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Research Note.

Under 203-D of the constitution of Pakistan, the petitioners have filed S P No I/P-1997,4/1 2005, SP No 1/i2007 and SP No 4/i2007, challenging 302-(B) of PPC and 345 (2) of Cr.P.C for being repugnant to the injunctions of Islam. The petitioners have inter-alia, raised the following important issues -

1. Under the said law, Qatle Amad has been made compoundable. According to the petitioner, Qatle Amad is not compoundable. The only punishment prescribed for Qatle Amad in Islam, is death penalty.

2. Under 302-B of PPC, death punishment has been prescribed even in the absence of qualitative and high standard evidences furthermore, it has been made not compoundable.

3. Under 245 (2) of Cr.P.C, it has been mandatory for all the legal heirs of the victim to agree on compromise. According to the petitioner, it is not necessary to agree all the heirs of the victim on compromise, hence, this provision is repugnant to the injunctions of Islam.

4. Tazir punishment should not reach to the standard of Hadd and Qisas. According to them, it is not in line with Islamic injunctions to prescribe death punishment under Tazir.

These issues will be discussed in the light of Islamic injunctions.

(1) The issue of compoundability was raised before the Shariat Bench of Peshawar High Court in Gul Hassan case, PLD 1980 Peshawar (page 80) and it was held that:- Section 345 of Cr.P.C is not mere a law relating to procedure of Court but relates to substantive law because the punishment and compoundability are subject matter of substantive law. The Court pleased to declare Qatle Amad as Compoundable.

When the Federal Shariat Court established in 1980, the petitioner Muhammad Raiaz again raised the issue of compoundability before this Court. One of the member of the bench Justice Karimullah Durani has discussed this issue in detail at pages 52, 53, 54 and 55 of PLD 1980 FSC.

When appeal preferred before the august Supreme Court of Pakistan against these two judgments, the Supreme Court dealt with these petitions in juxtaposition disposing of both the petitions by single judgment. The august Supreme Court declared the offence under Section 302-(a) as compoundable. In the presence of Supreme Court judgment on the issue of Compoundability of Qatle Amd, it cannot be reopened for discussion (PLD 1989 SC pages 651, 655 and 668 para-5). Apart from this there is clear cut Quranic verse, the jurists and commentators have derived therefrom the legality of compoundability in intentional murder Allah almighty says that. "وَمَنْ قُتِلَ مَظْلُومًا فَقَدْ جَعَلْنَا لَوْلِيهِ سُلْطٰنًا" (Whoso is slain wrongfully, We have given power unto his heir.)

(2) Whether it is mandatory for all the legal heirs of the victim to agree on compromise? The jurists have discussed this issue in detail in the following lines, we reproduce the views of some acclaimed jurists in this respect Abdurrehman al-Juzairi writes that.-

فقہاء کا اس پر اتفاق ہے کہ اگر یہی مسلمان کو لہو واجب القتل نہیں ہے، عداً قتل کر دیا جائے (اور قاتل مکلف اور ذی عقل) ہے اور مقتول کا باپ یا دادا نہیں ہے اور مقتول کی اولاد ذرینہ عاقل و بالغ موجود ہے اور اس نے قاضی کی عدالت میں حاضر ہو کر قصاص کا مطالبہ کیا تو حاکم پر واجب ہے کہ بلا تاخیر فوری طور پر حکم نافذ فرمادے، ہاں اگر مجرمہ باردار عورت ہو تو اس حکم قصاص کے نفاذ میں وضع حمل ہونے اور بچے کو دودھ پلانے کی مدت تک تاخیر کی جائے۔

