

## Diverse conformations to espouse the mother's womb-decrees, inferences and dilemmas Islamic anhydrous

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### Objectives:

Progeny being a natural desire, is something that all forms of life believe in and yearn for. Therefore, we intend to discuss this subject in light of Quran, Hadith and Islamic laws. The study goals are:

- To understand the process and different genres of surrogacy.
- Historical background of human artificial insemination.
- Surrogacy in the light of Quran and Hadith.
- Views and rulings of Islamic scholars.
- Social implications of surrogacy.

The implications of different conditions and situations during the process have also been highlighted and questions regarding the child genealogy have been tried to answer. Pedigree also poses a serious concern.

Allah Almighty has blessed man with thousand of his benisons, one of which is posterity. Progeny is an object of one's affection. One perceives complacency to have them. All blithes subsist only because of them. A man doesn't feel lumber while doing economic struggle for his posterity. This is a divine law; that to some people, Allah confers the ability to spawn while He deprives many of them from this blessing because of the crucible effects and prudence.

As said in surah AS-SHURA;

﴿لِلَّهِ مُلْكُ السَّمَاوَاتِ وَالْأَرْضِ بِخَلْقِ مَا يَشَاءُ يَهَبُ لِمَنْ يَشَاءُ إِنَّا وَإِنَّا وَمَنْ يَشَاءُ الذُّكُورَ أَوْ يُرَوِّجُهُمْ ذُكْرَانًا وَإِنَّا وَيَجْعَلُ مَنْ يَشَاءُ عَقِيمًا إِنَّهُ عَلِيمٌ قَدِيرٌ﴾. (1)

“To Allah belongs the dominion of the Heavens and Earth; He creates what He wills. He gives to whom He wills female [children], and He gives to whom He wills males. Or he makes them [ both] males and females, And He renders whom He wills barren. Indeed He is knowing and competent.”

Despite of all this; to have off- springs is such covet for which man is ready

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## References

1. M. Aminuddin, "Crime and the Laws of Islam", in *Shariah and Legal Profession*, ed. S.M. Haider (Lahore, Pakistan: Feroz Sons LTD, 1985), 223-224.
2. Intisar A. Rabb, *Doubt in Islamic Law; A History of Legal Maxims, Interpretation and Islamic Criminal Law*, 1st ed. (New York, USA: Cambridge University Press, 2015), 328-329.
3. Gul Muhammad Durrani, "Islamic Law of Punishments", in *Shariah and Legal Profession*, ed. S.M. Haider (Lahore, Pakistan: Feroz Sons LTD, 1985), 301.
4. Arbab Bashir Ahmad, "The Concept of *Hadd*", in *Shariah and Legal Profession*, ed. S.M. Haider (Lahore, Pakistan: Feroz Sons LTD, 1985), 322.
5. Imran Ahsan Khan Nyazee, *Islamic Legal Maxims*, 1st ed. (Lahore, Pakistan: Federal Law House, 2013), 181.
6. Saleem Uddin Memon, "Islamic Law of Punishments", in *Shariah and Legal Profession*, ed. S.M. Haider (Lahore, Pakistan: Feroz Sons LTD, 1985), 310.
7. Muhammad Iqbal Siddiqi, *The Penal Law of Islam*, 2nd ed. (Lahore, Pakistan: Kazi Publications, 1985), 87-88.
8. Intisar A. Rabb, *Doubt in Islamic Law; A History of Legal Maxims, Interpretation and Islamic Criminal Law*, 1st ed. (New York, USA: Cambridge University Press, 2015), 330.
9. Muhammad Iqbal Siddiqi, *The Penal Law of Islam*, 2nd ed. (Lahore, Pakistan: Kazi Publications, 1985), 140.
10. Muhammad Khalid Ataasi, *Sharh Majallah*, Trans. Mufti Amjad al-Ali, (Islamabad, Pakistan: International Research Institute, 1986), 68-70.
11. Ibid. 12
12. Safia M. Safwat, "Crimes and Punishments under Various Schools of Shari'ah: A Comparative Overview", in *Criminal Law in Islam and the Muslim World; A Comparative Perspective*, ed. Tahir Mahmood, 1st ed. (New Delhi, India: Institute of Objective Studies, 1996), 82.
13. Muhammad Khalid Ataasi, *Sharh Majallah*, Trans. Mufti Amjad al-Ali, (Islamabad, Pakistan: International Research Institute, 1986), 88.

