

## Application of Five Fundamental Islamic Legal Maxims (*al-qawa'id al-fiqhiyyah al-khams al-kubra*) to Islamic Criminal Law

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### Abstract:

*The legal maxims of Islamic law or jurisprudential maxims or Shari'ah maxims (al-qawa'id al-fiqhiyyah) are the general rules of Islamic law that can be applied in various issues which come under the common rulings. This research work explores the potential of the Islamic legal maxims in contemporary Islamic legal issues and examines their role within the field of Islamic criminal law. Among the hundreds of Islamic legal maxims, the jurists have culminated the top-most five maxims entitled, al-qawa'id al-fiqhiyyah al-khams al-kubra (the 5 major legal maxims). They are the universal formulas of Islamic legislature and the most comprehensive juridical principles, constituted by the jurists in accordance with the textual evidences of Shari'ah to explain specific cases and thus to participate in forming Islamic legal theories. These legal maxims have been elaborated here in this research paper along with their derivation sources and utilization in the field of criminal law of Islam. The role and application of each qaidah is supported with the help of evidences from Quran and Sunnah. The case examples are also given for a precise understanding and exploration of legal maxims in Islamic Law.*

### 1. الامور بمقاصدها (Matters are determined according to intentions)

The derivation source of this legal maxim is the following Prophetic Tradition recorded by all 6 most authoritative compilations of *traditions*.

انما الاعمال بالنيات

*"Indeed, actions are to be judged by the motives behind them."*<sup>1</sup>

This tradition is the most reliable one and almost reaches to the level of *mutawatir*. The maxim based on this Tradition expresses the idea that every action will be judged on the basis of the underlying intention of its performer. A law will be applied on the performer in accordance with his objective. So the legal rulings like reward and torment, liability and un-liability, penalty, compensation, expiation and pardon will be applied on him in respect to his intention.<sup>2</sup> This legal maxim is applied on the legal issues related to almost every chapter of Islamic law. Behind any action related to worships, social, family, transactional or criminal affairs, the actual intention of the performer will be observed and the ruling will be enacted on the performer according to that intention of him.

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The Hanafi jurists do not apply this legal maxim as a general principle for worldly acts, rather, they consider this maxim mostly applicable to the Hereafter. Nevertheless, this maxim is applicable to several offences.<sup>3</sup> Imran Ahsan Khan Nyazee<sup>4</sup> “In the domain of Islamic criminal law, intention is always taken into consideration and given due significance right as provided by the explicit texts. The Western law also deals with “what is going on in the mind of the guilty one”. Among the standards for determination of someone’s intention in Western law are; probability, foresight as to consequences. Also in England, the words maliciously, willfully, permitting, knowing, causing and corruptly are employed for this purpose. The role of intention can be seen in the Model Penal Code of USA as well like in legislation, the words knowingly, purposely, recklessly are utilized for analyzing intention. In Pakistan Penal Code, most of the above mentioned words are put into practice in this regard.

However, the criminal law of Islam observes an objective approach in offences. As it is not easy to calculate the perpetrator’s intention behind committing an offence, therefore, external standards are fixed which possibly help out to discover the inner purposes and aims in a perpetrator’s mind. These external standards are not invention of the jurists, instead they are based on textual evidences and the primary evidences for these standards can be found in the Prophetic Traditions, for instance, there are two traditions which differentiate intentional murder from un-intentional murder.”<sup>5</sup>

مَنْ قَتَلَ مُؤْمِنًا مُتَعَمِّدًا دُفِعَ إِلَىٰ أَوْلِيَاءِ الْمَقْتُولِ فَإِنْ شَاءُوا قَتَلُوا وَإِنْ شَاءُوا أَخَذُوا الدِّيَةَ وَهِيَ ثَلَاثُونَ جَفَّةً وَثَلَاثُونَ جَذَعَةً وَأَرْبَعُونَ خَلْفَةً وَمَا صَالَحُوا عَلَيْهِ فَهُوَ لَهُمْ وَذَلِكَ لِتَشْدِيدِ الْعَقْلِ .