اگر اس مقتول کی اولاد قصاص کے مطالبہ سے گزر کر دیت (خون بہا) کا مطالبہ کرے تو قاتل کے مال سے اس کی ادائیگی واجب ہے۔ گو مجرم اس پر راضی نہ ہو، لیکن اگر مطالبہ کے حقداروں میں باہم اختلاف ہو کہ ان میں سے بعض تو قصاص کا مطالبہ کریں اور بعض مرتکب کو معاف کرنا چاہیں تو قصاص باطل ہو جائے گا اور قاتل کے مال سے دیت کی ادائیگی واجب ہوگی جو وصول کر کے ورثاء میں تقسیم دی جائے گی۔ گو اس پر بعض ورثاء راضی نہ ہوں، کیونکہ (خون بہا) جو واجب ہے وہ تو تقسیم ہو سکتا ہے لیکن قصاص ناقابل تقسیم ہے۔ لہذا اس کے ساقط ہوجانے کا پہلو غالب ہے، تاکہ خون کرنے سے بچا جائے، انسانی خون قابل احترام ہے، پھر یہ کہ حد و شبہ کی صورت میں ساقط ہو جاتی نہیں یہاں یہی صورت ہے کہ قاتل پر قصاص کے لاگو ہونے میں شبہ ہے (کیونکہ بعض ورثاء معاف کرنا چاہتے ہیں) لیکن اگر وارثوں میں مرد اور عورت ہوں اور وہ معاف کر دینے یا حد قصاص کے لاگو کرنے یا دیت کے وصول کرنے میں اختلاف رکھتے ہوں ایسی صورت میں آئمہ فقہاء کے درمیان اختلاف ہے۔ (عبدالرحمن الجزیری، کتاب الفقہ علی المذہب الاربعہ، جلد پنجم، صفحہ ۳۹۱، ۳۹۲)

This issue has been also discussed in detail in Faqh Umar. Various incidents have been quoted wherein one or more of the legal heirs of the victim waived their right of Qisas or Diyat.

اور اگر مقتول کے اولیاء میں سے کسی نے قاتل کو معاف کر دیا تو قصاص ساقط ہو جائے گا۔ حضرت عمرؓ کے سامنے ایک مقدمہ پیش کیا گیا کہ ایک شخص نے کسی کو قتل دیا تھا۔ اولیاء مقتول نے قاتل کو قتل کرنے کا ارادہ کیا تو قاتل کی بیوی نے جو مقتول کی بہن تھی، کہا کہ میں نے اپنے شوہر کے جرم میں سے اپنا حصہ معاف کر دیا۔ حضرت عمرؓ نے فرمایا کہ یہ شخص قتل سے آزاد ہو گیا۔ اور اسی طرح حضرت عمرؓ کی خدمت میں ایک شخص کا مقدمہ پیش کیا گیا جس نے کسی کو قتل کر دیا تھا اولیاء مقتول آئے جب کہ ان میں سے بعض نے قاتل کو معاف کر دیا تھا۔ حضرت عمرؓ نے حضرت ابن مسعودؓ سے پوچھا کہ آپ کی کیا رائے ہے۔ حضرت ابن مسعودؓ نے کہا کہ یہ شخص قتل سے محفوظ ہو گیا۔ اس پر حضرت عمرؓ نے حضرت ابن مسعودؓ کے شانے پر ہاتھ رکھ کر فرمایا کہ آپ کا سینہ علم سے بڑ ہے۔

اسی طرح ایک شخص آپ کی خدمت میں لایا گیا جس نے عداً کسی کو قتل کیا تھا اور اولیاء مقتول میں سے بعض نے قاتل کو معاف کر دیا تھا۔ حضرت عمرؓ نے حضرت عبداللہ بن مسعودؓ سے پوچھا کہ آپ کیا کہتے ہیں۔ انہوں نے کہا کہ اے امیر المؤمنین فیصلہ کرنے کے آپ زیادہ حقدار ہیں۔ بعد ازاں حضرت عبداللہ بن مسعودؓ نے کہا کہ اگر اولیاء میں سے کوئی بھی معاف کر دے تو قصاص نہیں ہے۔ معاف کرنے والے کے حصہ کی قیمت ساقط ہو جائے گی اور بقیہ اولیاء کو ان کے حصہ کی دیت ملے گی۔ حضرت عمرؓ نے فرمایا کہ یہی صحیح رائے ہے۔ تم نے وہی کہا جو میرے دل میں تھا۔

