

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*.⁽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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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.²

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.³ 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 وَالْأَزْلامُ رِجْسٌ مِنْ 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.6779.⁴

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,

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 *“ما حرم أخذه حرم أعطائه”* *“What cannot be lawfully acquired, also cannot be given lawfully”*, *“ما حرم فعله حرم طلبه”* *“Demanding for something (some action) whose commission is prohibited, is also prohibited”*.⁽⁵⁾

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 Traditions⁶ like Surah al-Nur, verse 2 *الرَّائِيَةُ وَالرَّائِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِّنْهُمَا مِئَةَ جَلْدَةٍ* *“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, فِيمَنْ زَنَىٰ وَلَمْ يُحْصَن جُلْدًا مِائَةً* *“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 *“كل المسلم على المسلم حرام دمه وماله وعرضه”* *“The blood, wealth and honour of the Muslim is sacred to all Muslims”* and *ما يفضى الى الحرام حرام* *“What leads to unlawful actions is also unlawful”* 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 *“اليقين لا يزول بالشك”* *“Certainty is not overruled by a doubt”*, *“ما ثبت باليقين لا يزول بالشك”* *“What is established through certainty is not removed by doubt”* 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 *“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”*.

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

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 *لَا ضَرَرَ وَلَا ضِرَارَ* “*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.⁷ 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

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", يتحمل الضرر يدفع بقدر الامكان "Injury is to be repelled to the extent possible" and 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 المحظورات "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.⁸

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 أَيْدِيهِمْ وَأَرْجُلُهُمْ مِنْ خَلْفِهِمْ أَوْ يُنْفَوْا مِنَ الْأَرْضِ "they shall be killed or crucified, or their

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).⁹

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 *دفع المفساد أولى من جلب المنافع* “*Repelling an injury is preferred over the securing of a benefit*”.¹⁰

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 باقراره* “*One will be punished by one’s confession*”.¹¹

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*”.

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 الَّتِي تَبْغِي حَتَّى تَوْبَىءَ إِلَى 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 *درو المفاسد أولى من جلب المنافع* “Repelling an injury is preferred over the securing of a benefit”.¹²

Anyway, the maxims *المشقة تجلب التيسير* “Hardship begets facility”, *الضرورات تبيح المحظورات* “Necessity permits the prohibited”, *الضرورات تقدر بقدرها* “Necessity is limited by its extent”, *ما أبيع 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” 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

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”, *الخرج مرفوع* “Difficulty has been lifted up”, *الضرورات تبيح المحظورات* “Necessity permits the prohibited”, *الضرورات تقدر بقدرها* “Necessity is limited by its extent”, *ما أبيح 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 *درو المفاسد أولى من جلب المنافع* “Repelling an injury is preferred over the securing of a benefit”.¹³

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 *الأمر بمقاصدها* “Matters are determined according to their purposes” and *المرء مؤاخذ باقراره* “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

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 *لَا ضَرَرَ وَلَا ضِرَارَ* “*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 تندر 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.

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