*“Whoever kills [a Believer] deliberately, he is handed over to the guardians of the one killed. If they wish to, they have him killed, and if they wish to, they take the blood-money...”<sup>6</sup>*

And the other one is narrated by Hazrat Abdullah bin Amr (may Allah be pleased with him) that the Messenger of Allah (peace be upon him) said:

قَتِيلُ الْخَطَا شِبْهُ الْعَمْدِ قَتِيلُ السَّوْطِ وَالْعَصَا مِائَةٌ مِنَ الْإِبِلِ أَرْبَعُونَ مِنْهَا خَلْفَةٌ فِي بُطُونِهَا أَوْلَادُهَا

*“Killing by mistake that resembles intentionally, is killing with a whip or stick, for which the blood money is one hundred camels...”<sup>7</sup>*

*“This utilization of whip or stick causing victim’s death is an external standard which manifests that the perpetrator has not committed homicide purposely, though his intention was to hurt the victim seriously”.<sup>8</sup>*

Another hadith is:

القوق بالسيف

*“Homicide caused with a sword leads towards retaliation”.*  
*“The utilization of sword causing victim’s death is an external standard which demonstrates that the perpetrator has committed homicide intentionally that’s why, he has used such deadly weapon. So the utilization of an instrument for the purpose of homicide determines the intention of the perpetrator like choosing sword, knife, revolver, gun, arrow, poison and other fatal weapons like that”.*<sup>9</sup>

The intention plays same function in the case of causing hurts to someone, for instance, if the subject is accused of inflicting injuries, the judgment will be issued on the grounds of his intention that whether he really intended to injure someone or it was just a mistake. His intention will also be detected through his confession or proof of the offence, testimony or circumstantial evidences. Then it would be decided whether he is liable for a punishment, compensation, expiation or he can be granted forgiveness.

Not only in the criminal cases liable to *qisas* have punishment but intention had a vital role to play also in the offences liable to *hadd* penalties. For instance, in the case of theft, if the thief has stolen someone’s property with the intention of taking his own credit back from his debtor then his hand will not be amputated. Likewise, if the subject has picked up something from the way with the intention of not returning it back to its real owner then he will have to pay expiation for that. But if he did so with the purpose of returning it back, then he will not be liable with any charge of theft.<sup>10</sup> Moreover, commission of fornication under the state of coercion will not make the perpetrator liable of penalty because *hudood* penalties are implemented only when the offence is committed voluntarily by the perpetrator. Also drinking wine considering it water or consuming intoxicating beverage unwillingly under compulsion will not lead towards the liability of *hadd* penalty. Similarly, false allegation of fornication due to insanity is not punishable with *hadd* penalty at all because the perpetrator did not intend to commit this. The act of apostasy or the words containing blasphemy and libel damaging the reputation of the sacred personalities in Islam with the free will of the perpetrator will lead 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.<sup>11</sup>

## 2. الضرر يزال (Harm must be eliminated)

The derivation source is the prophetic tradition as under:

لَا ضَرَرَ وَلَا ضِرَارَ

*“There should be neither harming nor reciprocating harm”*.<sup>12</sup>

And this Prophetic tradition itself is another legal maxim at the same time. Also a supportive *Qur’anic* verse has also been discussed here as an evidence:

وَاعْلَمُوا أَنَّ فِيكُمْ رَسُولَ اللَّهِ لَوْ يُطِيعُكُمْ فِي كَثِيرٍ مِنَ الْأَمْرِ لَعَنِتُّمْ وَلَكِنَّ اللَّهَ حَبَّبَ إِلَيْكُمُ الْإِيمَانَ وَزَيَّنَهُ فِي قُلُوبِكُمْ وَكَرَّهَ إِلَيْكُمُ الْكُفْرَ وَالْفُسُوقَ وَالْعِصْيَانَ أُولَئِكَ هُمُ الرَّاشِدُونَ

