

Application of Islamic Legal Maxims to *Hudood* Offences and Their Punishments

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Introduction:

Whenever an offence is committed, its punishment would be enforced as simple proscription about an offence is not enough to halt people from its commission. Identification and implementation of penalties against offences is indispensable for the rectification and improvement of the structure of a healthy and stable society. The main objectives of Islamic legal penalties are to safeguard the peace and prosperity of a community, to provide justice to the victim, to rehabilitate the behavior of the criminal and to give warning to the rest of the society. According to the requirement of these objectives, the legal punishments would be implemented with harshness or ease. Penal philosophy underlying the Islamic penal law is based on the theory that each adult and sane individual is accountable and thus punishable for his or her wicked actions once convicted. The Islamic criminal system is incomparable and distinctive in contrast to other criminal systems of the world, for example, adultery, consumption of alcohol and turning away from one's religion are grave offences in Islam but they are not commonly regarded as offences in Western society, rather they are taken as just unethical acts. Islamic legal punishments are ethical, practical, exemplary, deterrent, reformative, just and proportional to the nature and extent of the offences. They are imposed only as a last resort after the failure of initial attempts of discouraging individuals from committing offences. The general conditions for their implementation are the free will, maturity, sanity and understanding (state of not being intoxicated) of the criminal. The derivation sources for the legal punishments of Islamic law are the Noble *Qur'an*, the *Sunnah*, and consensus of opinion, analogy, *ijtihad*, and *urf* and *maslaha mursalah*.⁽¹⁾

Relevance of Islamic Legal Maxims to *Hudood* Offences According to Quran and Sunnah:

It is revealed through the study of Islamic legal maxims that they govern almost every aspect of Islamic law including criminal law of Islam, offer a legal framework of juristic principles for the justification of the provisions of penal system of Islam and provide guidance for the formulation of judicial decisions regarding offences in the light of legal maxims on the

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18. Al-Qalhud, Shaykh Abd al-Rahman, Al-Mau'tmar al-Awwal li Majma al-Bahuth al-Islamia, p. 83.
19. Ibid. p. 95.
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21. Al-Muwatta Imam Malik bi Shara f al-Zurqani, Kitab al-A'tisam bi al-Kitab wa al-Sunnah (Al-Tijaria al-Kubra, 1373 A.H)
22. Al-Qur'an, 3:103.
23. Al-Qur'an, 4:59.
24. Al-Qur'an, 16:43.
25. Ibn Abidin, Radd al-Mukhtar, vol. 1, p. 119.
26. Mukhtasir al-Fatawa (Riyadh: Matba'ah al-Riyadh, 1382 A.H) p. 65.
27. Ibn Abd al-Barr, Jami Bayan al-Ilam wa Fadlihi, vol. 2, p. 80.
28. Ibid.
29. Sufyan al-Thauri b. Saeed (716–778 A.D) was an Islamic scholar, jurist and founder of the Thauri madh'hab' He was also a hadith compiler, of whom a great number of anecdotes are recorded.
30. Abd al-Wahab al-Sha'rani, Al-Mizan al-Kubra, vol. 1, p. 24.
31. Abu Ja'far Abd Allah b. Muhammad al-Mansur (95-158 A.H/714- 775 A.D) was the second Abbasid Caliph from 136 A.H to 158 A.H (754-775 A.D) He is generally regarded as the real founder of the Abbasid Caliphate.
32. Ibn Abd al-Barr, Yusuf b. Abd Allah b. Muhammad, Al-Intiqah (Beirut: Dar al-Kutub al-Ilmia, 1985 A.D) p. 169.
33. Abu Nu'aim, Hilyat al-Auliyya, vol. 6, p. 368.
34. Nawawi, Muhi al-Din b. Sharaf, Sharah Muslim (Cairo: Mustafa al-Babi, 1372 A.H/1952 A.D) vol.2, p. 23.
35. Yusuf b. Abd Allah b. Muhammad b. Abd al-Barr, commonly known as Ibn Abd-al-Barr was a famous Sunni Maliki Islamic Scholar. He died in December 2, 1071 (aged 93).
36. Abd al-Karim Zaidan, Al-Wajiz fi Usul al-Fiqh (Baghdad: Maktabah al-Qudus, 1405 A.H/1985 A.D) p. 40.
37. Ibid. vol. 4, p. 1.
38. Al-Bukhari, Al-Jami al-Sahih, Kitab: Al-A'tisam, Hadith No: 7352.
39. Shah Isma'il Dehalvi (26 April 1779-06 May 1831) was an Islamic scholar and a warrior in the so-called jihad proclaimed by Sayyad Ahmad Shahid with British support against the Sikh kingdom in Punjab in the 19th century.
40. Rashid Ahmad Gangohi, Fatawa Rashidia (Karachi: Matba'ah Saidee, n.d) p. 40.