ایک شخص نے اپنی بیوی کے پاس کسی مرد کو دیکھا اور اپنی بیوی کو قتل کر دیا۔ حضرت عمرؓ کے سامنے یہ مقدمہ پیش ہوا تو اس عورت کے کسی بھائی نے ترس کھا کر اپنا حصہ معاف کر دیا۔ اس پر حضرت عمرؓ نے باقی سب کو بھی دیت دیے جانے کا حکم دیا۔ ایک اور روایت میں ہے کہ ان میں سے ایک نے معاف کر دیا تھا۔ اس پر حضرت عمرؓ نے باقی اولیاء سے کہا کہ دو تہائی دیت قبول کر لو کہ اب قاتل سے قصاص کی کوئی گنجائش نہیں ہے۔ (ڈاکٹر، ردّ الواس قلعہ جی، فقہ حضرت عمرؓ، صفحہ ۲۲۰)

In this respect Abdul Qadir Awdha writes that:-

وإذا تعدد الأولياء في قصاص مشترك فعما أحدهم سقط القصاص عن القاتل لأن سقوط نصيب العافي بالعمو يسقط نصيب الآخرين ضرورة لأن القصاص لا يتجرأ وه قصاص واحد فلا يتصور استيفاء بعضه دون بعض ويسقط نصيب الآخرين مالا فياً حدود حصتهم من الدية ولا يأحدون الدية كاملة لأن للعاقي نصيباً فيها فياً حدود الباقي بعد حسم نصيب العافي أما العافي فإنه يأخذ نصيبه إذا عفا على الدية ولا يأحده إذا عفا محالاً۔“ (عبد القادر عوده، اشريع الجنائي الاسلامي، جلد ۲، صفحہ ۱۲۲)

"If many heirs share the right to a single Qisas and one of them remits it, the killer will be exonerated from Qisas. The reason is that the annulment of the remitter's share to Qisas results in the annulment of other's shares as well, for qisas is an indivisible single penalty. It is not, therefore, possible to execute a portion of qisas, leaving the rest. Consequently the shares other heirs will be transmuted into material compensation, and they will receive their respective shares of the blood-money, and no, the total blood-money for the remitters' share will have to be remitted there from, who would be

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entitled to it if he remits qisas in lieu of diyat. He relinquishes his share by unqualified.

It is appeared in *الفقه الإسلامي وأدلته* by Wahba Zuhaili that:-

”وأما تعدد الأولياء، فعما أحدهم، يسقط القصاص عن القاتل، لأن القصاص لا يتجرأ، وهو شئ واحد، فلا يتصور استيفاء بعضه دون بعض ويبقى للأحرين حصتهم من الدية، بدليل ما روى عن جماعة من الصحابة، وهم عمر واس مسعود وابن عباس أنهم أوجوا في عفو بعض الأولياء الذين لم يعفوا بصيهم من الدية، ويأخذ العافي بصيه من الدية إذا عفا على الدية، ولا يأخذ شيئاً إذا عفا محاناً -

لكن سقوط القصاص عن المالكية يعفو أحد المستحقين مقيد بما إذا كان العافي مساوياً لدرجة الساقب أو أعلى درجة، أو استحقاقاً، فإن كان أقل درجة أو لم يساو الباقي في الاستحقاق كاحوة لأمع إحوة لاب، لم يعتر عفو” (الدكتور وهبة الرحيلي، الفقه الإسلامي وأدلته، جلد ٦، صفحہ ٢٩٠، ٢٩١)

"If the number of legal heirs in Qisas is more than one and one of them waived off his right of Qisas, the killer shall not be executed by way of Qisas. Because, Qisas is a sole indivisible right which cannot be divided into portion. It is impossible that some of them waive of their right of Qisas and get their share in blood money while some others execute the killer. This view is based on the opinion of companions like Umar, Ibn Abbas and Ibn Masud, they accordingly held that those legal heirs who decline to waive off their rights of Qisas will get their share in blood money. Those who waive of their right of Qisas will get their share in blood money if pardon is given on a condition of blood money and if they forego their right of Qisas un-conditionally, they will get nothing in blood money.

According to Imam Malik, it is a condition that the status of the legal heir who waive of his right of Qisas, should be higher or atleast at par with other legal heirs. If his status is below or not equal to others, his Afwa (pardon) shall not become effective.

In the light above discussion it is thus concluded that the impugned law is not repugnant to the injunctions of Islam.

