informed Hazrat Omer about the event. Hazrat Omer well ordered him to punish all of them and stated that if all of the residents of san,a had participated in it, I would have executed all of them.<sup>10</sup>

**Participation by abetment (Arabic: الاشتراك بالتسبب)** means, The Participation of persons other than the actual doer, rooted in their consent, instigation or assistance. In this kind of participation, Participation is not held materially and on the spot of the crime but is held in its scheming and planning. A person who participated by abetment is called in Fiqha (الفاعل المعنوي).<sup>11</sup> Under Islamic law where the terms At Tahreez, and Al Ei,anat has been used, these will also have the same meaning as At Tasbub has.

AT Taabub (التسبب) is from Al sabab (السبب), literally it means, "A thing through which another thing comes into existence. A cause of the occurrence of something."<sup>12</sup> Under Islamic terminology it is "that thing due to which an action caused to the distroyness of another thing, existed. However this distroyness shall not be caused directly, it will be caused indirectly, through another thing which will be an act of a competent person.<sup>13</sup> In short we can say Al Mu Tasbib does not commit the crime directly, he only caused for its commission. He is indirectly part of the crime.

It is necessary for Participation by abetment that the act for which Participation is made should be punishable and should be committed, may be partly. The commission of an act as a whole is not required; partly commission is enough for Participation and that the abettor should be with the intention of commission the act of a crime.<sup>14</sup> For Punishment of the abettor, the punishment of the Principal offender for the crime is not required; he may be exempted from Liability of Crime due to insanity, minority, etc.

### **Ingredients of Participation by abetment (الاشتراك بالتسبب):**

The abetment should be committed in the form of consensus or Instigation or assistance. Below their details are mentioned orderly;

#### **Consensus (الاتفاق):**

Most of the jurists are on the considered opinion that there is deference among consensues, Tawafuq and Tamalo. Tawfuq is the thought of one person of two participants about the commission of a crime without an agreement among them. In Case of Tawafuq the participants in the commission of crime are not considered Participant by Abetment but may be considered participant by action if they commit the prohibited act.

The consensus requires a prior understanding for the commission of a crime between the Participant by Abetment and Participant by action. If there is no prior agreement,

but other than of the crime committed then there is no participation. For example Al-Mubasher went and hit the owner of the buffalo and another person-stolen buffalo, then there is no participation, but the lack of participation does not prevent the punishment of the agreement independent; because it is breaking of law.

In order for the participation to take place, it is required that it must be committed in a result of an agreement. If a crime has committed, but not because of an agreement, there shall be no participation.<sup>15</sup>

For example, A, agreed with B, to kill C. After their agreement and before the fixing date for the commission of crime, Mr C, come for the killing of A, and B. they kill him (C) in self defence, there is no responsibility on them, because they killed him in their self-defense.

Imam Malik, however, adopted a different line of reasoning. He suggests that if a person agreed for the commission of a criminal act and was present at the time of its commission, and have a position where the main offender seeks his help, he helps him immediately, then he would be deemed as an active participant and not as an abettor, even though he did not participate directly in commission of a crime.<sup>16</sup>

#### **Instigation: (التحريض):**

The term At Tahrize (التحريض) is an Arabic term which means "to instigate". It said (الحث على الشيء) to instigate (somebody) for the doing of something.<sup>17</sup> It has many meaning but Commonly It is used to instigate/incite somebody for the commission of illicit act. The instigation is made where a person having an intention for the commission of a crime has been instigated/incited and the instigation is thought to be the motive for the commission of crime. If the offender is to commit the crime, even if it is not seduced or incited, it can not be said that the instigator was not the one who pushed the offender toward the crime. According to the Principles of the Shariah, it is lawful to punish the incitement independently, even if the crime is not committed in a result of his instigation, because incitement to commit a crime is sinful alone and enjoined to commit evil.

Imam Malik suggests that where a person instigate the commission of a felonious act and was present at the time of its commission, he would be deemed as an active participant and not as an abettor, even though he did not participate actively in the crime.<sup>18</sup>

#### **An Assistance (الاعانة):**

Assistance (الاعانة) literally means to aid, to assist, to help.<sup>19</sup> Under Islamic law it is helping of third person in the commission of a crime, without taking direct participation in its commission, even he (helper) is not agreed with him(third person) in its commission prior to help.<sup>20</sup> Whoever leads to the murderer or to the thief, or waiting out from the place of stealing to help the thief, is considered an assistant to him. To assist the offender or the offenders in the transfer of the stolen goods is also considered assistance to them.<sup>21</sup>

The jurists made a distinguish between the Participant by action and an assistant in such a way that the Participant by action is one who comes to the prohibited action or tries to give it directly, while an assistant does not initiate the prohibited act; does not try to commit it directly, but assist in the commission of prohibited action indirectly.<sup>22</sup> The jurists distinguish between person who has fasten a person for killing of a third person; according to Imam Abu Hanifa and Imam Shafei, he is considered to be participant by abetment and not to say the Participant by action. Whereas Imam Malik, and Imam Ahmad Bin Hanbal said, he would be deemed as the active participant and not as an abettor, even though he did not participate actively in the crime.

The difference between jurists is not due to the definitions of the Participant by active and the Assistant. There is no difference between them in the definitions of the Participant by active and the Assistant, but the dispute is due to the application of the rules that indicate the way in which the crime is committed.