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4. Al-Ghazali, Al-Mustasfa min Ilm Usul al-Fiqh, vol. 2, p. 101.
5. Abu Zahrah, Muhammad, Usul al-Fiqh (Beirut: Dar al-Fikr al-Arabi, 1377 A.H.) p. 379.
6. Al-Ghazali, Al-Mustasfa min Ilam Usul al-Fiqh, vol. 2, p. 102.
7. Muhammad b. Ali al-Shaukani (1759–1839 A.D) was a Yamani scholar of Islam, jurist and reformer.
8. Al-Shaukani, Muhammad b. Ali, Irshad al-Fuhul ila Tahqiq al-Haqq min Ilm al-Usul (Beirut: Dar al-Fikr, n. d.) p. 250.
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10. Wahba al-Zuhaili, al-Fiqh al-Islami wa Adillatuhu, Trans: M. Tufail Hashmi (Islamabad: Institute of Islamic Research, 1st Edition 2009 A.D) vol.1, pp. 123-124.
11. Hafiz Ibn al-Humam (790-861 A.H) Kamal al-Din Muhammad b. Humam al-Din. He was born in Siwas, where his father was the judge. He studied under many famous ulama of Cairo and Alexandria acquiring a reputation for a keen intellect whilst still very young. His teachers included Imam Siraj al-Din al-Kan'ani, Abu Zuhra al-Iraqi, Hafiz Badr al-Din al-Aini, and Hafiz Ibn Hajar al-Asqalani. Hafiz Ibn al-Humam produced a number of works including an extensive commentary of Imam Marghinani's al-Hidayah titled Fath al-Qadir lil Ajiz al-Faqir. He died in Cairo in the year 861 A.H leaving behind a number of distinguished students such as Sharaf al-Din Yahya al-Manavi, Imam Shams al-Din Muhammad b. Muhammad b. Amir al-Haaj al-Halabi, Hafiz Qasim b. Qutulbughah, Hafiz Shams al-Din al-Sakhavi, Imam Jalal al-Din al-Suyuti and Hafiz Zain al-Din Zakaria b. Muhammad al-Ansari. May Allah have mercy on them all.
12. Muhammad b. al-Haj al-Abdari al-Fasi also known simply as Ibn al-Haaj (1250-1336 A.D) was an Egyptian Moroccan Maliki fiqh scholar and theologian writer. Originally he was from Fes, but died in Egypt on 1336 A.D. He is most remembered for his famous book "al-Mad'khal".
13. Al-Tahrir wa Sharah hu, vol. 3, p. 350.
14. Ibn Abidin, Radd al-Mukhtar Ala al-Durr al-Mukhtar, Rasam al-Mufti, (Beirut: Dar Ihya al-Turath al-Arabi, 1st Edition 1419 A.H /1998 A.D) vol. 1, p. 155.
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16. Ibid.

interpretations and not the final authority. So variations can be there to adopt different legal interpretations considering some rules and regulations.