*physical facts*” and البناء على الظاهر واجب ما لم يتبين خلافه “*The decision is to be structured upon the apparent facts unless its contrary is proved*”.

### **Conclusion:**

Almost all *hudood* penalties are covered by the same Islamic legal maxims as from accusation till conviction, penal law of Islam observes the same process in each offence. The legal maxim لا ضرر ولا ضرار “*There should be neither harming nor reciprocating harm*” demonstrates that laws should be made not to let occur any crime and for the establishment of a peaceful society so the factors and elements which assist in the emergence of crimes should be tried to diminish, for instance, provision of employment for every citizen to preserve the Islamic society from theft and robbery; building up such a framework in the Islamic state that people should enter Islamic way of life in their daily life to immobilize the offence of adultery and false accusation of adultery; have a check and balance on the production and sale of alcohol to save people from intoxication; laying the foundation for a moderate (not an extremist) society to restrain people from being displeased and dissatisfied from Islam to keep them away from apostasy; constituting fair and beneficial policies and rules for public welfare to halt them from causing rebellion. After all these precautionary measures, if still an offence occurs then legal penalty will be enforced. The legal maxim بالشبهات تدر الحدود “*Hudood punishments are to be warded off if doubts persist*” signifies that whenever a doubt will arise in case of a *hadd* offence, legal penalty will be lapsed, instead, *ta'zir* penalty will be imposed.

No.1458, مَنْ بَدَّلَ دِينَهُ فَاقْتُلُوهُ, “Whoever changes his religion then kill him”. In the Noble *Qur’an*, only condemnation of this act is found like in Surah an-Nahl, verse 106.

From the legal maxims المشقة التيسير تجلب “Hardship begets facility”, الحرج مرفوع “Difficulty has been lifted up”, الضرورات تبيح المحظورات, “Necessity permits the prohibited”, الضرورات تقدر بقدرها “Necessity is limited by its extent”, ما أبيض للضرورة يتقدر بقدرها, “What is permissible due to necessity, would be estimated through its quantity” and الأمر إذا ضاق إتسع “Under duress, the rules are relaxed”, it becomes clear that the basic purpose of *Shari’ah* is to produce ease for human beings, not sufferings and difficulties.

One of the objectives of *Shari’ah* is related to *hifz al-din* (the preservation of religion) and the perpetrator of apostasy vandalizes this objective by transgressing the limit set by Allah Almighty, criticizing Islam, betraying with his religion and Muslim community, turning his back from good and embracing evil and thus causes danger to the Muslims in an Islamic state. That’s why, Islam has recommended capital punishment on the commission of this terrible offence so that the risk brought by the apostate due to his treason to the Muslim community and to the political, economic and military secrets of an Islamic state could be eliminated. The theory of removal of such kind of harms has been supported by the maxims الضرر يزال “Harm must be eliminated”, الضرر يدفع بقدر الامكان “Injury is to be repelled to the extent possible”, يتحمل الضرر الخاص لدفع الضرر العام, “A private injury is borne to ward off a public injury” and درؤ المفاسد أولى من جلب المنافع “Repelling an injury is preferred over the securing of a benefit”.<sup>13</sup>

The act of apostasy done by the perpetrator with his free will leads towards the liability of capital punishment, so the perception of the accused one’s intention is necessary to make a final decision about his case and this is what these legal maxims have stipulated الأمور بمقاصدها “Matters are determined according to their purposes” and المرء مؤاخذ بأقراره “One will be punished by one’s confession”.

