

# The Principle of Legality in Islamic Criminal Justice System

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## **Abstract**

This work focuses on the principle of legality and the various other maxims regarding the rights of the accused under Islamic criminal justice system. Its main findings are: that the principle of legality (*mabda' al-Ibahat*) is the most basic principle (*mabda usuli*) of Islamic criminal law. This principle has two postulates: 1) no crime without law, and 2) no punishment without law. The natural outcome of these two principles is another principle, that is, 'no retroactive application of criminal law'. The majority of authors consider the principle of legality as absolute, however, this work carves out certain exceptions to it. In case a crime endangers the peace and security of the state or the interest of the community is involved or when giving retrospective effect would be necessitated by the interest of the community rather than the individual or when the application of the principle is beneficial to the accused, then it is allowed to give criminal law retrospective effect. In addition, this work finds out that the principle of legality is not against Islamic law as is the opinion of some scholars. This principle is intended to safeguard the fundamental rights of the accused either by not charging him or giving him lesser punishment even if that punishment be promulgated subsequent to the commission of the crime. Books of classical Islamic law do not focus on the basic principles of Islamic law. Those that exist are either mentioned in each separate chapter devoted to a specific crime or they must be found by deduction. Adhering to the principle of legality means that Islamic criminal justice system was well advanced since the dawn of Islam.

**Key words:** Justice, Law, Rights, Principles, Crime

## **Introduction**

Islamic criminal justice system is very fair and was always well ahead of its times regarding fairness and justice to the accused. This work focuses on the basic principles (*mabadi' al-Usuliya*) and how these safeguard the rights of the accused under Islamic criminal justice system. Some of the questions worth discussion are: what is the distinction between basic principle (*mabda' usuli*)

and legal maxim (*qa'ida fiqhiya*); what is the distinction between basic principle and rule? What are the limits of the basic principle of legality in Islamic criminal justice system? Whether the principle of legality is compatible with Islamic law as is the view of almost all authors surveyed in this work? Secondly, is this principle absolute or are there some exceptions? Analyses of these issues are based on the Qur'an, the Sunnah of the Prophet Muhammad (PBUH) as explained by the exegetes, the compilers of *ahadith*, and classical as well as modern Muslim jurists.

### **Basic Principle (*mabda' usuli*), legal rules and legal maxims in Islamic law**

It is interesting to note that many authors who wrote about the basic principles of Islamic criminal justice mixed up legal principles with legal maxims so that the later are discussed under the heading of legal principles.<sup>1</sup> It is absolutely necessary to clarify at the outset the distinction between a basic principle (*mabda' usuli*) and a legal maxim or *qa'ida fiqhiya* or *qanuniya* in Islamic legal system as well as the general legal system. The basic distinction between what constitutes a principle is, first, that it is the type of standard which is always part of (Islamic) legal system, that is, it is neither introduced by the Parliament through codification nor could it be repealed by it; secondly, unlike rules it cannot be superseded, repealed, suspended or modified by the legislator (Parliament); thirdly, legal principles are independent of each other, unlike rules that are dependent on each other or validate each other; fourthly, legal principles are observed because of an explicit or implicit Qur'anic injunction or the Sunnah of the Prophet Muhammad (PBUH). Speaking of a legal system that is not based on Islamic law it can be said that principles are standards to be observed because of a requirement of justice, fairness or some other dimension of morality. Fifthly, principles cannot be rebutted, unlike maxims that are rebuttable. Sixthly, principles are universal truths, unlike maxims that are based on presumptions. Consequently, all the maxims of equity are based on presumptions and are therefore rebuttable. Finally, principles do not contradict each other, unlike rules that might contradict each other in which case the court might rule that the earlier one is repealed by the later. However, there are general principles as well as specific principles operating in legal systems both Islamic as well as general legal systems. A detailed study of basic principles and its comparison with other standards is out of the scope of this work.

### **The Principle of Legality within the Islamic Criminal Justice System<sup>2</sup>**

The principle of legality also known as the 'rule of law' is to protect the interest of the individual by restricting the authority of the state. This principle is stated in the two postulates: *nullum crimen sine lege*, or no crime without law, and *nulla poena sine lege*, or no punishment without law. Another postulate that is the natural outcome of the above two is 'no retroactive application of criminal law'. These three postulates are inseparable and their

fundamental objective is to protect an individual's liberty, dignity, life and property from any abuse or loss by state's authorities. Thus, the individual cannot be charged if the alleged act was not a crime when committed nor will he be punished for that act. Kamali argues that according to the principle of legality, "the judge may not punish anyone on the basis of his own wishes, without lawful evidence and proof. Even then, the legal text that is applied must have been in existence at the time the offence was committed."<sup>3</sup> The principle of legality is recognized as one of the most basic principles of human rights law, international conventions, and states' constitutions of all civilized countries of the world.<sup>4</sup> However, we have to focus on the role of this principle in Islamic legal system and whether and how is it rooted in the primary sources of Islamic law, especially the Qur'an and the Sunnah of the Prophet. The majority of authors agree that prohibitions in Qur'anic verses and Prophetic sayings, acts or confirmation are prospective. The general arguments in support of this view are mentioned here.