*“And know it well that among you there is the Messenger of Allah. If he were to obey you in much of the matters, you would surely be in trouble. But Allah has endeared the faith to you and has beautified it in your hearts and has made disbelief, wrongdoings and sins hateful to you. Such are they who are the rightly guided”*.<sup>13</sup>

Allah Almighty has selected religion “Islam” for us as it is easy and convenient to follow and forbids from disbelief and wrong actions as they cause harm for both perpetrator and the victim. This legal maxim is applied on the legal issues related to almost every chapter of Islamic law. Harm will be removed in every possible way. The basic purpose of *Shari’ah* is elimination of damage and acquisition of benefit and for this purpose, attempts should be made. When a person suffers from an infliction or trouble which should not have caused to him legally, it is called harm. It is not allowed for a Muslim to be the victim and target of oppression whether that oppression would be in the form of a person or a system. The main purpose of *Shari’ah* is to create justice among individuals and societies and to save them from harm through getting rid of oppression so that the people could be satisfied about their rights. The general rule against causing injuries and repelling injuries has been established by *Shari’ah* firmly.<sup>14</sup> The application of this legal maxim can be explored through the application of *hudoos* and *qisas* penalties which, consequently, preserve the 6 fundamental objectives of *Shari’ah* i.e. protection of religion through *Hadd* penalty for apostasy, protection of life through *Qisas and Diyat* punishments, protection of property through *Hadd* penalty for theft and robbery, protection of honor through *Hadd* penalty for adultery, protection of lineage through *Hadd* penalty for false allegation of adultery and protection of intellect through *Hadd* penalty for alcoholism.<sup>15</sup> Therefore, following issues come under this legal maxim:

The situation (rape) when one party does not intend to involve in fornication and for the sake of securing his / her honor, injures or kills the exploiter. This self-defense is fully allowed to repel the harm to one’s honor and for the same reason, voluntary violation of the limits set for the sexual activities is also punishable in the sight of Islam for the removal of this harmful action of adultery as it causes

ruination of a family, destroys the process of raising a child, produces confusion in his parentage.<sup>16</sup>

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, peace of a family is destroyed, marital relation between the spouses is disfigured and above all a doubt upon the parentage of the child is created. So for repelling this injury from victim's honor, the slanderer must be punished.<sup>17</sup>

*To undo the effects caused by the heinous offence of dacoity, intense punishments of amputation of hands and feet, crucifixion, execution and banishment have been decided by the Noble Qur'an and Sunnah. Similarly for sheltering one's life, property and honor, murdering or injuring the violator (the dacoit) is permitted.*<sup>18</sup>

For the aversion of the menace and hazard created through rebellion to harm government as well as public, capital punishment for rebels has been recommended by *Shari'ah*.<sup>19</sup>

In Islam, capital punishment has been recommended on the commission of the terrible offence of apostasy 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.<sup>20</sup>

The law of retaliation and blood-money prevents people from the extreme and unjust ways of taking revenge for murder or infliction of hurts.<sup>21</sup> Besides, due to the implementation of this exemplary punishment, people will refrain from this offence.<sup>22</sup>

Here it will be suitable to state two *Qur'anic* verses which provide the same idea of repelling any kind injury and are supportive to the maxim.

فَمَنْ اعْتَدَىٰ عَلَيْكُمْ فَاعْتَدُوا عَلَيْهِ بِمِثْلِ مَا اعْتَدَىٰ عَلَيْكُمْ

*“So whoever transgresses against you, you transgress likewise against him...”*<sup>23</sup>

وَإِنْ عَاقَبْتُمْ فَعَاقِبُوا بِمِثْلِ مَا عُوقِبْتُمْ بِهِ

*“And if you punish them, then punish them with the like of that with which you were afflicted...”*<sup>24</sup>