Like the penalties for the previous offences, decision about the punishment of apostasy will also be made on the basis of physical evidences available and provided to the court. This is specified in the legal maxims الأحكام تنبنى على العادة الظاهرة “The laws are to be structured upon the apparent

## Islamic Legal Maxims and Punishment of Rebellion in Islam:

Rising against a rightful leader without any genuine cause is punishable with battle and eventually death sentence as Allah said in the Holy *Qur'an*, for example, in Surah al-Hujrat, verse 9, فَقَاتِلُوا الَّذِينَ تَبَغُّوا حَتَّىٰ تَبْغِيَهُ ۖ إِلَىٰ أَمْرِ اللَّهِ *“then fight you (all) against the one that which outrages till it complies with the command of Allah”* and condemnation of this undesirable act is stated in *Sahih Bukhari, Kitab al-Hudood*, Hadith No.7054.

Every attempt made by a citizen or group of rebel citizens of Islamic state against it such as voluntary opposition and disobedience to state laws and constitutional authorities, disturbing or weakening an organized Islamic state and its law and order situation, is major offence. A rebel tries to bring a revolt by using force that is not in the favor of legitimate ruler of Islamic state and overthrow the righteous system of government just for the sake of worldly benefits. For the aversion of this menace and hazard created to harm government as well as public, capital punishment for rebels has been recommended by *Shari'ah* and this principle of aversion of risk and its significance in penal law has been reflected through the legal maxims *الضرر يزال* “*Harm must be eliminated*”, *الضرر يدفع بقدر الامكان* “*Injury is to be repelled to the extent possible*”, *يتحمل الضرر الخاص لدفع الضرر العام* “*A private injury is borne to ward off a public injury*” and *دروء المفساد أولى من جلب المنافع* “*Repelling an injury is preferred over the securing of a benefit*”.<sup>12</sup>

Anyway, the maxims *المشقة تجلب التيسير* “*Hardship begets facility*”, *الضرورات تقدر* “*Necessity permits the prohibited*”, *الضرورات تبيح المحظورات* “*What is permissible due to necessity, would be estimated through its quantity*” and *بقدرها* “*Necessity is limited by its extent*”, *ما أبيع للضرورة يتقدر بقدرها* “*Under duress, the rules are relaxed*” disclose the permissibility of this act of rebellion when the intention of the perpetrator is not to overcome the government but just make the leader to abolish un-Islamic and unjust laws and policies against the interests of the public.

## Islamic Legal Maxims and Punishment of Apostasy in Islam:

Renunciation and abandonment of Islam by the means of conversion to some other religion; refusal from believing or performing any belief or principle of Islam; or by an act of profanity within *dar-al-salam* by a Muslim has been professed to be punishable with death sentence in *Sunnah*, for example, in *Jami' Tirmidhi, The Chapters on Legal Punishments*, Hadith

*hands and their feet be cut off on opposite sides, or be exiled from the land”* and in traditions like in *Sahih Bukhari, Kitab al-Hudood*, Hadith No.6804.

Like the offences of adultery, slandering with regard to adultery and theft, the legal maxim *كل المسلم على المسلم حرام دمه وماله وعرضه* “*The blood, wealth and honour of the Muslim is sacred to all Muslims*” shows the very prohibition of hurting someone’s life and property by the means of robbing and looting. The violation of the limits set by Allah The-Omnipotent through causing disturbance and chaos in a composed society of Islamic state whether by an individual or by an organized armed force of mischievous people; troubling the safety of the public places, committing homicide and snatching people’s property damages three objectives of *Shari’ah* at the same time i.e. *hifz al-jaan* (protection of life), *hifz al-maal* (protection of property) and *hifz al-sharf* (protection of honour as there can be the chance for dacoit to commit rape because he possesses power to terrorize people) therefore it is regarded as a war against Allah and His Messenger (peace be upon him).<sup>9</sup>

