DISCRETIONARY PUNISHMENT IN ISLAMIC LAW

WITH SPECIAL REFERENCE TO THE SHARĪ'AH COURTS OF MALAYSIA

BY

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IN THE NAME OF ALLAH

THE COMPASSIONATE, THE MERCIFUL

DECLARATION

I, THE UNDERSIGNED, HEREBY DECLARE THAT THIS THESIS IS WRITTEN BY MYSELF AND ANY REFERENCES MADE TO THE SOURCES ARE DULY ACKNOWLEDGED

NASIMAH HUSSIN

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ABSTRACT

This thesis is a study of discretionary punishment in Islamic law known as *taᶜzīr* with special reference to its application in Malaysia. For this reason, this thesis is divided into two parts. Part One is on the concept of *taᶜzīr* punishment in classical Islamic law, while Part Two is on the application of *taᶜzīr* laws in the Sharīᶜah Courts of Malaysia.

The study on *taᶜzīr* is important because its scope of application is very wide compared to the limited nature of *ḥudūd* and *qiṣāṣ*. *Taᶜzīr* crimes and punishments are also left unspecified in the *Sharīᶜa* texts which indicates the flexibility of Islamic criminal law. In this thesis, the discussion is made on the concept of *taᶜzīr* and its classification as well as on the various types of *taᶜzīr* punishments. Since *taᶜzīr* is a discretionary punishment, the enforcement of this law is left to the discretion of the ruler or the judge. Therefore, some guidelines for judges as to whether to be lenient or strict in sentencing are discussed in this thesis.

To some extent, *taᶜzīr* laws are being applied in the Sh̲arī ah Courts of Malaysia. This can be seen through the provisions of *taᶜzīr* crimes and punishments in the Muslim law enactments of each state of Malaysia. However, the application of *taᶜzīr* laws is limited due to certain factors. All these problems are identified and discussed in the thesis.

TRANSLITERATION OF ARABIC ALPHABET

ا	ʾ	ص	ṣ
ب	b	ط	ṭ
ت	t	ظ	ẓ
ث	th	ع	ʿ
ج	j	غ	gh
ح	ḥ	ف	f
خ	kh	ق	q
د	d	ك	k
ذ	dh	ل	l
ر	r	م	m
ز	z	ن	n
س	s	ه	h
ش	sh	و	w
ص	ṣ	ى	y

Vowels and Dipthongs

Long Vowels	Short Vowels	Dipthongs
اَـــ ā	ـــَ a	وَـــ aw
وُـــ ū	ـــُ u	ىَـــ ay
ىِـــ ī	ـــِ i	

LIST OF ABBREVIATIONS

F.M.S.L.R.	:	Federated Malay States Law Reports.
F.M.S.	:	Federated Malay States.
J.	:	Judge; Justice.
L.P.	:	Lord President.
M.L.J.	:	Malayan Law Journal.
P.P.	:	Public Prosecutor.
V	:	Versus

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PROBLEMS IN EXTENDING THE APPLICATION OF *TAᶜZĪR* LAWS IN THE SHARĪᶜAH COURTS OF MALAYSIA

INTRODUCTION

The most fundamental purpose of the *Sharīᶜa* is the protection of the five basic necessities of the human being i.e. religion, life, lineage, mind and property. These are known as *maṣāliḥ* (interests) which means human or public good, interest, welfare and utility. The protection of these interests is recognised by all jurists who also maintain that any transgression against these interests is considered unlawful and may be a punishable offence.[1] Concerning this matter, al-Ghazzālī is reported to have said that anything which protects these five basic necessities is *maṣlaḥa* while anything which denies their protection is *mafsada* whose prevention is also *maṣlaḥa*.[2] The prevention of *mafsada* may take various forms, one of which is the infliction of a punishment. Thus, the basis of Islamic criminal law, i.e. the prevention of *mafsada*, is in fact the same as the general purpose of the *Sharīᶜa*, i.e. the protection of people's interests (*maṣāliḥ*).