4 Whether Death punishment can be awarded by way of Tazir, where the evidences are not qualitative?

Under Islamic law, there are four cases where death punishment can be awarded in the light of commandments appeared in the Holy Quran and

Sunnah of the Holy Prophet. Three of them relate to Hudood and one of them relates to Qisas & diyat laws. The first one is Zani Muhsin or Muhsina, who is not insane, if commits Zina, shall be killed by stoning provided that the guiltiness is proved in the way as provided by the Shariah.

Secondly, Whoever being an adult is guilty of Hiraba, in the course of which he commits murder also, he will be given death punishment by way of Hadd in the light of Quranic commandments.

Thirdly, If a Muslim who is not insane becomes apostate, he will be awarded death punishment in the light of sayings of the Holy Prophet (pbuh).

Lastly, the rebels who come out revolting against the rightful Imam, shall be killed if they refuse allegiance. Though the punishment for the crime of Baghawat بغاوت and apostasy have been prescribed in the Holy Quran and Sunnah of the Holy Prophet but this law is not included in the list of Hudood laws enforced in Pakistan but there are certain provisions in PPC where the death punishment has been prescribed for similar crimes, that will be discussed subsequently.

In PPC, there are varieties of crimes for which death punishment has been prescribed. For example, under section 121 of PPC, death punishment has been prescribed for the crime of waging war against the state and under section 132 of PPC, death punishment has been prescribed for the crime of Mutiny and abetment in Mutiny. Likewise, death punishment shall be awarded to a person who commits the crimes of kidnaping a person under the age of 10 under (364-A of PPC), Kidnaping or ransom under (365-A of PPC), Hijacking and Harboring Hijacker under (402-C of PPC), Arm trafficking (13-A of Arms amendment Ord 1996), Drug trafficking under 10(2)B of Drug Act 1930 and 9(C) of Anti Narcotic substance Act 1997, Sabotaging Railway system under 127 of Railway amendment Act 1995, Gang rape and Zina bil Jabr under Huqooq Niswan Act, Using derogatory remarks against the Holy Prophet under 295-A of PPC. All these are penal punishments prescribed keeping in view the quantum of the crime and its far reaching

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effect on the society

The purpose of Tazir punishment is to weed out the crime from the society and promote peace and tranquility amongst the members of Islamic State. For this purpose, apart from Hudood and Qisas laws, the head of the State has been given powers to award a punishment for a crime not covered by Hudood and Qisas laws, keeping in view the circumstances of the crime and criminals. There are varieties of Tazir punishments ranging from the mere admonition to death punishment, awarded keeping in view the circumstances of the crime and criminal. The basic objective of this type of punishment is reformation of the criminal, and deter others from committing the crimes. It resembles the treatment of any patient suffering from any disease where normally treatment is started with light dose and low potency medicine and its effect is properly checked. If the patient does not recover, the potency as well as the dose of the medicine is being gradually increased till the patient recovers. 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 punishment under Tazir have been prescribed by the jurists. The justification of such severe punishment is based on public interest (مصلحة عامة). If a respectable member of the society commits a crime other than Hudood and Qisas, he will be treated differently as compared to an individual who is habitual and commits a crime again and again. For such type of peoples, mere appearance before the S.H.O or admonition is sufficient to reform or deter them from committing crime. In this respect, the following tradition of the holy Prophet is reported to have been said that: - اقبلوا دوى الهيات عتراتهم - (Pardon the wrong done by the nobles of the society except the crime of Hudood and Qisas. (مسئل السلام ح ٢ ص ٨٣))

The jurists of Islam are of the view that a person spreading corruption on earth (فساد فى الارض) can be awarded death punishment by way of

Tazir. The jurists have not confined Fasad 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 effect the peace and tranquility of the society. In the following lines, the view point of different commentators, jurists, scholars and writers are reproduced:-

While deciding Shariat Petition No 1/L of 1999, wherein death punishment prescribed under 9-(C) of the Anti Narcotic Substance Act had been challenged, the Federal Shariat Court, observed that. "Fasad 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 jurists have discussed this issue with specific reference to the following Quranic verses - "اسما حراء و الذين يحاربون الله ورسوله و يسعون في الارض فساداً ان يقتلوا او يصلوا او تقطع ايديهم وارجلهم من خلاف او ينفوا من الارض" (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)(5:33) The second quranic verse is that "من قتل نفساً" "بغير نفس او فساد في الارض فكأنما قتل الناس جميعاً" (Whosoever killeth a human being for other than manslaughter or corruption in the earth, it shall be as if he had killed all mankind)(5:32)