To implement *qisas* and *hudood* penalties or *ta'ziraat* on the perpetrators for certain offences, to pay expiation for a destructed or damaged object, not to create difficulty for the neighbors while building walls of one's house, fight back in the defense of one's life, property and honor, battle with the invaders, dacoits or the rebels of the Islamic state, appointment of the rulers and judges, all.<sup>25</sup> Imam Razi has made a lot of appealing and worthwhile debates in his classical work related to this maxim and stated that the removal of mental injuries also come under this maxim for which, in the present world, examples of cyber-

crimes, harassment, persecution, blackmailing, threatening to do bodily harm or destroy property or reputation can be given. Repelling these harms by enforcing laws and discretionary punishments, the purpose lies in this maxim can be achieved.<sup>26</sup> To put restriction on fraudulent *muftis* not to issue *fatawa* or fake doctors not to practice their job for saving the community from a great harm also shows the philosophy behind this legal maxim.<sup>27</sup>

### 3. المشقة تجلب التيسير (Hardship begets facility)

The derivation sources of this legal maxim are the following *Qur'anic* verses:

إِنَّ مَعَ الْعُسْرِ يُسْرًا

“Verily, along with every hardship is relief”.<sup>28</sup>

يُرِيدُ اللَّهُ بِكُمْ الْيُسْرَ وَلَا يُرِيدُ بِكُمْ الْعُسْرَ

“Allah intends for you ease and He does not want to make things difficult for you”.<sup>29</sup>

Some other *Qur'anic* verses can also be regarded as sources of derivation of this legal maxim as follows:

إِنَّمَا حَرَّمَ عَلَيْكُمُ الْمَيْتَةَ وَالدَّمَ وَلَحْمَ الْخِنْزِيرِ وَمَا أُهْلَ بِهِ لِغَيْرِ اللَّهِ فَمَنْ اضْطُرَّ غَيْرَ بَاغٍ وَلَا عَادٍ فَلَا إِثْمَ عَلَيْهِ إِنَّ اللَّهَ عَفُورٌ رَحِيمٌ

“He has forbidden you only the dead animals, blood, the flesh of swine and that which is slaughtered as a sacrifice for other than Allah. But if one is forced by necessity without willful disobedience or transgressing due limits, then there is no sin on him. Truly, Allah is Oft-Forgiving, Most Merciful”.<sup>30</sup>

لَا يُكَلِّفُ اللَّهُ نَفْسًا إِلَّا وُسْعَهَا

“Allah burdens not a person beyond his scope”.<sup>31</sup>

يُرِيدُ اللَّهُ أَنْ يُخَفِّفَ عَنْكُمْ وَخُلِقَ الْإِنْسَانُ ضَعِيفًا

“Allah wishes to lighten (the burden) for you and man was created weak”.<sup>32</sup>

وَمَا جَعَلَ عَلَيْكُمُ فِي الدِّينِ مِنْ حَرَجٍ

“He has chosen you and has not laid upon you in religion any hardship”.<sup>33</sup>

مَا يُرِيدُ اللَّهُ لِيَجْعَلَ عَلَيْكُم مِّنْ حَرَجٍ

“Allah does not want to put you in difficulty”.<sup>34</sup>

The general principle described in this maxim can be comprehended easily from its literal wording which demonstrates that whenever a trouble, difficulty and hardship is emerged, an accompanied relaxation is always emerged too as its result and this relaxation would not be applicable during normal circumstances, for instance, prohibition of consuming pork or any dead animal is determined

by the *Qur'an* and *Sunnah* but under special circumstances, their consumption will be permitted.<sup>35</sup>

This legal maxim deals with exceptions and alleviations. To produce facility in religion means if a hardship occurs in an unusual and specific situation and if some other permitted substitute is present there, then the easiest one will be adopted. Hardship is the underlying philosophy on the basis of which, numerous legal rulings can be deducted. The jurists and judges may settle for-coming cases related to any domain of Islamic law by applying this maxim. However, it cannot be utilized to find out additional exceptions beyond the limit set by *Shari'ah*. The main purpose of this maxim is supplying assistance to comprehend the already resolved matters where the exceptions have already been granted and to prevent from establishing further exceptions and alleviations on the basis of analogy.<sup>36</sup> Hardships are of 3 types: (i) tolerable hardships, (ii) medium hardships and (iii) intolerable hardships. Here the main concern is about the third type which includes the situation in which a person is forced or extremely needy to utilize prohibited thing or to commit a crime.<sup>37</sup> The *Shari'ah* injunctions are based on the convenience of the people otherwise everyone would suffer from difficulties, complications and illogical restrictions.