Allah says in the Qur'an, "And never do we punish any people until We send a Messenger (to make the Truth distinct from falsehood)."<sup>5</sup> According to Muhammad b. Ahmad al-Qurtubi (d. 671 A.H./1273 CE), it means that the rules cannot be proven except on (the basis of) law."<sup>6</sup> Rules include obligations, prohibitions, and punishments. Muhammad Abu Zahra argues that it is against "the blessing of God to punish people without sending a messenger who teaches and explains the right path."<sup>7</sup> The majority of Muslim jurists argue that the punishment mentioned in the above verse is the punishment in this world and not in the hereafter.<sup>8</sup> The Qur'an also says, "Your Lord would not destroy a town until He had sent to its center a Messenger who would recite to them our verses. Nor would We destroy any town unless its inhabitants were iniquitous."<sup>9</sup> In addition, the Qur'an says, "We never destroyed any habitation but that it had warner's to admonish them. We have never been unjust."<sup>10</sup> Allah states in the Qur'an, "Had We destroyed them through some calamity before his coming, they would have said: 'Our Lord! Why did you not send any Messenger to us that we might have followed your signs before being humbled and disgraced?'"<sup>11</sup> The above verses are quite clear that Allah never punishes people unless He had warned them earlier. Thus, there can be no crime without law, no punishment without law, and no retroactive application of criminal law in the Qur'anic scheme in general.<sup>12</sup>

On the other hand, there are so many verses in the Qur'an expressly stating that Allah has forgiven whatever happened in the past as long as a person has mended his ways. The Qur'an says, "[O Prophet!] Tell the unbelievers that if they desist from evil, their past shall be forgiven and if they revert to their past ways, then it is well known what happened with the people of the past."<sup>13</sup> Similarly, Allah says in the Qur'an, "Do not marry the women whom your fathers married, although what is past is past."<sup>14</sup> Allah repeats the same in the

next verse which goes thus, “It is also forbidden for you to take the wives of the sons who have sprung from your loins and to take two sisters together in marriage, although what is past is past.”<sup>15</sup> In addition, the Qur’an prohibits usury and allows business transactions and forgives what has already passed. Allah says in the Qur’an, “[E]ven though Allah has made buying and selling lawful, and interest unlawful. Hence, he who receives admonition from his Lord, and then gives up (dealing in interest), may keep his previous gains, and it will be for Allah to judge him.”<sup>16</sup>

There is another set of verses in the Qur’an that prohibit criminal offences but do not give law retrospective effect. The Qur’an says, “There will be no blame on those who believe and do righteous deeds for whatever they might have partaken (in the past) as long as they refrain from things prohibited, and persist in their belief and do righteous deeds, and continue to refrain from whatever is forbidden and submit to divine commandments, and persevere in doing good, fearing Allah. Allah loves those who do good.”<sup>17</sup> Allah says in the Qur’an, “Allah has pardoned whatever has passed; but Allah will exact penalty from him who repeats it. Allah is All-Mighty. He is fully capable of exacting penalties.”<sup>18</sup>

Jalaluddin al-Suyuti (d. 911 A.H./1505 CE) while commenting on this verse states that the Prophet (PBUH) was asked about those who got killed for the cause of Islam in the early days, and they used to drink and gamble (as these were not yet prohibited). In order to answer this question, Allah revealed this verse and stated that they are forgiven for what has passed.<sup>19</sup>

The Qur’anic scheme about most offences, especially fornication/adultery, drinking, gambling, theft, and prohibition of killing games in pilgrimage, prohibition of marrying two sisters at the same time, prohibition of marrying stepmother, and prohibition of usury is that these were given prospective effect and all those people who had committed these offences in the past were pardoned for what they had done in the past before these were prohibited. Thus, there was ‘no crime without law’, ‘no punishment without law’, and ‘no retrospective application of criminal law’ in the Qur’anic scheme regarding these offences. However, we shall explain the dissenting note regarding this conclusion below.