To undo the effects caused by this heinous offence, intense punishments of amputation of hands and feet, crucifixion, execution and banishment have been decided by the Noble *Qur’an* and *Sunnah* and this repelling of injury is presented in the legal maxims *الضرر يزال* “*Harm must be eliminated*”, *الضرر يدفع بقدر الامكان* “*Injury is to be repelled to the extent possibility*”, *يتحمل الضرر الخاص لدفع الضرر العام* “*A private injury is borne to ward off a public injury*” and *درو المفسد أولى من جلب المنافع* “*Repelling an injury is preferred over the securing of a benefit*”.<sup>10</sup>

The legal penalty will be executed after the provision of authentic and indisputable proofs, prescribed testimony (i.e. from 2 witnesses) or confession of the dacoit. On the basis of just circumstantial evidences or infirm proofs when a space for doubt is built, legal penalty for dacoity will be lapsed. This principle is justified by the maxims *الأصل براءة الذمة* “*The initial presumption is freedom from all liability*” and *الحدود تدرأ بالشبهات* “*Hudood punishments are to be warded off if doubts persist*”.

Intention of the perpetrator will be judged for imposing *hadd* penalty. If he has done the offence voluntarily and not under any compulsion or under a threat of death or hurting body part, the he will be liable to prescribed legal penalty. The principle is supported by the maxims *الأمر بمقاصدها* “*Matters are determined according to their purposes*” and *المرء مؤاخذ بأقراره* “*One will be punished by one’s confession*”.<sup>11</sup>

The punishment whether *hadd* or *ta’zir* will be enacted only on the basis of apparent facts and figures which are seemingly solid and unarguable as depicted in the legal maxims *الأحكام تتبنى على العادة الظاهرة* “*The laws are to be structured upon the apparent physical facts*” and *البناء على الظاهر واجب ما لم يتبين خلافه* “*The decision is to be structured upon the apparent facts unless its contrary is proved*”.

been declared in both religious texts like in Surah al-Ma'idah, verse 38, *وَالسَّارِقُ وَالسَّارِقَةُ فَاقْطَعُوا أَيْدِيَهُمَا* "As for the thief, both male and female, cut off their hands" and in traditions like Sahih Bukhari, Kitab al-Hudood, Hadith No.6787. Just like the life and honour, property of human beings is also considered precious and worthy to be secured in the sight of Islam that's why, the legal maxim *كل المسلم على المسلم حرام دمه وماله وعرضه* "The blood, wealth and honour of the Muslim is sacred to all Muslims" (also a Hadith) asserts the value of these three fundamental rights of a person and deters strongly the idea of violating these rights.

This violation and depriving someone of one's hard-earned money or property by the means of theft causes disturbance in a peaceful society and hurts the objective of *Shari'ah* i.e. *hifz al-maal* (protection of property) and removal of this injury caused by the thief will be come into existence through the strict measure as maintained in the criminal law of Islam and this concept becomes clear from the legal maxims *الضرر يزال* "Harm must be eliminated", *الضرر يدفع بقدر الامكان* "Injury is to be repelled to the extent possible" and *يتحمل الضرر الخاص لدفع الضرر العام* "A private injury is borne to ward off a public injury" that also support the nature of Islamic criminal law which penalizes only that kind of theft which is committed by the professional and habitual criminals. Some other legal maxims with the same notion *الضرورات تبيح الضرورات* "Necessity permits the prohibited" and *لا ضرر ولا ضرار* "There should be neither harming nor reciprocating harm" declare the philosophy of hurting the violator back in self-defense for the purpose of saving one's own belongings and justify the permission given by *Shari'ah* to the victim to injure or kill the perpetrator of theft in order to safeguard his basic right of possessing and protecting the property.