In Islamic criminal law, crimes and punishments are divided into two categories, fixed and discretionary. The first is subdivided into *ḥadd* (plural: *ḥudūd*) and *qiṣāṣ* for which punishments are prescribed by God and thus unchangeable. *Hudūd* are the legally prescribed punishments for seven major crimes as the right of God (*ḥaqq Allāh*), these being unlawful intercourse (*zinā*), false accusation of *zinā* (*qadhf*), drinking intoxicants

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[1]ᶜAbd al-Karīm Zaidān, *Majmūᶜa Buhūth Fiqhiyya*, p.384.

[2]*Ibid.*

(*shurb al-khamr*), theft (*sariqa*), robbery (*ḥirāba*), apostasy (*ridda*) and rebellion (*baghy*), while *qiṣāṣ* is for crimes involving the taking of life or the causing of bodily harm which are punishable by retaliation or blood money (*diya*), both being fixed in the *Sharīᶜa* texts. Unlike *ḥudūd*, *qiṣāṣ* is imposed as the right of individuals (*ḥaqq al-ᶜibād*) and, accordingly, the victim or his relatives have the right to forgive or reduce the penalty of the accused person.[3]

The second category of crimes consists of all kinds of transgression where no specific and fixed punishment is prescribed. The judge is, in this case, authorised to inflict a punishment on the offender as he deems fit under the particular circumstances of the case. This type of punishment is known as *taᶜzīr*, and this is our main concern in this thesis.

It is obvious that the scope of discretionary punishment in Islamic criminal law or *taᶜzīr* is very wide. However, the early jurists and the founders of the legal schools such as Abū Ḥanīfa, Mālik ibn Anas, al-Shāfiᶜī and Aḥmad ibn Ḥanbal do not discuss in detail the subject matter of *taᶜzīr* in their books. Their discussions on this matter are also not systematically presented and are normally found scattered within the *bāb al-*

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[3]For further details on *ḥadd* and *qiṣāṣ*, see: Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.5, pp.210-406, al-Sarakhsī, *al-Mabsūṭ*, vol.xxvi, pp.58-188, Mālik b. Anas, *al-Mudawwana al-Kubrā*, vol. xvi, pp.202-454, Ibn Rushd, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid*, vol.ii, pp.484-563, al-Ramlī, *Nihāyat al-Muḥtāj ilā Sharḥ al-Minhāj*, vol.vii, pp.245-468 & vol.viii, pp.1-18, al-Shīrāzī, *al-Muhadhdhab*, vol.ii, pp.172-288, Ibn Qudāma, *al-Mughnī*, vol.viii, pp.1-326, al-Bahūtī, *Kashshāf al-Qinā*, vol.vi, pp.5-186. See also: Abd al-Qadīr Awda, *al-Tashrīᶜ al-Jināᶜī al-Islāmī*, vol.i&ii, Muḥammad Abū Zahra, *al-Jarīma wa al-ᶜUqūba Fī al-Fiqh al-Islāmī*, Wahba al-Zuhaylī, *al-Fiqh al-Islāmī wa Adillatuh*, vol.vi, Aḥmad Fatḥī Bahnasī, *al-ᶜUqūba Fī al-Fiqh al-Islāmī*.

jināyāt and *bāb al-ḥudūd*.

Therefore, this thesis explores the issues of *taᶜzīr* in the classical Islamic legal texts and analyses the views of the jurists of the various schools on this matter while attempting also to determine the strongest and practicable opinion whenever necessary. An attempt has also been made to systematise the principles of law therein according to modern methodology.

This study on *taᶜzīr* concentrates on three main subjects: the crimes of *taᶜzīr*, the punishments of *taᶜzīr* and the rules governing the implementation of *taᶜzīr*. Considerable attention is given to this last issue especially on factors which influence the degree of *taᶜzīr* punishments since this is the most common problem faced by judges in making judgements concerning punishments of discretionary types. Moreover, it seems that no thorough discussion has been made by jurists on this issue.