Regarding death punishment for creating mischief on earth the view point of some acclaimed commentators of the Holy Quran is reproduced hereinbelow:-

Maulana Shabir Ahmed usmani while elaborating the Quranic verse No 5 33, writes that:- "By mischief-mongers or corruptors most of the Commentators have meant dacoits and highwaymen. But if the general sense of the word is taken the meaning becomes wider. The Traditions, which are mentioned about the cause of revelation of this verse, also demand a generalization. Waging war against God and against His

Messenger or spreading corruption and mischief on the Earth include the aggressions and invasions of the Non-Muslims, the mischief of apostasy, highway robbery, murder, criminal plottings, subversive propoganda Every crime is liable to punishment as follows:

(i) Execution (ii) Crucifixion (iii) Cutting of right hand and left foot (iv) imprisonment somewhere else as held by the great Imam Abu Hanifa".(TafsirUsmani Vol-1 page 270)

A prominent commentator, Abu bakr Jassas writes that. *و من قتل نفسا بغير* - "The person who advertently kills another person he deserves death punishment arguments can also be dered from this Quranic verse that the person spreading michief on land also deserves death punishment". احكام (القران للحصاص ح 2-ص 205)

In this respect Allama Ibn Jarir Tabari writes that "A person armed with weapon if created terror for the passerby, the head of the State is empowered to award death punishment to this person even if who has not committed murder nor robbery". (جامع البيان، لاس حریری ح 2 ص 138)

Amin Ahsan Islahi, a prominent commentator of this sub-continent while elaborating verse Al-Maida-33 writes that *و حالات کی نوعیت کے لحاظ سے حکومت* مناسب اقدام کا اختیار ہے۔ قرآن حکیم۔ الفاظ صاف اس بات پر دلیل ہیں کہ حکومت حالات کی نوعیت اور بد امنی اور قانون شکنی کے موجود اور متوقع اثرات کے لحاظ سے، اس میں سے جو اقدام بھی مناسب سمجھے کر سکتی ہے۔ عربی زبان میں "آؤ" کا استعمال اسی مفہوم کو ظاہر کرتا ہے۔ اس وجہ سے مجھے ان لوگوں کے رائے صائب معلوم ہوتی ہے۔ جو حکومت کو اختیار دیدتے ہیں کہ قیام امن و اشتعال فتنہ کے نقطہ نظر سے ان میں سے جو کسی شکل بھی اس کو بید موثر اور مطابق مصلحت نظر آئے اس کو اختیار کر سکتی ہے۔ (تذکران جلد دوم، صفحہ 28)

Imam Qurtubi while narrating the background of revelation of verse 5:33, writes that "عکک and عرینین were two tribes suffering from various diseases When they came to the Holy Prophet and embraced Islam, the Holy Prophet prescribed medicine for them. As a result they recovered from the cronic disease. They, after recovery, not only converted to other religion but mercilessly killed the shepherd of the holy Prophet by amputing his body parts. The Holy Prophet ordered to react in the same manner They were

killed in the same way and their bodies were exposed to heat of the sun They were known for spreading mischief in the land by committing theft and unjustly killing innocent people and creating terror in the area In this respect the verse 5 33 was revealed" (احكام القرآن للبرطى ح ٦ ص ١٣٩).