### **The Principle of Legality and the Sunnah of the Prophet (PBUH)**

The Prophet (PBUH) is reported to have said in his last sermon, “Beware! All *riba* (usury) of *jahili* (ignorance) era is annulled, and the first claim of *riba* which I annul is that of my uncle ‘Abbas.”<sup>20</sup> In another hadith the Prophet (PBUH) says, “Islam destroys whatever has been before it.”<sup>21</sup> Upon conversion from infidelity to Islam all the previous sins are washed away. The Prophet had therefore pardoned his enemies such as Abu Sufyan and his wife Hind for the

crimes in the past. It is reported in another hadith that when ‘Amr b. al-‘Aas came to embrace Islam, the Prophet (PBUH) while shaking his hand, asked him the reason for his decision. ‘Amr said he wanted the Prophet (PBUH) to pardon him. The Prophet replied that he should know that Islam washes away all the sins of the past, and that migration to Madina washes all the sins before it, and that hajj (pilgrimage) washes all sins before it.<sup>22</sup> Thus, the Sunnah of the Prophet (PBUH) endorses the Qur’anic injunctions that there shall be no retroactive application of the law.

### **Is the Principle of Legality Absolute?**

The most interesting discussion of the principle of legality is whether it is absolute or are there some exceptions to it. According to ‘Abdul Qadar ‘Awda and Muhammad Sallam Madkur, the governing principle in Islamic law is that criminal law does not operate retrospectively except in two situations: first, when giving retrospective effect would be necessitated by the interest of the community rather than the individual, such as *li‘an*;<sup>23</sup> Secondly, when the offence endangers the peace of land or law and order, such as the cases of *qadhaf*; finally, when the retrospective application of criminal law is beneficial for the accused, such as the case of *zihar*. For example, if the new law allowed an act that was prohibited before, and the accused was punished under it, the punishment shall not be carried out. If the new law enhances the punishment of the accused, then it shall not be applicable to him because the accused should be punished according to the law in force at the time when the crime was committed.<sup>24</sup> We shall examine *qadhaf*, *zihar* and *li‘an* one by one.

#### **a) *Qadhaf* (launching a false charge against a chaste person)**

*Qadah* is proscribed by the Qur’an and the Sunnah. The Qur’an says,

“Those who accuse honourable women (of unchastity) but do not produce four witnesses, flog them with eighty lashes and do not admit their testimony ever after. They are indeed transgressors, except those of them that repent thereafter and mend their behavior. For surely Allah is Most Forgiving, Ever Compassionate.”<sup>25</sup>

In addition, the Qur’an also says,

Those that accuse chaste, unwary, believing women, have been cursed in the world and the Hereafter, and a mighty chastisement awaits him. On the Day Allah will justly require them, and they will come to know that Allah – and He alone – is the Truth, the One Who makes the Truth manifest.”<sup>26</sup>

As a matter of fact, ‘A’ishah bint Abu Bakr, the wife of the Prophet (PBUH), was falsely accused by some of committing adultery. The launching of the

false charge shook the Muslim community and the Prophet (PBUH) was deeply disturbed. The community was very confused. Thereupon, ten verses of the Qur'an were revealed stating that 'A'ishah was totally innocent and that this was a baseless accusation. The Prophet (PBUH) thereafter, punished two men and one woman for *qadhaf*.<sup>27</sup> 'Abdul Qadar 'Awdah argues that since the Prophet (PBUH) punished the accusers of 'A'ishah, therefore, the verses were given retrospective effect. The reason was that the issue was very serious and endangered the peace and security of the community. In other words, this is an exception to the principle of legality. Although, there is some controversy about the time of the revelation of the verses describing the innocence of 'A'ishah what is clear from these verses is that they were revealed after the launching of the false charge. Salim 'Awwa argues that defamation might have been prohibited first, while 'A'ishah was accused later, and when she was proved innocent, the slanderers were punished. In this case, the verses will have no retrospective effect.<sup>28</sup> This view seems to be against the Qur'anic verses discussed above.

Another scholar, Muhammad 'Abd al-Salam, has given another explanation. He argues that the crime committed by the slanderers was a continuous offence till 'A'ishah was proved innocent. This means that they had continued in their accusation and its propagation to others until the revelation of the verses, as 'A'ishah herself reports that the Prophet (PBUH) punished the accusers when her innocence was announced. Thus, there was a continuity of offence and, therefore, the punishment had no retrospective effect. The accusers had not committed their offence once but had repeated it many times, and they were punished only when they did it for the last time.<sup>29</sup> The views of Salim 'Awwa and 'Abd Al-Salam cannot be accepted because if the punishment for *qadhaf* already existed, then it would not have taken one month to decide the imposition of *hadd* punishment against the accusers! In addition, it is clear from the report of 'A'ishah herself that when these verses were revealed the Prophet (PBUH) spoke to the people from his pulpit and when he came down he ordered the imposition of the punishment. Consequently, the punishment for launching a false charge of adultery against a chaste person (*qadhaf*) was given retrospective effect. This is an exception to the general rule regarding the principle of legality in Islamic law.