This thesis thus excludes any study of the procedures for establishing *taᶜzīr* crimes (*ṭuruq al-ithbāt*) as these matters can be found in any *kitāb al-shahāda wa al-bayyina*, or of the factors which invalidate punishment such as absence of mind, duress, private defence and so on, as these factors are normally discussed under the concept of crime and punishment in general. The thesis also excludes the study of the other categories of crimes and punishments, i.e. *ḥudūd* and *qiṣāṣ*, since they have been thoroughly discussed by both early jurists and contemporary Muslim and Western scholars in their writings. However, in certain circumstances, it is essential to deduce

the law of *ta^{c}zīr* from the principles of *ḥudūd* and *qiṣāṣ* and this is done through analogical reasoning (*qiyās*). From the discussion of the above, we are able to extract vital elements, conditions and rules governing the application of *ta^{c}zīr* laws.

This thesis is also designed to examine the application of *ta^{c}zīr* laws as applied in the Sharī^{c}ah Courts of Malaysia. The focus is on the criminal jurisdiction of the Sharī^{c}ah Courts in the context of whether or not they conform with the principles of the *Sharī^{c}a* concerning *ta^{c}zīr*. It does not only analyse the provisions of *ta^{c}zīr* crimes and punishments in the state enactments but also evaluate and compare them with the principles of *ta^{c}zīr* in the classical Islamic view.

The Importance of the Study

A study of *ta^{c}zīr* is important for two main reasons: firstly, its scope, as we have seen, is very wide compared to the limited nature of *ḥudūd* and *qiṣāṣ*; secondly, the discussion of the leading jurists on the matter of *ta^{c}zīr* is brief and made only on a general basis. Moreover, the infliction of *ḥudūd* punishments are almost impossible due to the very strict requirements regarding the procedure of establishing *ḥudūd* crimes, based on the *ḥadīth* of the Prophet which says, "Set aside ḥudūd punishments in cases of doubt".[4] As the infliction of *ḥudūd* punishments may be set aside due to the existence of even the slightest doubt, most cases are reduced to *ta^{c}zīr* punishments which thus increases the

[4]Al-Shawkānī, *Nayl al-Awṭār*, vol.vii, p.272.

number of crimes which fall under the category of *ta^{c}zīr*.

Ta^{c}zīr crimes and punishments are left unspecified in the *Sharī^{c}a* texts so as to make them appropriate to the changing requirements of a society as it develops. This indicates the flexibility of Islamic criminal law which can be adapted according to different times and places and remains compatible with the demands of the modern world. This study is aimed at highlighting this point and justifying how it can be implemented today.

Another point that needs to be raised here is the reason why the writer has chosen to study the application of *ta^{c}zīr* laws in Malaysia and the rationale of choosing the Sharī^{c}ah Courts as a model for the purpose of implementing *ta^{c}zīr* laws. Firstly, Malaysia's historical background before the British intervention succeeded in setting aside Islamic law until it was only applied in a very limited scope, as it is today, shows that Islamic criminal law is not strange to the Malay Peninsula since it was extensively enforced in the community for *ḥudūd*, *qiṣāṣ* and *ta^{c}zīr*. Secondly, the demand for infusing Islamic law, particularly Islamic criminal law, into the administration of justice and the judicial system in Malaysia has become an important issue today. Numerous conferences and seminars on Islamic criminal law[5] have been held on ways of introducing this law in Malaysia. Moreover, the Kelantan state government under the

[5]Such as Islamic law seminar, organised by the Bar council, 1985, seminar "Towards the Islamisation of Laws, 1986, Syari`ah seminar, organised by the Faculty of Syariah, University of Malaya, 1987, Conference on "the Amendment of the Federal Constitution of Malaysia: Implication of law", organised by International Islamic University, 1989, 9th Malaysian law conference, "Islamic Law in Malaysia: Its impact on Civil Law, organised by Bar council, 1991.

rule of the Islamic Party of Malaysia recently declared its decision to enforce an Islamic penal system in that state.[6] Though it was rejected by Parliament, it is sufficient to show that many Malaysian people wish to see the implementation of Islamic criminal law in Malaysia. Thirdly, all the punishments which are applied in the Sharī'ah Courts of Malaysia fall under the category of *ta'zīr*.

Punishments in the Civil Courts, which might be considered not directly relevant to the application of *ta'zīr* laws in the Sharī'ah Courts, have also been discussed. Their importance and relevance lies in the fact that some of *ta'zīr* crimes and punishments fall under the jurisdiction of the Civil Courts and are not mentioned when *ta'zīr* laws in the Sharī'ah Courts are being discussed.