In this respect it is appeared in عقوبته المدنية في فقه الاسلامى written by Egyptian scholar that لا يشترط في المفسد في الارض عدد ولا حرية والاحس ولا ملة معينة ولا سلاح يشهر امام الناس فالواحد ولو كان اتى اذ اما عرض مصالح المسلمين للخطر او فعل كل ما يندرج "No specific conditions have been prescribed for the person spreading corruption in the land like freedom, number, sex, displaying arm or belonging to a 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 الفساد في الارض, the man in authority is empowered to punish him keeping in view the quantum of crime. The writer has further stated that: لولى الامر ان يصل بعقوبة الحرام المصررة بالصحة العامة كالرشوه والعش والتزوير الى القتل - لكن بعد ان تطبق عقوبة الحد الدنيه على الحامى فان عاد الى حنائه فهذا يعنى انه محرم تاصل فيه الاحرام وطانت نفسه بالحرمة فيحتاج الامر الى موارته دقيقة اما الانقاء على امثاله يعيشون في الارض - الفساد واما تطهير الارض من فسادهم وراحة الناس جميعا - ولا حدال في ان حق الجماعة اولى بالرعايه ----- ان التعرير بالقتل جازم عند اكثر الفقهاء - ولكن هل تنفذ عقوبة القتل تعزيراً في المرتس ؟ الحواب كل المفسدين في الارض عند فيهم هذه العقوبة اذالم يتحلوا عن فسادهم واصروا عليه وحسبها "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, he has firstly to apply light corporeal punishments like flogging or lashes on the offender. If he does not reform, but continued to commit the crimes, it means that he is a criminal minded and totally inclined toward crimes There is a need to opt between two choices, either to led him and his other accomplices to continue their act of corrup' on on the land or to stop them from spreading Fasad on the land and prote ct all the people from their evil effect There is no controversy amongst the jurists that the right of the

people shall have precedence over others. He further stated that According to majority of the jurists, death punishment by way of Tazir is permissible but the question arises whether death punishment by way of Tazir can be awarded to a person guilty of giving bribes? the answer is that "This punishment shall be awarded to all those spreading corruption on earth (مفسدين في الارض) if the society is not protected from the evil effects of their activities. In short, it is thus concluded that bribery, the person who call towards innovation, the person who commits crime under Hadd repeatedly, where no death punishment is prescribed, come within the purview of Fasad fil Ard and death punishment can be awarded for that crimes by way of Tazir" (العقوبة المدنيه في الفقه الاسلامي - حسيني سليمان جاد 225-226-229)

Those who oppose the capital punishment by way of Tazir, have placed reliance on the following two traditions. Narrated Abdullah that the Messenger of Allah said that, The blood of of a Muslim who confesses that There is no God but Allah and Muhammad is his Messenger, cannot be shed except in three cases: 1. Life for life in case of intentional murder without right, 2: A married person who commits illegal sexual intercourse and 3. A person who convert to other religion and becomes apostate."

The second tradition is that "من سلع حدا في غير حد فهو من المعتدين" Any one who awarded punishment to the extent of Hadd punishment, in cases of Non Hadd, he is amongst the aggressors" The meaning of this Tradition is that The sentences awarded in cases of Tazir neither be equal nor exceed the Hadd punishment but it must be less than Hadd punishment

As far as the first tradition is concerned, where the death punishment is restricted to three cases One of them relates to Qisas while the other two come within the purview of Huddod. Though this tradition is reported by Bukhari and the Muslim both, therefore, the authenticity of this tradition is not in question. but what to say about the punishment prescribed by the Holy Quran for the crimes of Hiraba (جرائم) and Rebellion (بغوات). Regarding Hiraba, Allah Almighty says that "The punishment of those who wage war

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against God and his apostle, and strive with might and main for mischief through the land is execution, or crucifixion, or cutting off hands and feet from opposite sides. (5.33). The Quranic verse (فان بعث احدهما على الاخرى فقاتلوا التي تعي) "If any one of them transgresses beyond bounds against the other, then fight you all against the one who transgresses" supported by tradition, suggests that the rebellion will also be killed by way of Hadd Keeping in view the contradiction between Quran and Sunnah, the writer of Umdatul Qari, Badruddin Aini has declared this tradition as abrogated عمدته (القارى- لمرالدين عيسى جلد 22 ص 21) There are many traditions where death punishments have been prescribed for comparatively less dangerous crimes, which are enumerated below.-

"عن ابن عباس عن سي عليه السلام قال ومن وجدتموه يعمل عمل قوم لوط فاقتلوا الفاعل والمفعول" Reported by Ibn Abbas 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."

It is also reported by Muavia bin Abu Sufiar from the Holy Prophet to have been said that. "Any one who drinks wine, award him a punishment of lashes, and if he repeated this crime fourth times, then award him death punishment"

Regarding habitual thief, it is appeared in the tradition that he will be awarded capital punishment if he repeated a crime of theft at fifth times

"عن سراس عارب قلت مرسى حالى ابو بردة بن بيار ومعه لواء اين تريد؟ فقال بعثنى رسول الله الى رجل سروح امرآة ابيه ان آتيد براسه" Reported by Bara bin Azib Once his maternal uncle Abu Bardah passed through over here carrying a flag in his hand, he was asked about his destination He said that the Holy Prophet has sent him to a person with an order to bring his head who has married with the wife of his father

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Reported by Abdullah bin Abbas from the Holy Prophet to have been said that "Kill the person who committed sexual intercourse (Incest) with the female of prohibited degree .