On the basis of inadequate proofs or circumstantial evidences, the guilty one cannot be inflicted with the amputation of hand. This is the principle described in the legal maxims *الأصل براءة الذمة* "The initial presumption is freedom from all liability" and *الحدود تدرأ بالشبهات* "Hudood punishments are to be warded off if doubts persist". This legal maxim about the doubt in commission of an offence postures the theory for criminal liability, establishes the outline of criminal law, improves and strengthens the juristic capacities of the judges and jurists, supervises and gives directions to them regarding religious, legal and ethical concerns to formulate the judicial decisions and decree the judgments related to the sentence for guilty ones when a doubt arises in the criminal cases.<sup>8</sup>

### **Islamic Legal Maxims and Punishment of Highway Robbery or Dacoity in Islam:**

The legal penalty for highway robbery or dacoity is mentioned in both religious texts like in Surah al-Ma'idah, verse 33, *أَنْ يُقْتَلُوا أَوْ يُصَلَّبُوا أَوْ تُقَطَّعَ أَيْدِيَهُمْ* "they shall be killed or crucified, or their

restrain from this abominable activity and for achieving this purpose (acquisition of public welfare i.e. protection of the honour of people), the private harm will be inflicted to the offender by enforcing *hadd* penalty on him so that the rest of the people would avoid this offence of adultery due to the fear of such a severe punishment. This principle has been described in the maxim *يتحمل الضرر الخاص لدفع الضرر العام* “A private injury is borne to ward off a public injury”.

### **Islamic Legal Maxims and Punishment of False Accusation of Adultery in Islam:**

The false allegation of un-chastity levied by someone against a chaste person whether man or woman has been regarded as punishable with 80 stripes and deprivation of the right of giving evidence ever in the court as a citizen in the Noble *Qur'an* like in Surah al-Nur, verse 4, *فَأَجْلِدُوهُمْ ثَمَانِينَ جَلْدَةً وَلَا تَقْبَلُوا لَهُمْ شَهَادَةً أَبَدًا* “flog them with eighty stripes and reject their testimony forever” and in traditions like in *Sunan ibn Majah, The Chapters on Legal Punishments*, Hadith No.2567.

The legal maxim (also a *Hadith*) *كل المسلم على المسلم حرام دمه وماله وعرضه* “The blood, wealth and honour of the Muslim is sacred to all Muslims” reveals that putting forward slanders or scandalous statements about an innocent, virtuous and guiltless person without adequate proof is an awful offence in the sight of Islam. That is the reason such a strict and disgraceful penalty will be inflicted upon him that not only will he be punished with corporal suffering but also deprived of the citizen’s right of conveying evidence for any case.

Here the function of legal maxims *الضرر يزال* “Harm must be eliminated” and *لا ضرر ولا ضرار* “There should be neither harming nor reciprocating harm” can be seen as a legal device for the protection of the objective of *Shari’ah* i.e. *hifz al-sharf* or *hifz al-’ird* (preservation of dignity) which justifies the provisions related to *hadd* penalty for false accusation laid down in the religious texts. In the case of an allegation of characterlessness, the reputation of the victim is injured in the same way like in the case of adultery. It also destroys the peace of a family, disfigures the marital relation between the spouses and above all casts a doubt upon the parentage of the child. So for repelling this injury from victim’s honour, the slanderer must be punished.<sup>7</sup> The related legal maxim in this case *يتحمل الضرر الخاص لدفع الضرر العام* “A private injury is borne to ward off a public injury” presents the same idea that the one who has brought disgrace to the honour of a chaste person will be penalized inflexibly so that the innocent people of a community will be saved from slanderers by punishing them.