This relief, convenience and alleviation provided by *Shari'ah* have two types:

- The convenience granted by *Shari'ah* just for the sake of ease for human beings.
- The exceptions granted by *Shari'ah* due to some special circumstances. They include freedom from liability due to minority, insanity, disease, forgetfulness, unconsciousness, sleep and slavery. For instance, a child will not be deprived of inheritance if he commits murder of his legator; or an insane will not be liable to legal penalty if he commits any offence. During sleep, a person is helpless to stop himself from doing anything wrong so if he fell upon someone else during his sleep and thus killed him, he will not be liable to *Qisas*, however, blood-money (100 camels by paternal family of the perpetrator) and expiation (freedom of a Muslim slave by the perpetrator) will be payable. Mistake is also an exception to make a person free from liability, that is why, when a person kills someone mistakenly with no intention of causing bodily harm or death to him, he will not be punished with death sentence, nevertheless, he will free a Muslim slave as expiation and his family will pay blood-money (100 camels). The state of slavery is another exception. Alcoholism and fornication perpetrated by a slave is punishable with half of the *hadd* penalty.<sup>38</sup> Another implementation of this legal maxim is that eating or drinking a prohibited item is allowed under some dire necessity due to hunger or thirst; or pressure due to the threat of infliction of injuries or death, yet only to the extent of necessity and compulsion.<sup>39</sup>

In the case of choosing between taking interest to pay debt and going to jail for not paying debt to the creditor, a person can choose to take interest as refusal from taking it will cause his imprisonment and his family's affairs will get worse.<sup>40</sup> Theft committed due to some miscomprehension (the guilty one thought of the victim's property as his own), intense need or under compulsion due to the fear of injury to his own property, honor or life will not lead towards the liability of amputation of hand.<sup>41</sup> Rebellion is permissible when the intention of the rebels 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 and to provide their fundamental rights. Disobedience of the leader due to gaining some real objective is allowed in the certain limits and as soon as the demands of the rebels are fulfilled, they will have to cease their rebellion.

Therefore, any *qisas, hadd or ta'zir* offence is committed by a minor, insane or a person in sleep, the penalty would not be imposed on him due to his helpless position. The commission of an offence mistakenly or under coercion and being ignorant from the teachings of Islam because of staying in a non-Muslim country also causes granting exemption to the people.<sup>42</sup>

However, this convenience and relief doesn't mean that there would be no ethical or legal boundaries for anyone. In fact, without enforcing laws related to ethical, religious and social matters, the existence of a pious and peaceful society is impossible.<sup>43</sup>

#### 4. اليقين لا يزول بالشك (Certainty is not overruled by doubt).

The evidence for this legal maxim is found in the following *Qur'anic* verse and *Hadith*:

إِنَّ الظَّنَّ لَا يُغْنِي مِنَ الْحَقِّ شَيْئًا

“Certainly, conjecture can be of no avail against the truth”.<sup>44</sup>

Narrated by Hazrat Abbad bin Tamim (may Allah be pleased with him) that my uncle asked Allah's Messenger (peace be upon him) about a person who imagined to have passed wind during the prayer. Allah's Apostle replied:

لَا يَنْفَتِلُ. أَوْ لَا يَنْصَرِفُ. حَتَّى يَسْمَعَ صَوْتًا أَوْ يَجِدَ رِيحًا

“He should not leave his prayers unless he hears sound or smells something”.<sup>45</sup>

This legal maxim is the much developed and polished shape of Imam Abu Hanifa's assumption which is as follows:

“When something is ascertained by comprehension and certainty in any manner, this existing state remains as long as there is no proof to the contrary”.<sup>46</sup>