Mode of Organisation

The study is divided into two parts. Part One covers the concept of *ta'zīr*, the various types of punishments which can be imposed as *ta'zīr* and the rules governing the implementation of *ta'zīr* in Islamic law. The topics covered under this part are very wide, and thus the writer has tried to identify only the main principles and issues of *ta'zīr* which are scattered throughout the classical manuals and relevant books by contemporary authors.

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[6]The Kelantan State Assembly on 25th November 1993.

Part Two focuses on the application of *taᶜzīr* laws in Malaysia, providing a detailed analysis of the provisions on *taᶜzīr* crimes and punishments which are included in the Muslim law enactments of the states of Malaysia by evaluating and comparing them with the principles of *taᶜzīr* in Islamic law. A note on punishments which are applied in the Civil Courts is also presented in order to give a clearer view regarding the actual situation of the implementation of Islamic criminal law in Malaysia.

Discussion of Sources

Any study on *taᶜzīr* will never be reliable without consulting the two primary sources of Islamic law, i.e. the Qurʾān and the *ḥadīths* of the Prophet Muḥammad. The translation of the Qurʾānic verses used in this thesis is based on that of ᶜAbdullah Yūsuf ᶜAlī, *The Holy Qurʾān: Text, Translation and Commentary* (Amana Corp, Maryland, 1983) with a few modifications made for the sake of precision of meaning. In addition, classical exegeses such as *Tafsīr al-Tabarī*, *Tafsīr al-Qurṭubī*, *Tafsīr Ibn Kathīr* etc. have been referred to.

The *ḥadīths* of the Prophet used in the study are based on the "Six Books" of al-Bukhārī, Muslim, Abū Dāwūd, al-Tirmidhī, al-Nasāʾī and Ibn Māja. In addition, a few popular books of *ḥadīths* such as *Nayl al-Awṭār*, *al-Muwaṭṭāʾ*, *al-Musnad*, *Subul al-Salām* and *Mishkāt al-Maṣābīḥ* have also been used. From an analysis and intepretation of both sources of law, the basic principles governing the area can be derived.

In examining the concept of *taᶜzīr* crimes and punishments, reference to the major books written by the founders of the four popular legal schools i.e. Abū Ḥanīfa (d.767), Mālik ibn Anas (d.795), Muḥammad ibn Idrīs al-Shāfiᶜī (d.820) and Aḥmad ibn Ḥanbal (d.855) has been essential. Their opinions and the opinions of their eminent disciples are periodically referred to throughout this thesis.

Since the discussions of the early jurists in their *fiqh* manuals on the subject matter of *taᶜzīr* are brief and general, it has been essential to consult other relevant sources. Among works written by contemporary authors, the following in particular have been consulted: ᶜAbd al-Qadīr ᶜAwda, *al-Tashrīᶜ al-Jināʾī al-Islāmī*; Muhammad Abū Zahra, *al-Jarīma wa al-ᶜUqūba fī al-Fiqh al-Islāmī*; Wahba al-Zuhaylī, *al-Fiqh al-Islāmī wa Adillatuh*; Aḥmad Fatḥī Bahnasī, *al-ᶜUqūba fī al-Fiqh al-Islāmī* and *al-Jarāʾim fī al-Fiqh al-Islāmī*; ᶜAbd al-ᶜAzīz ᶜĀmir, *al-Taᶜzīr fī al-Sharīᶜa al-Islāmiyya*; and Muṣṭafa al-Khin, *al-Fiqh al-Manhajī* have been referred to. Reference has also been made to several books written in English such as: Muhammad Iqbal Siddiqi, *The Penal Law of Islam*; Mohamed S. El-Awa, *Punishment in Islamic Law*; Abdul Rahman I.Doi, *Shariah The Islamic Law*; Joseph Schacht, *An Introduction to Islamic Law*; and Matthew Lippman, *Islamic Criminal Law and Procedure*.