**b) *Li'an* (Sworn allegation of adultery committed either by Husband or Wife)**

*Li'an* is to curse and praying for Allah's wrath on each other. Certain specific types of oaths between husband and wife with special connotation are *li'an* in Islamic law. When a husband accuses his wife of adultery or refuses to own his child as being legitimate, and his wife refutes his allegation to be false, and claims for the punishment of false accusation (*qadhaf*) of eighty stripes to be

awarded to him, then the husband produces four witnesses so that the wife could be awarded the punishment of adultery, and if he could not produce four witnesses, then they will be subjected to the procedure of *li'an*. Under this procedure, the husband will be asked to testify four times with the wording given in the Qur'an to the effect that he is honest, and the fifth time will say that if he was lying, then God's curse be on him. If the husband refused to say these words, then he should be arrested and asked either to swear by saying these words five times or accept himself to be a liar. Until he accedes to one of the two alternatives, he should remain in detention. If he accepted to be a liar, then he should be awarded the punishment of *qadhaf*. But if he completed the *li'an* procedure, then the wife be asked to swear to undergo the *li'an* procedure. If she refused, she will remain in detention till she completes the *li'an* procedure or pleads guilty to the charge of adultery, in which case she will be given the *hadd* punishment. In case both the husband and wife complete the *li'an* procedure, both will escape punishment for adultery. Upon the completion of the procedure, either the husband has to announce divorce or the court will dissolve the marriage irrevocably. The Qur'an has described the procedure of *li'an* in the following verses:

“As for those who accuse their wives (of unchastity), and have no witnesses except themselves: the testimony of such a one is that he testify, swearing by Allah four times, that he is truthful (in his accusation), and a fifth time, that the curse of Allah be upon him if he be lying (in his accusation). And the punishment shall be averted from the woman if she were to testify, swearing by Allah four times that the man was lying, and a fifth time that the wrath of Allah be on her if the man be truthful (in his accusation).”<sup>30</sup>

The reason of the revelation of these verses is very interesting. Exegetes and the compilers of *ahadith* have mentioned that it is reported by ‘Abdullah b. ‘Abbas that when the Qur'anic verse about *qadhaf* was revealed in which accusing a chaste person of adultery required four witnesses,<sup>31</sup> one of them the accuser himself. After hearing these verses, Sayyidna ‘Asim b. ‘Adi<sup>32</sup> enquired from the Prophet Muhammad (PBUH) that “[I]f I see a shameless wife in a situation that a strange man is laying over her, then would it not be right for me to scold him and remove him from there. Instead, will it be incumbent on me to get four men and show them this situation to make them eye-witnesses, and by the time I could find four men, he runs away after performing his work?”<sup>33</sup> Qurtubi mentions that when ‘Asim went out he saw Hilal b. Umiyyah who came and told the Prophet (PBUH) that a man had adultery with his wife. It is said that many companions from the Ansar got together and they were worried that ‘Asim might be given the *hadd* punishment for *qadhaf*. The Prophet (PBUH) demanded three other witnesses from him to testify when these verses (24:6) were revealed.<sup>34</sup> What is important for our discussion is that the rules of

*li'an* were revealed after the incident had taken place which would be an exception to the first postulate of the principle of legality, that is, 'no crime without law'. It could be said, however, that since revelation was still taking place and no rules or procedure existed at the time of occurrence of this crime, therefore, Allah the Almighty, explained the procedure subsequently. Whatever the case, an exception to the basic principle is proven. This is the case in which the interest of the community is predominant and the interest of the individual takes precedence over the interest of the individual.

### C) *Zihar* (A Pre-Islamic form of Divorce)

*Zihar* is a pre-Islamic form of divorce and may take the form of certain words of repudiation. The typical words used by *fugha* for *zihar* are when a husband tells his wife: 'You are to me like my mother's back.' In the pre-Islamic *jahiliya* period, the punishment for this was very severe. The woman would stand divorced and neither was the husband allowed to re-marry her nor could she be married to anyone else. That was too harsh for the woman. The Qur'an abolished this form of divorce. A man upon divorcing his wife by *zihar*, was required to do one of the three things to expiate his sins. The Qur'an says,

"Those who declare their wives to be their mothers and thereafter go back on what they have said shall free a slave before they may touch each other. That is what you are exhorted to do. Allah is fully aware of all your deeds. And he who does not find a slave (to free), shall fast for two months consecutively before they may touch each other, and he who is unable to do so shall feed sixty needy people."<sup>35</sup>