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It is also appeared in the tradition that In circumstances where one cannot get rid of a mischievous activities of a person,he will be executed. -
"عس عرفحة الاشععي رصى ابنه عه قال سمعت رسول الله يقول من اتاكم وامركم جميع على رحل
- "It has been reported on the authority of Arfaja who said 'i have heard the messenger of Allah saying that Different make their appearance in the near future Anyone who tries to disrupt the affairs of this Ummah while they are united, you should strike him with the sword whatever he be." The writer has also mentioned that the Muslim spy, incorrigible and habitual offender, those who invite towards innovation, those who committ sodomy and Apostate shall be killed by way of Tazir (Al Siyast-ul-Jinaia fi Shariatul Islamia pages 79,81,158 and 160)

A prominent Egyptian scholar writes that: "One of the principles of the Shariah is that Tazir is designed to reform the offender and, therefore, the appropriate Tazir is that which poses no threat to the life of the offender Hence Tazir punishment should not be mortal That is why death penalty and amputation of limb as Tazir is totally disallowed But most of the jurists allowing exception to this general rule, maintain that death penalty as Tazir is warrantable provided that public good requires it or that the life of the offender poses the danger of perpetration of evil caused by him which can only be eradicated by his execution, as for example the execution of spy or one calling upon the Muslims to accept innovation in their faith or a dangerous habitual. (Section 480 Tashriul Jinai Vol -1)

In this respect Allama Ibn Abideen Shami writes that. "An offences, where no death punishment is prescribed for the the offender, can be awarded death punishment when the offender committs these crimes repeatedly and it is in the interest of public good. Likewise, the number of Hudood may also be increased if the situation is warranted. The person committing theft repeatedly or kills the citizens by strangulation or becomes apostate and or being a muslim, acts as a spy, all of them shall be killed to protect the people from their evil effect and to promote peace and tranquility

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in the society (Ibn Abideen shami Vol-3 page 194) :

Maulana Salamat Ali, the author of Islamic Faujdari Qanoon, writes that.

تعمیر قتل درے لگانے قید کرنے گھر سے نکلنے اور مجرم کے مال کی ترقی سے دی جاسکتی ہے۔۔۔۔۔ امام کیلئے جائز ہے گا وہ عادی چور، جادوگر، خنایک، موذی آدمی اور جو شخص برہمنی ظلم کرے یا ذاکو 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 دیگا (اسلامی فوجداری قانون) (مولانا سلامت علی - ص 131-132)

It is pertinent to mention here that the issue of capital punishment by way of Tazir came before this Court apart from Shariat petition No 1/L of 1999, as referred earlier, in Gul Hassan case, it was held that "There is not going to be any violation of injunctions of Islam if law provides Tazir (Imprisonment or death) in the case of recidivist accused of theft or murder other than accidental even if there is a pardon by the heirs of the deceased on payment of blood money. (PLD 1980-Pesh-20)

In Muhammad Riaz VS State, the Federal Shariat Court has reproduced the view point of Shabir Ahmed Usmani, who while elaborating the Quranic verse regarding Hiraba (5.33) *الما حزاء الرأس يحاربون الله* writes that: The words of the verse are applicable inter alia to situation where the action of the individual or a group amount to creating corruption in the land (فساد في الارض) because spreading corruption in the land itself amount to waging war against Allah. The Court further observed that Precedents are, therefore not lacking to show that where there is element of corruption, the matter is governed by the principles of right of Allah and it is open to the court to sentence a culprit by way of Tazir to death or imprisonment (PLD 1980 FSC 28)

The jurists of Islam are of the view that a death punishment can be awarded by way of Tazir to a person who spread corruption on earth (فساد في الارض). According to them, there is no legal justification to limit the scope and applicability of the verse 5-33 to decoity and highway robbery. The prominent commentators of the Holy Quran while elaborating the Quranic verses *ومن نفل فسادا في الارض* and the verse *ويسعون* write that the offences which do not come within the purview of

Hudood and Qisas but being within the domain of Fasad fil Ard, death punishment can rightly be awarded to the offender on the basis of it. احكام (القران للحصاص ح ٢ ص ٥٠٣)

The issue of worth consideration is, that when and on what circumstances and for what offences Imam or the man in authority can prescribe or award death punishment by way of Tazir?