According to the jurists, conformity or strong presumption about occurrence or non-occurrence of a matter is called certainty while the equal level of uncertainty about occurrence or non-occurrence of a matter is known as doubt. A certainty is established by a clear evidence and it cannot be removed by a doubt which is lower in its strength and status than that of a certain judgment. So a mere suspicion has no legal capacity to cancel the certainty of a matter, however, it is possible to undo a certainty through another authentic certainty. This maxim deals with the elaboration of the facts and figures, proofs and evidences where, due to any reason, an uncertainty arises in the state of affairs.<sup>47</sup> This important principle is applied in almost every chapter of Islamic Law. The jurists have estimated that the legal rulings which have been derived on the basis of this legal maxim consist of more than three-fourth of all jurisprudential rulings of Islamic law. This premier maxim has capacity to produce many other presumptions.<sup>48</sup> Imam al-Qarafi said that if a matter is suspected, it would be like if it was never occurred.<sup>49</sup> Imam Abu Hanifa said that certainty of a matter will continue until and unless its contrary is proved with a definitive evidence.<sup>50</sup>

All juristic rulings in respect to their themes and derivation sources are of two types:

- i- *Qat'iyah* (definitive legal rulings) which are formulated through the clear texts of the Holy *Qur'an* and the *Sunnah* and related to the basic beliefs and pillars, ethical values of Islam and explicit instructions about permitted and prohibited things. For instance, in the Holy *Qur'an*, there is a clear ruling for the prohibition of wine drinking, adultery and false accusation of adultery.
- ii- *Zanniyyah* (speculative) which are established through the sources other than the *Qur'an* and *Sunnah*.<sup>51</sup>

The function performing by this legal maxim can be understood by an example. If a man is missing from his city or country and it is not possible to trace him or confirm whether he is alive or dead then he will be presumed alive as there are no whereabouts of him so being missing, his life is certain and death is doubtful. This legal ruling is valid till the time period specified by the judge for declaring that missing person legally dead is over or if some evidence contradictory to the previous one is available. If the missing person is married then that woman will be regarded as his wife till the termination of that suggested time period. During this time, if his wife married someone else, it will be a punishable offence with *hadd* penalty.<sup>52</sup>

Another example where this maxim can be applied is that generally, the state of certainty for a person is that he is free from any liability unless a strong evidence is available which leaves no space for doubt and proves the guilty one as the perpetrator of an offence, for instance, in the absence of prescribed witnesses or guilty one's confession, only circumstantial evidence like pregnancy of a woman

(guilty one) apparently not having a husband is not sufficient for the infliction of 100 lashes on her.<sup>53</sup>

Similarly, when it is the question of imposition of legal penalty on committing a *hadd* or *qisas* offence, first of all, the guilty one will not be convicted until strong and satisfactory proofs are available otherwise he will be regarded as free from any liability. The *hadd* or *qisas* penalty will be implemented on strong evidentiary basis whether through the availability of testimony provided by prescribed witnesses or through offender's confession. And once the guilty one is convicted of an offence, the legal decision decreed will not be changed on the basis of a mere doubt, until and unless a definite contrary proof is accessible.<sup>54</sup> If a novel type of food, whether from amongst vegetables or animals, is explored by people, then the initial presumption for that food will be permissibility, until and unless an evidence which is opposite to the former ruling is come into existence and proves that food prohibited.<sup>55</sup>

##### 5. العادة محكمة (Custom is a basis for judgment).

For this legal maxim, the derivation source is the saying of the Companion, Abdullah ibn Mas'ud (may Allah be pleased with him) as follows:

فما راي المسلمون حسنا عند الله فهو حسن وما راوا سيا عند الله فهو سيء

*“Whatever the Muslims determine to be good, is good in the sight of Allah and whatever they view as evil is evil in the sight of Allah.”*<sup>56</sup>

The evidence for this legal maxim can also be found in the *Qur'anic* verse:

وَأْمُرْ بِالْعُرْفِ

*“Enjoin what is customary”.*<sup>57</sup>

*Aadah* means custom, practice, tradition and convention which can be altered according to the demand of time, place and circumstances.<sup>58</sup> Ibn Nujaym has defined *Aadah* as *“something which is accepted by sound minds as an established practice”*.<sup>59</sup> The matters, for which explicit injunctions have not been provided in the sources of Islamic law, will be dealt legally in compliance with prevailing custom, on the condition that it should not be in contradiction with the fundamentals of *Shari'ah*.<sup>60</sup> The relevant term used for *aadah* in the Noble *Qur'an* is *“urf”* or *“ma'ruf”* which also means the norm and customary law commonly prevailed by majority of the people of a certain large (not limited and narrow) area through their actions and sayings that are good and useful in the eyes of *Shari'ah*, not only in front of people. Such compatible customs are not abrogated by *Shari'ah*, rather they are kept in practice.<sup>61</sup> The customs rely

upon the human practices so this maxim shows the prime influence physical facts have for determining laws.

There are two types of custom:

- Lawful custom which has the ability to resolve the cases and issue legal rulings in the absence of clear text of the Noble *Qur'an* and *Sunnah* but not conflicting with *Shari'ah*.<sup>62</sup>
- Unlawful custom which is not in favor of *Shari'ah* rulings e.g. to bring prohibited things and acts into social practices like taking and charging interest, giving and taking bribery, utilization of gold and silk by men, alcoholism, smoking, consumption of heroin, excessive amount of dowry etc.<sup>63</sup>

Like the former legal maxims, this maxim is also applicable to various chapters and subjects of Islamic law and it can become the valid foundation principle for establishment of several legal decisions where clear texts are not available.<sup>64</sup> For instance, when the grape juice is dealt with and heated in a specific way, it transfers into wine which is prohibited to consume. This physical fact is acknowledged as custom here. Another example is that when a sexual intercourse is performed by a man and a woman, the discharge of semen is occurred after penetration. This is the physical fact acknowledged as custom and the rulings for fornication are based on this fact.<sup>65</sup>

If a mute person normally communicates with people through indications, it will be presumed as his declaration by speech (e.g. for giving testimony) because communicating through indications is his *aadah*. Likewise, if a person is illiterate and does not know how to write or if he is handicapped and not able to write anything then any kind of indication can fulfill the purpose of giving testimony.<sup>66</sup>

Another example from the domain of penal law is that before the arrival of Islam, during the time of ignorance in Arabia, the legal penalties were present which have been provided by Islam later on e.g. death penalty or financial compensation for murder and injuries, amputation of hand for theft, stoning (along with blackening the face, a non-Islamic punishment) for adultery etc. However, there was unjust, unfair and extremist system for conducting those punishments. Islam maintained many of these penalties but in the form of a fair and proper criminal system. Another example of observing custom is present in the following verse of the Holy *Quran*:

فَمَنْ عَفَىٰ لَهُ مِنْ أَخِيهِ شَيْءٌ فَاتَّبِعْهُ بِالْمَعْرُوفِ

*“But if the killer is forgiven by his brother, the blood money should be decided in accordance with the customary law”.*<sup>67</sup>

The verse demonstrates that if the heir of the victim forgives the murderer and accepts blood money instead, that would be according to the customary law of that specific region e.g. in Arab, it was the custom to pay the blood-money with 100 camels. As with the passage of time changes are occurred in the laws related to the criminal system due to changes in the norms, cultures of different countries or due to the appearance of novel crimes in different societies. So discretionary punishments are inevitable to be formulated and enacted in Islamic states which would be suitable to the demand and situation of the cases and based on *Shari’ah* injunctions.<sup>68</sup> Today in Pakistan, short-term and long-term imprisonment and financial punishment like fine are the customary punishments, enforced for most of the offences and have acquired the status of legal penalties in the constitution and penal code of Pakistan. These discretionary punishments are not against an explicit text, rather they have been certified by the practice of the Apostle’s Companions.<sup>69</sup>

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