Thus, the Qur'an gives three options: a) freeing of a slave; or b) if he does not have a slave, fasting for two consecutive months; or c) if he can't do this, he should feed sixty poor people. The occasion of the revelation of this verse was an incident relating to Aws b. Samit<sup>36</sup> who had reportedly divorced his wife through *zihar* whereupon this verse was revealed. The Prophet (PBUH) is reported to have asked Aws, if he could afford to set a slave free. But he replied in the negative. The Prophet (PBUH) is reported to have asked him if he could fast for two months in a row. He replied, "O Prophet of Allah, if I do not eat three times a day, I am afraid my eyesight will be lost." The Prophet (PBUH) then asked him, "Can you feed sixty poor people"? He said, "O Prophet of Allah! Yes, provided you help me in this regard." It is reported that the Prophet (PBUH) helped him to feed sixty poor people and, thereafter, he started living with his wife.<sup>37</sup> Thus, the punishment of *zihar* was changed from irrevocable divorce to expiation. 'Abdul Qadar 'Awdah argues that the punishment of *zihar* was applied to the case of Aws b. Samit, which arose before the verse was revealed and, therefore, it had a retrospective effect.<sup>38</sup> This is, therefore, another exception to the basic principle of 'no retroactive application of criminal law'. However, as mentioned above, it was applied to



the case subsequently because the punishment in the verse was less or it was more beneficial for him to be judged by the new law.

As far as *ta'zir* offences are concerned Muslim jurists argue that *ta'zir* punishments shall not be applicable to cases that had arisen before the law was made. In addition, people should know about the law before it is applied. In other words, it should be sufficiently publicized. 'Ali b. Muhammad Mawardi argues that before *ta'zir* punishment is implemented, the punishment should have been known to the person before he is condemned.<sup>39</sup>

Before concluding this section, the main points may be summarized. The principle of legality with its three sub-principles, that is, 'no crime without law', 'no punishment without law', and 'no retroactive application of criminal law' is rooted in Islamic law. This is clear from so many verses of the Qur'an, the Sunnah of the Prophet Muhammad (PBUH), as elaborated by exegetes and Muslim jurists. However, this principle is not absolute and has some exceptions. Cases that endanger law and order, such as *qadahf* and wherein an important public interest is involved, such as *li'an*, and where the subsequent punishment is less than the original one, such as *zihar*, are exceptions to the principle of legality.

### **Is the Principle of Legality Compatible with Islamic Law?**

We have explained above that the principle of legality is not against Islamic criminal justice. This is the opinion of a great many scholars. However, there is at least one dissenting note that needs some attention. Yahyah b. Turkey considers the principle 'no crime and no punishment without law' as a principle of positive law. According to Yahyah b. Turkey, the principle '*la jarima wa la 'uqubata illa bi al-nuss*', that is, 'no crime and no punishment without law' is against Islamic law.<sup>40</sup> He argues that Islamic law has given the ruler the right to legislate regarding *ta'zir* offences<sup>41</sup>, therefore, *ta'zir* offences are out of the sphere of 'no crime and punishment without law'.<sup>42</sup> He states that analogy is used to extend *hudud* according to the methodology of the majority (*jamhoor*) *fugha* with the exception of Ahnaf. For example, according to the majority of Muslim jurists, the *hadd* of *zina* (adultery/fornication) is extended to cover homosexuality. In addition, the *hadd* of theft is extended to cover the punishment of pickpocket according to the *jamhoor*. However, according to Ahnaf analogy cannot be used in *hudud* cases as it creates doubt and *hudud* cannot be implemented in case of doubt.<sup>43</sup> Furthermore, the consensus of the companions to punish for drinking eighty lashes on the basis of analogy on the one who launches a false accusation of *zina* against a chaste person (*qadhaf*).<sup>44</sup> According to Ahnaf, an analogy cannot be used to extend *hudud* offences because *hudud* cannot be implemented in case of any doubt whereas analogy creates doubt. The Hanafis argue that the punishment of drinking from forty to eighty lashes was raised by *ijma'* (consensus) of the companions which

removed any doubt created by analogy. Turkey further argues that Islamic law has prescribed penalties in limited cases of *hudud*, that is, *zina*, *qadhaf*, drinking, theft, robbery<sup>45</sup> and offences against the person, *qisas* (retribution) and *diyat* (blood money) and the vast majority of offences are based on *ta'zir* which he believes are created by the judge or their punishments are invented by him.