Because this study also concerns the application of *taᶜzīr* laws, sources containing practical experiences relating to various legal issues including that of *taᶜzīr* have also been consulted. Among these are: Ibn Farḥūn, *Tabṣirat al-Ḥukkām*; Ibn Taymiyya, *al-Siyāsa al-Sharᶜiyya* and *al-Ḥisba fī al-Islām*; Ibn Qayyim, *al-Turuq al-*

Ḥukmiyya and *Iʿlām al-Muwaqqiʿīn*; Ibn Faraj, *Aqḍiyat Rasūlillāh*; and Muḥammad ibn ʿIrnūs, *Tārīkh al-Qaḍā fī al-Islām*.

As far as the application of *taʿzīr* laws in Malaysia is concerned, materials such as law acts, codes, enactments and works relating to Malaysian history and its legal system are essential. In particular, the works of Ahmad Mohamed Ibrahim, *Towards a History of Law in Malaysia and Singapore*, *Islamic Law in Malaya*, *Malaysian Legal System*, Wu Min Aun, *Introduction to Malaysian Legal System*, Mohd Suffian Hashim, *An Introduction to the Constitution of Malaysia*, Hashim Mehat, *Malaysian Law and Islamic Law on Sentencing* and Abu Bakar Abdullah, *Towards the Implementation of Islamic Law in Malaysia: Problems and Solutions* have been examined. Apart from these sources, law digests, journals and seminar papers have been used in this thesis.

PART ONE

THE CONCEPT OF *TAʿZĪR* IN ISLAMIC CRIMINAL LAW

CHAPTER ONE

The Background to the Concept of Taᶜzīr In Islamic Criminal Law

1.1 Introduction

Crimes and punishments in Islamic criminal law are divided into two categories, fixed and discretionary. The first category includes *ḥadd* and *qiṣāṣ* punishments which are prescribed by God and thus unchangeable. The second category consists of all kinds of trangression where no specific punishment is prescribed but for which there may be *taᶜzīr*. In this chapter, we discuss the concept of *taᶜzīr*, its definition and classification, and explain terms relevant to the definition of *taᶜzīr*.

1.2 Definition of *Taᶜzīr*

The word *taᶜzīr* is derived from the verb "*ʿazzara*" which means to prevent or to restrain.[1] It also means to respect[2] and to support.[3] The latter meaning can be found in the following Quranic texts:

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[1]Ibn Mandhūr, *Lisān al-ᶜArab*, vol.xx, p.561.

[2]Al-Rāzī, *Mukhtār al-Siḥāḥ*, p.36.

[3]Ibn Qudāma, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol.x, p.347.

1. ... And God said: I am with you if you (but) establish regular prayers, practise regular charity, believe in my apostles, honour and assist (*ʿazzartumūhum*) them...[4]

2. ... So it is those who believe in him, honour him, help (*ʿazzarūhu*) him, and follow the light which is sent down with him,...[5]

3. In order that ye (O men) may believe in God and His apostle that ye may assist (*tuʿazzirūhu*) and honour him, and celebrate His praises morning and evening.[6]

In Islamic criminal law, *taʿzīr* (plural : *taʿāzīr* or *taʿzīrāt*) signifies the unprescribed punishment delivered against the commission of a *maʿṣiya* (religious disobedience) which is subject neither to *ḥudūd* nor *kaffāra* (atonement), and which is intended to prevent the culprit from committing further offences and to purify him. All the four schools of Islamic law unanimously agree with the definition of *taʿzīr* as above.[7] The *Sharīʿa* gives the ruler or the judge considerable discretion in the infliction of *taʿzīr* punishments, which range in gravity from a warning to death. The term *taʿzīr*

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[4]Qurʾān, 5:12

[5]Qurʾān, 7:157

[6]Qurʾān, 48:9

[7]Al-Zaylaʿī, *Tabyīn al-Haqāʾiq*, vol.iii, p.207, al-Kāsānī, vol.vii, p.63, al-Haṭṭāb, *Mawāhib al-Jalīl*, vol.iv, p.319, al-Shīrāzī, *al-Muhadhdhab*, vol.ii, p.288, al-Ramlī, *Nihāyat al-Muḥtāj*, vol.viii, p.18, al-Māwardī, *al-Aḥkām al-Sulṭāniyya wa al-Wilāyat al-Dīniyya*, p.236, al-Bahūtī, *Kashsāf al-Qināʿ*, vol.vi, p.121, Ibn Qudāma, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol.x, p.347.

can be applied both to offences and punishments.