### **Islamic Legal Maxims and Punishment of Theft in Islam:**

The legal penalty (amputation of the offender’s hand) for the offence of surreptitiously taking away someone’s property from his / her custody has



production and consumption, buying and selling, gifting and receiving intoxicating drinks and converting them into vinegar is forbidden in Islam as provided by the legal maxims *“What cannot be lawfully acquired, also cannot be given lawfully”* ما حرم أخذه حرم أعطائه *“Demanding for something (some action) whose commission is prohibited, is also prohibited”*.<sup>(5)</sup>

### Islamic Legal Maxims and Punishment of Adultery in Islam:

The action of carnal conjugation or penetration between a man and a woman outside the legal relationship of wedlock; or due to suspecting themselves to be married; or in the case of whoredom is called adultery whose legal penalty (100 stripes) has been described both in *Qur'anic* verses and Prophetic Traditions<sup>6</sup> like Surah al-Nur, verse 2 الرَّائِيَةُ وَالرَّائِي فَاجْلِدُوا كُلَّ وَاحِدٍ *“The woman and the man guilty of fornication, flog each of them with a hundred stripes”* and *Sahih Bukhari, Kitab al-Hudood, Hadith No.6831, فيمن زنى ولم يُحصن جلدًا مائة, “an unmarried person guilty of illegal sexual intercourse be flogged one-hundred stripes”*. As far as the punishment for a married adulterer (stoning to death) is concerned, it is only mentioned in traditions like in *Sahih Bukhari, Kitab al-Hudood, Hadith No.6814*.

The legal maxims *“The blood, wealth and honour of the Muslim is sacred to all Muslims”* ما يفضى الى *“What leads to unlawful actions is also unlawful”* الحرام حرام express that for the protection of the chastity, modesty and honour of a person, such a severe *hadd* penalty has been selected by *Shari'ah* and not only adultery but also each action which leads towards this offence like alcoholism, indecent dress code of women, establishing night clubs and encounter of men and women in privacy are unlawful.

In the case of presence of a strong evidentiary basis, once an accused one is convicted of adultery then the legal decision decreed will not be changed on the basis of a mere doubt, until and unless a definite proof is accessible. The legal maxims *“Certainty is not overruled by a doubt”* اليقين لا يزول بالشك *“What is established through certainty is not removed by doubt”* أن ما ثبت باليقين لا يزول بالشك deal with the situation where certainty surrounds a case, a doubt would not remove that certainty unless another certainty contrary to the previous one is established.

Whatever, decision is made by the judge will be based on apparent substantial circumstances and information which would be obvious and valid as expressed in the legal maxims *“The laws are to be structured upon the apparent physical facts”* الأحكام تتبنى على العادة الظاهرة *“The decision is to be structured upon the apparent facts unless its contrary is proved”* البناء على الظاهر واجب ما لم يتبين خلافه.

As the *hudood* penalties are exemplary and deterrent so the penalty implemented on the adulterer is required to warn the entire community to

basis of the *Shari'ah* injunctions related to penal system. The function, Islamic legal maxims perform in the area of *hudood* offences and their penalties and their utilization for the postulation of the objectives and interests of *hudood* punishment system, have been analyzed here. Therefore, the application of legal maxims have been discussed here to elaborate and support of the philosophy behind each and every *26ad* penalty of Islamic law as well as it has been examined that how these maxims match and justify the commandments given in the *Qur'anic* verses and Prophetic Traditions related to these penalties.<sup>2</sup>