These rules are summarized in that the Participant by action if met with the cause do not go out of three cases:

The first is that when the abetment overcomes the Participation by action and this happens if the Participant by action is not aggressive, as false testimony to the accused of murder and sentenced him based on this testimony.

The second is that when the Participation by action overcomes the abetment and this is when the direct action is cut off, and the abetment is not due to coercion, such as someone who threw another one in a jar that cannot be saved. A third person killed him in the jar.

The third is that when the crime is committed equally by Participation by action and by abetment, and this happens when they equal their work, such as killing by Coercion. It is the impiety that drives the direct and carries it to commit the accident, and if the first did not do the second thing, and if the second did not lead to coercion to kill.

The difference between the two kinds depends on the way the participators conduct themselves in the commission of a crime. In the first kind of Participation, two or more persons; jointly participate in the commission of the crime and their cooperation in the performance of the act is material and active. In the second kind, the Participation of the persons other than the actual doer is rooted in their consent, instigation or assistance. Their participation is not in the material and on the spot of the crime but in its scheming and planning.<sup>23</sup>

Imam Malik has, however, adopted a different line of reasoning. He suggests that if a person consented to the commission of a felonious act and was present at its commission, he would be deemed as the active participant and not as abettor, even though he did not participate actively in the crime.<sup>24</sup>

#### **Causes for the commission of abetment:**

There are three causes for the commission of abetment which are cause of sharait, cause of usages and cause of common sense.

##### **Cause of Shariat (السبب الشرعي):**

The cause, which is based on (النصوص الشرعية). The judges make his decision based on these (النصوص الشرعية) for the commission of crime.<sup>25</sup>

False testfaction: A person falsely made testification in a result of which the court of law passed judgment of sentence to death to the accused. After execution of sentence, the witness revoked from their testefiction. Now what kind of punishment to be awarded these Hostile witnesses, there are differences among the Islamic scholars:

Abu Hanifa said in the above mentioned situation, the witnesses shall not be awarded punishment of Qisas rather they will be punished to Tazir.<sup>26</sup>

Imam shafie<sup>27</sup>, Malik<sup>28</sup>, Ahmad bin Hanbal<sup>29</sup> said they will be punished as qisas.

##### **Cause of usages for abetment (السبب العرفي):**

The cause, which is based on usages, due to usages and custom the people are doing it.<sup>30</sup>

Example: presenting of meal to the guest by the Host and the eating the meal of guest without any query, is a custom of the people. A Host presents poisoned meal to the guest, which he eats without any query, in a result he died. What kind of punishment to be awarded to the host, there are differences among the Islamic scholars:

Abu Hanifa said in the above mentioned situation the guest shall not be awarded punishment of Qisas rather they will be punished to Tazir.<sup>31</sup>

Imam shafie<sup>32</sup>, Malik<sup>33</sup>, Ahmad bin Hanbal<sup>34</sup> said he will be punished as qisas.

### **Cause of common sense for abetment (السبب الحسي):**

Cause of common sense for abetment (السبب الحسي) means the cause, which is based on common sense. The people know that cause (السبب الحسي) due to common sense.<sup>35</sup>

Example: A Person dig a well on the way and cover with the intention that when a third person passes this way, he shall fell therein. That person falls down and died. What kind of punishment to be awarded to that person, there are differences among the Islamic scholars,

Abu Hanifa said in the above mentioned situation the digger shall not be awarded punishment of Qisas rather they will be punished to Tazir.<sup>36</sup>

Imam Malik, said he will be punished as a qisas.<sup>37</sup>

### **Further division of Participation by action and participation by abetment:**

It is further divided into two forms: Tawafuq (توافق) and Tamalo (تمالو). Tawafuq means that two or more persons actively participate in the commission of a crime, but during its process, they perform separate acts: for example, an act of murder, one person cuts the throat and the second person mutilates the limbs, which result in the death of the person. If the first person is held accountable for cutting the throat and the second for mutilating the limbs, this is known as Tawafuq. In this form of cooperation, each one of the participants is separately and independently accountable for the act, which he has literally committed. For the sake of terminological convenience, this form of cooperation may be called participation with separate liability.<sup>38</sup>

While in form of Tamalo (تمالو) the participants are jointly accountable for their action. For example two persons jointly beat a person on different parts of his body, with an intention of his killing, in a result of which he died. Both of them will be responsible for his died without any discrimination, irrespective of their differential roles in the composite act of killing. This form of cooperation is known as Tamalo. It may be conveniently described as cooperation with joint Liability.<sup>39</sup>

The distinction between the two forms of an active cooperation is based on the idea of cooperation involving separate liability as grounded in association made on the spot of the commission of an offence without earlier planning and intention. However, the cooperation involving collective liability is grounded in prior intention and some of the Muslim jurists have created planning of this distinction. Whereas, Imam Abu Hanifah does not recognize any difference between the two forms of cooperation. Hanbille believes that both forms of active cooperation possess the same legal consequence. The participants in the crime are held separately liable. Their criminal liability is joint and collective. He, therefore, discards the creation of this distinctive. As a futile exercise at hair splitting. Some of the Shafei and Hanbali scholars have also agreed with the views expressed by Imam Abu Hanifah. The distinction, according to them, is not based on the existence of genuine differential features but exists in the form of a spurious dichotomy.<sup>40</sup>

There is a consensus of juristic opinion that punishments of Hudood are awarded only in the case of cooperation by action. The abettor is neither subject to Hadd He would be awarded discretionary punishment whether he abetted a crime of Hadd/fixed.

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