It should be noted that the word *taᶜzīr* in its legal meaning is not used in the Qurʾān and the *Sunna*. Nevertheless, the punishment of *taᶜzīr* is alluded to in both texts since they do refer to some types of offences without specifying the punishments to be imposed, which means that the judge is left to determine the suitable punishment to be inflicted on the offender. For example, the Qurʾān states:

> If two men of you are guilty of lewdness, punish them both.[8]

The phrase "punish them both" is an order to punish those who practise sodomy[9] without specifying the fixed punishment to be inflicted on them which implies that it is left to the judge's discretion to determine its punishment. Another example is the following Qurʾānic text:

> The recompense for an injury is an injury equal thereto (in degree).[10]

The above text concerns the treatment of any misdeed without giving a detailed

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[8]Qurʾān, 4:16

[9] Ibn Kathīr, *Tafsīr al-Qurʾān al-ᶜAẓīm*, vol.i, p.462.

[10]Qurʾān, 42:40

punishment to be imposed.[11] Thus it is left to the discretion of the judge in the determination of the most suitable punishment to be inflicted on the offender.

There is a *ḥadīth* of the Prophet reported by Abū Burda that the Prophet said:

Nobody can be flogged more than ten lashes except in the case of a *ḥadd*.[12]

From the above *ḥadīth* text, it can be understood that punishment which is not included under *ḥadd* punishments is the punishment of *taᶜzīr*. In addition, the *Sunna* of the Prophet has ample practical examples concerning *taᶜzīr* punishments. (Numerous examples are mentioned in Chapter Two and Chapter Three of this thesis). Thus the claim that the punishment of *taᶜzīr* is not mentioned in the Qurʾān and that the *Sunna* has very little to record about it cannot be accepted.[13]

The actual meaning of *taᶜzīr*, in fact, cannot be understood unless the terms of *maᶜṣiya*, *ḥadd*, *kaffāra*, and the meaning of the right of God (*ḥaqq Allāh*) and the right of individuals (*ḥaqq al-ᶜibād*) are explained first. Thus, in the following paragraphs explanations of these terms will be given.

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[11] Al-Tabarī, *Jāmiᶜ al-Bayān ᶜan Taʾwīl Āy al-Qurʾān*, vol.xxv, p.37.

[12] Abū Dāwūd, *Sunan*, vol.iv, p.167.

[13] H.A.R. Gibb and J.H. Kramers, *Shorter Encyclopaedia of Islam*, p.589. See also: Joseph Schacht, *An introduction to Islamic Law*, p.207.

1.2.1 Explanation of terms

1.2.1.1 *Maᶜṣiya* (Disobedience)

Maᶜṣiya (disobedience) means the commission of a forbidden act or the omission of an obligatory act. Thus any violation of a legal order or prohibition is called *maᶜṣiya* and is punishable according to Islamic criminal law.[14] The obligatory commandments and prohibited acts are recognised by studying the Islamic jurisprudence (*uṣūl al-fiqh*).[15] [The term *maᶜṣiya* will be discussed thoroughly later on under the sub-topic "The classification of *taᶜzīr*", see below, pp.33-38].

1.2.1.2 *Hadd*

Hadd (plural: *ḥudūd*) signifies an unchangeable punishment prescribed by Divine law which is considered as the right of God.[16] In the penal context, prescribed punishment means that both the quantity and the quality thereof is determined and that it does not

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[14]ᶜAwda, *al-Tashrīᶜ al-Jināʾī al-Islamī*, vol.i, p.128.

[15]See for example: al-Āmidī, *al-Iḥkām fī Uṣūl al-Aḥkām*, vol.i, pp.160-174, ᶜAbd al-Wahhāb Khallāf, *ᶜIlm Uṣūl al-Fiqh*, pp.79-89, al-Shāṭibī, *al-Muwāfaqāt fī Uṣūl al-Sharīᶜa*, vol.iii, pp.119-259, Ibn Hazm, *al-Iḥkām fī Uṣūl al-Aḥkām*, vol.i, pp.42-43.