Death punishment by way of Tazir Tazir punishment is designed to reform the offender. Therefore, general capital punishment is not allowed, however Most of the jurist maintain that death penalty can be awarded as a Tazir punishment when it is warranted. Four situations have been mentioned by the jurist of Islam

Firstly Muslim spy shall be awarded death penalty as a Tazir punishment when it becomes necessary for public good The opinion is supported by Imam Malik and Imam Ahmed bin Hanbal

Secondly The person callin upon the Muslim to accept innovation in their faith. (الداعى الى البدعة)

Umar bin Abdul Aziz had awarded death penalty to one Ghilanul Qudri who used to call upon Muslim to accept innovation in their faith This viewpoint is supported by Imam Malik, Imam Shafi and Imam Ahmed bin Hanbal.

Thirdly. (من لا يزول فسادة الا بالقتل) 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 act Imam Abu Hanifa appose the view point (الطرق الحكميه ١٠٤)

Fourthly: A jurist was asked that is it permissible to kill a person if one finds him with his wife in abjectionable condition? The Jurist replied that if it is possible to desist the rapist by mere intimidation and warning from committing Zina, then the killing of such person is not allowed, otherwise the husband is authorized to kill him. (البحر الرائق جلد ٥، صفحہ ٣٥)

There is divergence of opinion amongst the Jurists about death penalty by way of Tazir. The offences for which Hanafite award death punishment by way of Tazir or chastisement, are treated differently by the Jamhoor. They regard such penalty as Qisas or Hadd. According to Hanafite the person who kills another person by using some heavy thing (القتل بالثقل) shall be executed by way of Tazir, likewise, the one who commits sodomy, shall be awarded death punishment by way of Tazir. While according to Jamhoor, the one who commits murder by using some heavy thing or commits sodomy, the former shall be awarded punishment by way of Qisas while the later shall be awarded punishment by way of Hadd. (التشريع الحناني جلد 1، صفحه 288)

According to Malikite, Hanbalite and Shafi Jurists, the person who call upon Muslims to accept innovation in their faith shall be punishment by way of Tazir while Hanafite consider such person as Murtadd, (apostate) (مرتد) and propose to award him punishment by way of Hadd. The person who commits blasphemy or utter derogatory remarks against the Holy Prophet peace be upon him, shall be killed by way of Tazir. Likewise, Sorcerer or Zindiq (زندیق) or the person who repeatedly commits theft shall be killed by way of Tazir (الفقه لاسلامی وادلته جلد 2، صفحه 300)

Most of the Jurists maintain that Imam is empowered to award death punishment by way of Tazir 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. Allama Ibnul Qayyim, has quoted the saying of the Holy Prophet that (من شرب الخمر فاحلده، فان عاد فاحلده، فان عاد فاحلده، فان عاد فاحلده، فان عاد فاحلده) "A person who drinks wine one or two times he shall be punished with whipping. If he repeatedly drinks wine then on the third or fourth time, he shall be awarded death penalty" (الطريق الحكمية صفحه 121)

In this respect, Abdul Aziz Amir, the author of (التعريف في تريعة الاسلاميه) writes that. I say, death punishment by way of Tazir is permissible, because

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to depend only on hudood and Qasis not only tantamount non adherence to law giver's object of punishment but also considered to be irrational and against sense. There are offences more heinous than the those for which death punishment has been prescribed by way of Hadd and Qisas. 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 him 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 Tazir. "الارض كان" --- واجب السلطان احصاعة الى شرع الله سبحانه (Tazir). No specific conditions have been prescribed for the person spreading corruption in the land like freedom, number, sex, displaying arm or belonging to a specific nation or tribe. 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.

In the light of above, it is concluded that 302(B) is not repugnant to the injunctions of Islam.