Ijtihad and the Contradiction of Opinion:

If the contradiction would be entirely prohibited, there should be no permission of ijtihad in Islam. Contradiction of opinion in ijtihad is just natural. It is not compulsory that all the Mujtahideen should be agreed upon a matter always, rather sometimes they have unanimity of opinion and sometime contradiction, but not only the ijtihad is allowed rather it is declared as rewardable. The Prophet (SAWS) said: "If a judge interprets and gives a right judgment he will have earned two rewards; if he interprets but errs in his judgment he will still have earned one reward" (38).

The contradiction of fuqaha was not on personal basis; rather it was due to the diversity of those natural characteristics which Allah al-Mighty has awarded to his slaves (Ibads). This was the reason that fuqaha like Shah Wali Allah, who never has restricted the *haqq* (truth) in any individual, has declared all as torchbearer of *haqq* (truth). He considered the fiqhi (legal) contradictions of scholars just like the contradictions of Qir'at-e-Sab'ah (seven recitation of the Qur'an), or the contradiction among Mutakalimeen in some partial issues, or like the contradiction of the people of enlightened hearts have naturally. On these basis Shah Isma'il Shahid (39) wrote in his book "'Abqat": "All the schools of thought are truthful. There is no doubt to act upon the Shafi'i school whenever needed, but it should not be on personal basis; if it is due to any need as legal requirement, then it is allowed. All the schools should be considered truthful, and no one should be criticized, all should be considered as Imam" (40).

The openness and broad spectrum of thinking of the above scholars about the contradiction of opinion is giving a very positive sign to address the controversial issues of different schools of thought in present era. Moving on with this attitude will not only create an ease to act upon the sharia rather will enhance the confidence of the masses on different schools of thought as different interpretations of sharia and act upon any one feeling ease in it for them.

Conclusion:

Considering the changing trends of Muslim society due to progress of science, technology, Social and political circumstances, it is need of the era to have collective ijtihad instead of individual ijtihad. This collective ijtihad can be done practicing the theory of Talfiq bain al-Madhahab and considering the Mara'at al-Khilaf. These two terms have been practically exercised by the jurists of major schools of thought as well. So any collective ijtihad founded on these intellectual groundings can be the best solution of the problems of Muslim ummah of this era.

adopt the opinion which is more appropriate and beneficial according to their circumstances, conditional to not opposing the explicit texts of the Qur'an, Sunnah and Ijma. The fifth among the Rashidun Caliphs, Umar b. Abd al-Aziz said: "I dislike that the Sahaba (RA) did not have contradictions, because if there would be only one option, the people will be in trouble. And the Sahaba are the A'ima (leaders) of the Muslims, which are followed. Therefore, if someone acts upon the opinion of any of them he will have ease" (27).

Among the several famous fuqaha of Madina, one faqih and tabi'e Qasim b. Muhammad b. Abi Bakr said: "Surely Allah al-Mighty has facilitated by the contradictions of practices of Sahaba (RA). Anyone, when acts upon the practice of any one of them, considers that it has a scope as it was performed by the Sahabi (companion), which was better than him". According to another narration, Qasim b. Muhammad said: "Surely Allah has created an ease for the people by the mutual contradiction of the companions of Muhammad (SAWS). As pursuance of each of them will leave no perplex in the hearts of the followers (28).

It is a quotation of Imam Sufyan Thauri (29): "Do not say that scholars have a contradiction in this matter, rather say that scholars have created an ease for the Ummah"(30).

Abu Ja'far al-Mansur (31) tried twice and after him Haroon al-Rashid once seeks permission from Imam Malik (RA) to implement his book Al-Muwatta' in the entire country as practicable law, but Imam Malik said: "Let the people free to act upon their own opinion, as it difficult for all of them to agree upon my opinions" (32).

Sufyan Thawri¹ said: "When you observe a person performing any activity, which has a contradiction in its permissibility, and your opinion is against his opinion, do not forbid him of it" (33).

Imam Nawavi said: "Ulama' forbid the activity about which, there is ijma of a'imah of its being munkar, and which have contradiction, it is not permissible to forbid of it" (34).

Ibn Abd al-Barr (35) wrote: "It is permissible for the follower of a specific school of thought to follow the other school in some matters. He does not have any restriction to follow his specific school in all the matters of ijtihaad" (36).