### **Islamic Legal Maxims and Punishment of Wine Drinking in Islam:**

Neither from the *Qur'anic* verses, nor from the Prophetic Traditions, has the *hadd* penalty related to consumption of alcoholic beverages been found.<sup>3</sup> Only prohibition can be found in the verses revealed gradually like Surah An-Nisa, verse 43, then Surah Al-Baqarah, verse 219 and the last one is Surah Al-Ma'idah, verse 90 i.e. *إِنَّمَا الْخَمْرُ وَالْمَيْسِرُ وَالْأَنْصَابُ وَالْأَزْلَامُ رِجْسٌ مِّنْ عَمَلِ الشَّيْطَانِ* "Wine, gambling, (ungodly) shrines and divining devices are all abominable handiwork of Satan" and the commandment for eating, drinking and using the lawful things in daily life affairs in Surah al-Ma'idah, verse no.4 *يَسْأَلُونَكَ مَاذَا أُحِلَّ لَهُمْ قُلْ أُحِلَّ لَكُمْ الطَّيِّبَاتُ* "They ask from you what is lawful for them. Say: Lawful unto you are the good things" that is a legal maxim as well as in Traditions like Hadith no.4956 in *Sahih Muslim* in the *Book of Drinks* i.e. *كل شراب أسكر فهو حرام* "Every drink that causes intoxication is forbidden" that is also a legal maxim. Nevertheless, the drunken ones were used to beat up with shoes or branches of tree for 40 times. The punishment remained in practice in the form of 40 lashes in the era of the first Caliph Abu Bakr (may Allah be pleased with him). It was in the era of the second Caliph Umar (may Allah be pleased with him) that due to vast increase in the utilization of alcoholic drinks, the penalty was raised to 80 lashes for a free man and 40 lashes for a slave after the decision constituted through the consensus of Sahabah which is mentioned in *Sahih Bukhari, Kitab al-Hudood*, Narration no.6779.<sup>4</sup>

The philosophy behind the prohibition of alcoholism is that it makes the consumer intoxicated, damages his intellect, turns his body and mind into an unproductive and abnormal system and harmful from not only temporal but also spiritual point of view as it obscures the ethical sensibilities of the drunken one and leaves him unable to fulfill his duties towards Allah and the people. The drunken one is not only dangerous for oneself but also injurious for the others. Alcoholism harms one of the objective of *Shari'ah* i.e. *hifz al-aql* (preservation of intellect). Therefore, every action like be in the company of drunken ones is also not allowed as it would lead towards the commission of the offence and that is exactly mentioned in the legal maxim *ما يفضى الى الحرام حرام* "What leads to unlawful actions is also unlawful". Besides,

## 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, reformatory, 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*.<sup>(1)</sup>

### 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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17. Al-Bani, Muhammad Saeed b. Abd al-Rahman, Umdah al-Tahqiq fi al-Taqlid wa al-Talfiq (Damascus: Dar al-Qadri, 15<sup>th</sup> Edition: 1417 A.H/ 1997 A.D) p. 106.
18. Al-Qalhud, Shaykh Abd al-Rahman, Al-Mau'tmar al-Awwal li Majma al-Bahuth al-Islamia, p. 83.
19. Ibid. p. 95.
20. Al-Bani, Umdah al-Tahqiq fi al-Taqlid wa al-Talfiq, p. 121.
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.

## References

1. Ibn Manzur , Abu al-Fadal Jamal al-Din Muhammad b. Makram, Lisan al-Arab (Beirut: Dar al-Fikr li al-Taba'at wa al-Nashar wa al-Tauzi, 1<sup>st</sup> Edition: 1410 A.H /1990 A.D) vol. 1, p. 520.
2. Al-Ghazali, Abu Hamid Muhammad b. Muhammad, Al-Mustasfa min Ilm Usul al-Fiqh (Cairo: Maktabah al-Tijariah al-Kubra, 1356 A.H.) vol. 2, p. 101.
3. Ibn Manzur, Lisan al-Arab, part.1, p. 521.
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.
9. Al-Bedavi, Nasir al-Din, Shara f al-Asnavi ala Minhaj al-Wusul ila Ilm al-Usul (Egypt: Maktaba Jamhuriya, 1396 A.H /1976 A.D) vol. 3, p. 266.
10. Wahba al-Zuhaili, al-Fiqh al-Islami wa Adillatuhu, Trans: M. Tufail Hashmi (Islamabad: Institute of Islamic Research, 1<sup>st</sup> 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, 1<sup>st</sup> Edition 1419 A.H /1998 A.D) vol. 1, p. 155.
15. Al-Qarafi, Ahmad b. Idris, Al-Ahkam fi Tamyeez al-Fatawa an al-Ahkam (Beirut: Dar Ihya al-Turath al-Arabi, 1<sup>st</sup> Edition 1419 A.H /1998 A.D) p. 250.
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 Thawri<sup>1</sup> 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) Imamat 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