This approach has many problems. Turkey seems to have misunderstood the principle of legality. Once crimes under *ta'zir* are fixed by the legislator of a Muslim state through codification, the court has to apply it. This is true in Pakistani legal system where crimes are defined and their penalties are fixed in criminal statutes and once the crime is proven the judge has to apply the punishment. Secondly, in case there is no codification of criminal law and judges are asked to follow manuals within a particular school of thought, the judge has to apply the punishment for every *ta'zir* offence mentioned by the *fuqaha* of that school of thought. This is the case in Saudi Arabia<sup>46</sup> where judges have official instructions requiring them to follow two late commentaries written by Mansur b. Yunus al-Bahuti (d. 105/1641).<sup>47</sup> If the answer to a legal question that has arisen cannot be found or there is some contradiction of opinions in these two manuals, then judges are allowed to look into two other manuals of the Hanbali school of thought.<sup>48</sup> Should the answer be absent in all the four manuals, any book within the Hanbali school of thought can be consulted to decide the case.<sup>49</sup> Consequently, no judge has to invent *ta'zir* crimes or penalties every time he decides a *ta'zir* case under Islamic criminal justice system. He either applies what is in the statutes or what is in *fiqh* manuals. The arguments of Turkey are, therefore, based on a misunderstanding of the working and operation of Islamic criminal justice system and are thereby insignificant.

## Conclusion

To sum up the above discussion the main conclusions are that the principle of legality has two postulates, that is, 'no crime without law', and 'no punishment without law.' The natural outcome of these two postulates is another principle, that is, 'no retroactive application of criminal law'. Some Muslim scholars have combined the first two postulates into one, that is, 'no crime and no punishment without law' (*la jarimata wa la 'uqubata illa bi al-nass* or *la 'uqubata wa la jarimata bi gayri nass*). Many authors have mixed up basic principle (*mabda usuli*) with legal maxim (*qa'ida fihiya*). The former is a universal truth whereas the latter is based on presumption. The former cannot be rebutted whereas the latter is rebuttable. In addition, principles are superior standards whereas maxims are much more inferior standards to be considered by judges while deciding cases.

The principle of legality is not absolute and there are some exceptions. The principle operates as the general and governing principle but is subjected to a few exceptions. If a case endangers the peace and security of the Muslim community or when giving retrospective effect would be necessitated by the interest of the community rather than the individual or when the retroactive application of criminal law is beneficial for the accused, then in all these cases the principle of legality or the retroactive application of criminal law might not be adhered to. The cases in which incidents happened and revelations came after the happening of the event are: *zihar*, *qadhaf*, and *li'an*. These cases come under the above exceptions. The principle of legality is compatible with Islamic law. Those considering this principle against Islamic law have misunderstood the working and operation of Islamic criminal justice system.

### Notes & References

- <sup>1</sup> See, for instance, M. Cherif Bassiouni, "Crimes and Criminal Process", *Arab Law Quarterly*, Vol. 12, No. 3 (1997), pp. 269-286. Bassiouni has also discussed 'the presumption of innocence' to be a 'basic principle' or '*mabda' al-Usuliyya*' in his article at 272-73. Similarly, Gamil Muhammed Hussein, "Basic Guarantees in the Islamic Criminal Justice System", *Criminal Justice in Islam: Judicial Procedure in the Shari'a*, ed., Muhammad Abdel Haleem, Adel Omar Sherif & Kate Daniels (London/New York: I.B. Tauris, 2003), pp. 3-37 discusses "Presumption of Innocence under Islamic Shari'a" and considers it as a 'basic principle'. See, pp. 45, 48 of his article. As we have stated above 'presumptions' are much lower standards than 'basic principles'. The former are rebuttable but the latter cannot be rebutted as these are universal truths. Kamali has also discussed the maxim 'presumption of innocence' under the principle of legality thereby mixing principles with maxim. See, Mohammad Hashim Kamali, "The Right to Personal Safety (*Haqq al-Amn*) and the Principle of Legality in Islamic Shari'a" in *Criminal Justice in Islam: Judicial Procedure in the Shari'a*, ed., Muhammad Abdel Haleem, Adel Omar Sherif & Kate Daniels (London/New York: I.B. Tauris, 2003), pp. 64-72 at p. 65.
- <sup>2</sup> Many authors have discussed the principle of legality. These include, Mohammad Hashim Kamali, "The Right to Personal Safety (*Haqq al-Amn*) and the Principle of Legality in Islamic Shari'a" in *Criminal Justice in Islam: Judicial Procedure in the Shari'a*, ed., Muhammad Abdel Haleem, Adel Omar Sherif & Kate Daniels (London/New York: I.B. Tauris, 2003), pp. 64-72; Gamil Muhammed Hussein, "Basic Guarantees in the Islamic Criminal Justice System", *Criminal Justice in Islam: Judicial Procedure in the Shari'a*, ed., Muhammad Abdel Haleem, Adel Omar Sherif & Kate Daniels (London/New York: I.B. Tauris, 2003), pp. 3-37; Imran Ihsan Khan Nyazee, *General Principles of Criminal Law (Islamic and Western)*, (Rawalpindi: Federal Law House, 2010), pp. 70-77; Turki b. Yahya, *Muqaf al-*