He further said: "It is not compulsory for him to consult a specific scholar, nor the taqlid of a specific scholar is binding for him, as Allah al-Mighty has not set him bound of it (37).

The above opinions of the scholars represent the true picture of status of different schools of thought and different interpretations of Qur'an and Sunnah. The final authority is Qur'an and Sunnah. Fiqhi schools are just

- ii) The second is that as completely transfer from one school of thought to another is permitted, in the same way, the partial transfer of school in some matters is permitted considering some conditions.

Fuqaha have explained that it is permitted if it is based upon argument and legal requirement and if it is done for selfishness or for degradation and fun with religion, then it is unacceptable and causes a punishment of ta'zir for the performer. For such situations, fuqaha said: If someone transfers from Hanafi'ism to Shafi'ism, he will be given a punishment of ta'zir. Likewise, acting upon one thing, if someone adopts another school leaving the previous one, it is batil; means that a matter has been performed following an Imam, after it, the other school has been adopted in this matter, then the action performed by previous school needs not to be repeated in this new one. Anything done by previous school in the past has been done; the new school will be acted upon in the future. Allamah Shami said: "The transfer (from one school to another) will be considered ta'zirable crime, when not performed for a good religious cause" (25).

Such people which neither have ability of ijtiḥad nor have a keen and extensive knowledge of Qur'an and Sunnah, or cannot research a matter thoroughly, are not allowed to play with Sharia or the rulings of Sharia according to their personal wishes. It is only the duty of such experts of Sharia, who have grasped the sciences of Arabic and Islamic studies from the experts of the subjects and have developed the taste of research and academic expertise in the result of a prolonged affiliation with legal science.

They should not only the technical experts rather should be furnished with the features of piety and God fearing and they should have the ability of demonstration and derivation. Imam Ibn Taymiyyah wrote about such people:

"Some scholars say that taqlid is entirely haram (prohibited) for the person, who has the ability of derivation and some say that it is entirely permitted at the hour of necessity. For instance, there should not be enough time to derive the ruling by research. And this is the most reliable view" (26).

However, talfiq plays an important role in collective ijtiḥad as it does not set the compulsion of any specific school of thought.

2. Mara'at al-Khilaf:

Considering the limits of Sharia, the freedom of expression and contradiction of opinion in the faru'ie ahkam (secondary commandments) and Masalih Mursalah (public good) is not harmful, rather it is beneficial. Following different schools of thought, considering all of them as only one school, is a practice to reduce the harm and to extend the Din. It helps out to know the beneficial and accurate opinion. It nourishes the scholars intellectually and theoretically and for the masses, it develops an ease to

matter and the other in some other matter. The ruling for a scholar is that he should act upon his own knowledge, not to follow the knowledge and research of someone else.

Contrary to it, a lay man is advised to take guidance from a scholar: "Ask the followers of the Remembrance if ye know not! (24).

But even then, it is not compulsory to consult the scholar of any specific school of thought. A person can consult any scholar whom he trusts. Even a layman, like a scholar can be impressed by scholars of different schools of his area. It is a principle based thing and practice is also according to this principle. People follow that scholar, whose knowledge impresses them. If a scholar's researches a matter, or is impressed by the research of someone else, it is permitted to act according to his research and conscious.

Elaborating the examples of permission of transfer from one school of thought to another, Allamah Sharanbalani, wrote that the examples we have given, clear the following realities:

- i) It is not mandatory to follow a specific school of thought.
- ii) A person can follow the matters of some other school against his own school, conditional to considering all the conditions of his school.
- iii) He can act upon two different and contradictory rulings in two different times, one according to one school and the other according to other school.
- iv) The action performed following the previous imam, cannot be considered batil (fake) while following the other imam. The prayer performed according to Shafi'e school will not have to repeat (qadha) after adopting Hanafi School.
- v) After an action has been performed, the taqlid of other school can be adopted. For instance, a person performed prayer considering it accurate according to his own school of thought, but then he came to know that he was wrong, the prayer was not accurate according to his school of thought, however is accurate according to another school, it is permitted for him to consider it accurate following the other school of thought and do not repeat the prayer. Therefore, it is narrated in fatawa Bazaziyyia about Imam Abu Yusuf that once he leded Jum'ah prayer having ablution with the water of hamam (Public bath). Later on, he came to know that the water of hamam was polluted by falling and dying a rat in it. He said: no matter we act upon the saying of our Madni brothers (scholars of Madina) that the water is not being polluted until reaches to two pitchers.