[16]ᶜAwda, *al-Tashrīᶜ al-Jināʾī*, vol.i, p.343.

admit of degree. What is meant by its being prescribed as the right of Allah is that it is prescribed for the public interest (*maṣlaḥa ᶜāmma*) and individuals as well as the community cannot annul it. It means that whenever a *ḥadd* crime is established on the offender the judge has no choice other than punishing him with a *ḥadd* punishment prescribed for it.[17] According to the majority of the jurists, *ḥudūd* crimes are *zinā* (unlawful sexual intercourse), theft, *qadhf* (false accusation of *zinā*), drinking intoxicants, *ḥirāba* (highway robbery), *baghy* (rebellion) and *ridda* (apostasy).[18]

According to al-Māwardī, *ḥadd* covers *qiṣāṣ* and *diya* as they are also prescribed punishments.[19] However, *qiṣāṣ* and *diya* differ from *ḥadd* in the context that they concern the individual right and therefore can be waived with the consent of the victim or his family. *Qiṣāṣ* is an offence against the soul (i.e. murder) and the body (i.e. injury) of the human being.

1.2.1.3 *Kaffāra* (Atonement)

Kaffāra (atonement) is actually a kind of religious observance (*ᶜibāda*) as it is normally concerned with releasing a slave, fasting, or feeding the poor. However, if this order

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[17] *Ibid.*, pp.343-344.

[18] For further details on *ḥudūd* crimes, see: Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, pp.210-416, Mālik b. Anas, *al-Mudawwana al-Kubrā*, vol.xvi, pp. 202-304, al-Ramlī, *Nihāyat al-Muḥtāj*, vol.vii, pp.402- 468 & vol viii, pp.1-18, Ibn Qudāma, *al-Mughnī*, vol.viii, pp.104-326. See also: ᶜAwda, *al-Tashrīᶜ al-Jināʾī al-Islāmī*, vol.i, p.79 & vol.ii, p.345, Abū Zahra, *al-Jarīma*, p.56.

[19] Al-Māwardī, *al-Aḥkām al-Sulṭāniyya*, pp.219 & 231.

results from the commission of *maᶜṣiya*, it is called *kaffāra*.[20] Thus, *kaffāra* is an act which is prescribed by the *Sharīᶜa* to clear the sins of those who commit certain offences.[21] The offences which are punished by atonement are in fact, clearly mentioned in the Qurʾān and *Sunna*. They are limited and such acts are as follows:

i. Spoiling Fasting in the Month of Ramaḍān

The majority of Muslim jurists hold that one who spoils his fast in the month of Ramaḍān by having sexual intercourse with his spouse or other permitted female should make up (*qaḍāʾ*) the fast and be punished with atonement i.e. release a slave, or fast for two months consecutively, or feed sixty poor.[22] This is based on the *Hadīth* reported by Abū Hurayra:

> A man came to see the Prophet and said that he had ruined himself by having sexual intercourse with his wife during the day during Ramaḍān. The Prophet asked him whether he had a slave to free. He said he had none. The Prophet asked him whether he could fast for two months consecutively. He said he could not. Then the Prophet asked him whether he had enough food to feed sixty poor. The man said no. The Prophet then brought to him a parcel of dates and ordered him to donate it to the poor.[23]

[20ᶜ]Awda, *al-Tashrīᶜ al-Jināʾī al-Islāmī*, vol.i, p.131.

[21]Al-Khin, Muṣṭafā, *al-Fiqh al-Manhajī*, vol.iii, p.113.

[22]Al-Ḥaṣkafī, *Sharḥ Durr al-Mukhtār*, vol.i, p.201, al-Ramlī, *Nihāyat al-Muḥtāj*, vol.vii, p.92, Ibn Rushd, *Bidāyat al-Mujtahid*, vol.i, p.351.