*Shari'a min al-Qa'ida al-Qanuniya La Jarimata wa la 'uqubata illa bi al-Nass*, (The Principle of Legality under Islamic Law) unpublished Masters of Shari'a dissertation submitted to the Faculty of Shari'a, Faculty of Shari'a and Islamic Studies, Department of Fiqh, Ummul Qurra University, Makka, Saudi Arabia, 1408 A.H.; and Muhammad Salam Madkoor, *Nazariyyat al-Ibaha' indal Usulieen wa al-Fuqaha* (Cairo: Dar al-Nahdah al-Arabiya, 2<sup>nd</sup> edn., 1984). Some others have discussed other basic principles in general (*mabadi' usuliyyah*) but have mixed them up with legal maxims or have raised legal maxims to the status of basic principles. See for instance, M. Cherif Bassiouni, "Crimes and Criminal Process", *Arab Law Quarterly*, Vol. 12, No. 3 (1997), pp. 269-286.

- <sup>3</sup> Mohammad Hashim Kamali, "The Right to Personal Safety (*Haqq al-Amn*) and the Principle of Legality in Islamic Shari'a" in *Criminal Justice in Islam: Judicial Procedure in the Shari'a*, ed., Muhammad Abdel Haleem, Adel Omar Sherif & Kate Daniels (London/New York: I.B. Tauris, 2003), 64.
- <sup>4</sup> For a good study of the principle of legality in international law and various criminal legal systems, see M. Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (New York: Transnational Publishers, 1996), pp. 265-91.
- <sup>5</sup> Qur'an 17:15. The translation of the Qur'an in this work is taken from *Towards Understand The Quran*, abridged version of Mawdudi's *Tafheem-ul-Quran*, translated and edited by Zafar Ishaq Ansari (Leicester: The Islamic Foundation, 1988) unless otherwise indicated.
- <sup>6</sup> Muhammad b. Ahmad al-Qurtubi, *Al-Jami' li Ahkam al-Qur'an*, vol. 5, p. 152. The Mu'tazilah argue that the word '*rasool*' is human reasoning and that people can be punished if human reason considered something illegal. See, Qurtubi, *Ahkam al-Qur'an*, vol. 5, p. 152. Ibn 'Ashoor argues that the Mu'tazilah's interpretation of the word '*rasool*' to mean 'reason' cannot be accepted because the word '*nab'ath*' is not used for '*aql*' (reason). See, Muhammad al-Tahir b. 'Ashoor, *Al-Tahrir wa al-Tanvir* (Tunis: Dar Sahnoon, n.d.), vol. 15, p. 52.
- <sup>7</sup> Muhammad Abu Zahra, *Zahrat al-Tafasir* (Cairo: Dar al-Fikr al-'Arabi, n.d.), vol. 8, p. 4351.
- <sup>8</sup> Ibid., and Ibn 'Ashoor, *Al-Tahrir*, vol. 15, pp. 51-52.
- <sup>9</sup> Qur'an 28:59.
- <sup>10</sup> Qur'an 26:208-9.
- <sup>11</sup> Qur'an 20:135.
- <sup>12</sup> See, this author's, "The Principle of *Nulla Poena Sine Lege* in Islamic Law and Contemporary Western Jurisprudence", *Annual Journal of International Islamic University, Islamabad*, vol. 21 (2004), p. 5.
- <sup>13</sup> Qur'an 8:38.
- <sup>14</sup> Qur'an 4:28.
- <sup>15</sup> Qur'an 4:29.
- <sup>16</sup> Qur'an 2:275.
- <sup>17</sup> Qur'an 5:93.