The following things have been cleared by the results taken by Allamah Sharanbalani:

- i) The first is that it is compulsory that the action should be performed following any mujtahid imam, whether whoever he would be.

(SAWS) said:” I have left two things to you, until you are holding them never can lose your way; the book of Allah and the Sunnah of His Prophet (SAWS) (21).

The Qur’an and Sunnah are the actual Din and regarded as the “Habl Allah” (The rope of Allah). And hold fast, all of you together, to the cable of Allah, and do not separate. And remember Allah’s favour unto you: how ye were enemies and He made friendship between your hearts so that ye became as brothers by His grace; and (how) ye were upon the brink of an abyss of fire, and He did save you from it. Thus Allah maketh clear His revelations unto you, that haply ye may be guided (22).

Anyone who acts upon the Qur’an and Sunnah acts upon the Din. Away from the Qur’an and Sunnah, no school of thought is specified by Al-mighty Allah to follow or peruse. However the Qur’an and Sunnah have set compulsory the pursuance of Oulu al-Amr (Opinion holders) fuqaha, but that is conditional to subordination of the Qur’an and Sunnah, not contradicting or conflicting to it. If there is contradiction with the Qur’an and Sunnah, then Qur’an and Sunnah will be followed not the fuqaha. Allah al-Mighty says:

O ye who believe! Obey Allah, and obey the messenger and those of you who are in authority; and if ye have a dispute concerning any matter, refer it to Allah and the messenger if ye are (in truth) believers in Allah and the Last Day. That is better and more seemly in the end (23).

This verse cleared that along with pursuance of Al-mighty Allah and Prophet (SAWS), the pursuance of Oulu al-Amr is also compulsory, but it is a non permanent pursuance. It can be contradicted in the light of the Qur’an and Sunnah but the final decision will be of the Qur’an and Sunnah, which are the superior laws. So far as the fiqh and schools of thought are concerned, these are the commentaries, explanations and methods of derivation from the Qur’an and Sunnah. No verse or Hadith is revealed about any fiqh or any school of thought. The people connected to different schools of thoughts are not due to the order of any verse or Hadith, rather the research, knowledge, conduct and character of the fuqaha impressed them enough to be inclined to them. It means the affiliation to any specific school of thought is not due to any divine order, rather the arguments and conduct of fuqaha is the basic thing.

On these grounds, if a person can incline to any school of thought, being impressed by it collectively, he even can adopt different schools for different matters on the same basis. Therefore, if a person is following a faqih (jurist) in any one or various matters being impressed by his arguments, he in the same way can follow someone also being impressed by him in other matters.

A knowledgeable person is at full liberty to have research and critical analysis of different researches and to prefer the research of a scholar in one

Hanabilah:

Tartusi has explained that all those orders were implemented by Hanbali Qudh'at, which were issued considering talfiq (19). It clears that Hanabilah have approved talfiq with its wider scope.

The Prohibited Talfiq:

Talfiq is not permitted absolutely; however it can be acted upon within limits, considering its all conditions. There are some types of talfiq, which are wrong in itself, for instance, any talfiq which declares a haram (prohibited) as halal (permitted) i.e. wine or adultery etc. is batil. There are also such types of talfiq, which are prohibited, but not in itself, rather due to factors, which are faced in them. They are of three types:

- i) If a person seeks the easiest order of each school without any problem and acts upon it, it is prohibited, as it ends up the takalif-e-sharia (religious hardships) entirely, so it is necessary to close this door of fasad (disorder).
- ii) Any talfiq which causes the decision of a qadhi or ruler as null and void is not permitted, as the decision of qadhi ends up the contradiction. If it is not be accepted, it will cause anarchy, which is needs to be avoided.
- iii) If talfiq sets it compulsory to reverse the action, which the muqallid has performed in taqlid, or to reverse to any activity which is mandatory to perform due to consensus, then it is not acceptable. However it is not compulsory in worships. In it, if some action is compulsory to be reversed, which is performed earlier as taqlid, or which is mandatory due to consensus, even then Talfiq is permitted in it, conditional to not causing the abolition of actual philosophy of religious hardships (takalif-e-sharia), or to born such excuses, which are against the hikmat-e-sharia (The strategy of Sharia) and cause to spoil the objectives of Sharia (20).

Fiqh and schools of fiqh are basically the commentary and explanation of the Qur'an and Sunnah and the methods of derivation from these sources. These are actually different methodologies and results of different thoughts of fuqaha of their understanding and consideration of the Qur'an and Sunnah. All the schools of thought of Ahl-e-Sunnah are united and agreed upon Tauheed (the oneness of Allah) Nabuwat (the prophet hood) Aakhirat (the Day of judgement) Imamah wa Khilafat (the theory of Caliphate) and the entire principles and believes of Din (Religion). Whichever contradiction is there among them is just in secondary commandments but they do not degrade one another. Considering different schools of thought as different interpretation of Din can be regarded as one Madh'hab (school of thought) and different schools of thought can be acted upon in different matters. The system revealed by Allah al-Mighty is the Qur'an and Sunnah. The prophet

not having any specific school. Their school in each matter is the school of the scholars, whom they are asking the matter. Further, the permission of talfiq is concerned to create ease for the people. Following are the brief views of scholars of different schools about the permissibility of talfiq.

Ahnaf:

Kamal Ibn al-Humam (11) and his pupil Ibn Amir al-Hajj (12) have said in “Al-Tahrir” that: Muqallid is at liberty to have taqlid of anyone he likes. If a lay man adopts the opinion of such mujtahid which is easy, in each matter, I do not know which is the disallowing factor between reason and text? In ijtehad, there is relaxation to adopt such quotation of mujtahid, which is easy to be acted upon. I do not know that any sharia has condemned it, on the other hand the Prophet (SAWS) liked the matters, which have ease and facilitation for ummah (13).

Ibn Abideen opine in “Tanqeeh al-Fatawa al-Hamidiyyia” that: A compound order (i.e. to act upon the opinions of two different fuqaha (jurists) in a matter) is declared as permitted (14). There is also a quotation of Qadhi Tartusi (d 757 A.H) regarding the talfiq being permitted (15). The Mufti of Room, Abu al-Saud al- Imadi (d 983 A.H) issued a fatwa about its permissibility. Ibn Nujaim (d 970 A.H) of Egypt clearly declared the talfiq as permitted in his Risalah “Bay al-Waqf bi Ghaban Fahish”, and quoted its permissibility from fatawa Bazaziyyia (16).

In short, although generally it is said that talfiq is batil (disallowed) but the scholars are against this attitude and there are numbers of arguments, which prove its authority as being permissible.

Malikis:

According to later Maliki fuqaha, the accurate and practical quotation is that talfiq is permissible. Ibn Arfah Maliki has regarded the permission of talfiq as authentic, in the footnote of “Al-Sharah al-Kabir” of Durdir, Allama Advi has issued a fatwa of its jawaz (permission) and Dasuqi has also declared it permissible (17). The attitude of later Maliki fuqaha about talfiq represents their consideration of the faced latest issues and accommodation of other schools of thought.

Shuwafay:

Among Shafiee’s, some have declared each form of talfiq as prohibited. Some have considered it prohibited in some specific circumstances, while others have permitted it only when all the conditions of the schools will be fulfilled which are going to be adopted (18). It means Shuwafay have more reservations about the status of talfiq, but somehow or the other, they cannot ignore it completely, and considered its significance to meet the needs of changing era’s.