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- <sup>18</sup> Qur'an 5:95.
- <sup>19</sup> Jalaluddin Al-Suyuti, *Luban al-Nuqul fi Asbab al-Nuzul*, pp. 112-13. It is pertinent to note that drinking and gambling were prohibited in stages: First, the Qur'an prohibited Praying when one is drunk, in verse 4:43; secondly, Allah stated that the benefits of drinking and gambling were less than their sin (2:219); finally, the Qur'an strictly prohibited both in verse, 5:90.
- <sup>20</sup> Muslim b. al-Hajjaj al-Nisapuri, *Sahih Muslim*, *hadith* no. 1218.
- <sup>21</sup> *Ibid.*, *hadith* no. 121.
- <sup>22</sup> Muslim b. al-Hajjaj al-Nisapuri, *Sahih Muslim*, *hadith* no. 121.
- <sup>23</sup> Abdul Qadar 'Awda, *Al-Tashri' al-Janai' al-Islami* (Beirut: Dar al-Kutub al-'Ilmiyah, n.d.), vol. 1, p. 261. M. Salam Madkur, *Al-Madkhal lil Fiqh al-Islami*, p. 751.
- <sup>24</sup> *Ibid.*
- <sup>25</sup> Qur'an 24: 4, 5.
- <sup>26</sup> Qur'an 24: 23-5.
- <sup>27</sup> The names of the two men are: Hassan b. Thabit and Mastah b. Uthatha. The woman's name is Hamnah bint Jahash. See, Qurtubi, *Al-Jami' li Ahkam al-Qur'an*, vol. 12, p. 134.
- <sup>28</sup> See, Muhammad Salim 'Awwa, *Usul al-Nizam al-Islami*, p. 56.
- <sup>29</sup> See, Muhammad 'Abd al-Salam, *Al-Mabadi' al-Shariyyah fi Ahkam al-'Uqubat Fi al-Fiqh al-Islami* (Beirut: Dar al-Gharb al-Islami, n.d.), p. 181.
- <sup>30</sup> Qur'an 24: 6-8.
- <sup>31</sup> Qur'an 24:4.
- <sup>32</sup> Qurtubi also mentions that in another report the name of the companion who asked this question was Sa'd b. Ma'ad. See, Qurtubi, *Al-Jami'*, vol. 12, p. 122. This makes it two incidents.
- <sup>33</sup> *Ibid.*, vol. 12, p. 123.
- <sup>34</sup> The Prophet conducted the *li'an* procedure and eventually dissolved their marriage and ruled the child to be born of this conception will not be attributed to the father, but the child should not be disparaged.
- <sup>35</sup> Qur'an 58:4-5.
- <sup>36</sup> See, Suiti, *Lubab al-Nuqul fi Asbab al-Nuzul*, p. 284.
- <sup>37</sup> Awdah, *Al-Tashreei' al-Janai'*, vol. 1, p. 270.
- <sup>38</sup> *Ibid.*
- <sup>39</sup> Ali b. Muhammad Mawardi, *Al-Ahkam al-Sultaniya*, p. 249.
- <sup>40</sup> Turkey, *Muqaf al-Shari'a*, pp. 130, 137.
- <sup>41</sup> The punishment for which is not fixed by the Qur'an and the Sunnah and the ruler has to fix it in case of codification or will be left to the judge if not codified.
- <sup>42</sup> Turkey, *Muqaf*, p. 130.
- <sup>43</sup> *Ibid.*, pp. 133.
- <sup>44</sup> *Ibid.*, p. 133.
- <sup>45</sup> Turkey also counts apostasy and rebellion as *hudud* offences although these two

are not considered by the Ahnaf as *hudud* offences. They bring them under '*al-Siyasah al-Shariyah*' (the administration of justice according to Shari'ah). As a matter of fact an apostate man may repent within three days and his crime is pardoned. Similarly, rebels may reconcile with the '*ahl al-'adl*' governing the Muslim state and their crime may be forgiven. How could a crime be a *hadd* offence when it is pardonable?

- <sup>46</sup> For a detailed discussion of the Saudi Legal System, see this author's, "Precedent in Islamic Law with Special Reference to the Federal Shariat Court and the Legal System in Pakistan", *Islamic Studies*, vol. 47, No. 4 (2008), pp. 445-482, at 478-481.
- <sup>47</sup> These commentaries are: Mansur b. Yunus al-Bahuti, *Sharh Muntaha al-Iradat*, 3 vols. (Beirut: Dar al-Fikr, n. d.) and his *Kashshaf al-Qina' 'an Matn al-Iqna'*, ed. Hilal Musaylihi and Mustafa Hilal, 6 vols. (Beirut: Dar al-Fikr, 1982).
- <sup>48</sup> Ibrahim b. Muhammad b. Salim b. Duyan, *Manar al-Sabill fi Sharh al-Dalil*, 2 vols. (Beirut: al-Maktab al-Islami, 1979); Mansur b. Yunus b. Idris al-Bahuti, *al-Rawd al-Murbi'*, a commentary on Musa b. Ahmad al-Hujawi, *Zad al-Mustaqni: Mukhtasar al-Mughni*, 2 vols. (Cairo: Matba'at al-Sunnah al-Muhamadiyyah, 1955).
- <sup>49</sup> Al-Hay'ah al-Qada'iyyah [Judicial Board], Decision No. 3, 7 Muharram, 1347 (June 25, 1928). Confirmed by the King on 24 Rabi' I, 1347 (Sept. 9, 1928). Reprinted in *Majmu'at al-Nuzum*, 11. See also, Nabil Saleh, "The Law Governing Contracts in Arabia," *International and Comparative Law Quarterly*, 38 (1989), 764-765.