[23]Ibn Rushd, *Bidāyat al-Mujtahid*, vol.i, p.352.

ii. Spoiling *Iḥrām* (Religious Consecration for Pilgrimage)

The jurists unanimously agree that having sexual intercourse while in *iḥrām* spoils the *ḥajj* (pilgrimage), based on the following Qurʾānic text:

> The *ḥajj* is in well known months. If one undertakes that duty (*ḥajj*) therein, let there be no obscenity (*rafath*), nor wickedness (*fusūq*), nor wrangling (*jidāl*) in the *ḥajj*.[24]

They are also in agreement that having sexual intercourse before *wuqūf* (the period of stopping at ᶜArafa during the pilgrimage) spoils the *ḥajj* and similarly, if one who performs *ᶜumra*[25] has sexual intercourse before *ṭawāf* (circumambulation of the Kaᶜba) and *saᶜy* (the running between al-Safa and al-Marwa).[26] The jurists however, have a difference of opinion as to whether having sexual intercourse after *wuqūf* at ᶜArafa but before *ramy* (the stone throwing) of the Jamratul ᶜAqaba or after *ramy* of the jamra but before *ṭawāf al-ifāḍa*, spoils the *ḥajj*.[27]

In fact, the *ḥajj* can be invalid or become less in quality due to the commission

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[24]Qurʾān, 2:197

[25]ᶜ*Umra* means pilgrimage to Mecca (the so called "minor *ḥajj*" which, unlike the *ḥajj* proper, need not be performed at a particular time of the year and whose performance involves fewer ceremonies).

[26]Ibn Rushd, *Bidāyat al-Mujtahid*, vol.i, pp.353-430, al-Shīrāzī, *al-Muhadhdhab*, vol.i, pp.207-215.

[27]*Ibid.*

of any acts which spoil the *iḥrām* such as killing animals, cutting hair or nail and thus, atonement should be imposed.[28] For example, the following Qurʾānic text:

> O ye who believe! Kill not game while in the sacred precincts or in pilgrim garb. If any of you do so intentionally, the compensation is an offering, brought to the Kaʿba, of a domestic animal equivalent to the one killed, as adjudged by two just men among you, or, by way of atonement, the feeding of the poor, or its equivalent in fasting.[29]

iii. Breach of Oath (*Yamīn*)

All the jurists agree that atonement in the case of breaking one's oath is of four types,such as mentioned in the Qurʾānic text:

> ...for expiation, feed ten poor persons, on a scale of the average for the food of your families, or clothe them, or give a slave his freedom. If that is beyond your means, fast for three days. That is the expiation for the oaths ye have sworn.[30]

According to the jurists, a person who breaks his oath has the option to choose any of the first three atonements i.e. feeding the poor, or clothing them, or releasing a slave, while fasting should be chosen as a last resort only if he cannot afford the first

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[28] *Ibid.*

[29] Qurʾān, 5:95

[30] Qurʾān, 5:89

three types.[31]

The atonements for breaking one's solemn pledge (*nadhr*) are similar to those for breaking one's oath since there is a *ḥadīth* of the Prophet which says:

> *Kaffāra* for breaking *nadhr* is the *kaffāra* for breaking *yamīn*.[32]

iv. *Zihār* (Withdrawal from a Legal Wife by Describing Her as His Mother)

The basis of *ẓihār* can be found in both the Qur'ānic text and the tradition of the Prophet as follows:

> But those who divorce their wives by *ẓihār* then wish to go back on the words they uttered, (it is ordained that such a one) should free a slave before they touch each other... and if any has not (the wherewithal), he should fast for two months consecutively before they touch each other. But if any is unable to do so, he should feed sixty indigent ones.[33]

There is a *ḥadīth* reports that Khawla bint Tha'laba pleaded to the Prophet complaining that her husband Aws ibn Sāmit had divorced her by *ẓihār*. The Prophet could not make any decision other than to separate them both according to Pagan custom

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[31] Al-Marghīnānī, *al-Hidāya Sharḥ Bidāyat al-Mubtadī*, vol.ii, p.63, Ibn Rushd, *Bidāyat al-Mujtahid*, vol.i, p.485, al-Shīrāzī, *al-Muhadhdhab*, vol.ii, p.141, Hajāwī, *al-Iqnā'*, vol.iv, p.337.

[32] Ibn Māja, *Sunan*, vol.i, p.687.

[33] Qur'ān, 58:3,4

until the revelation of the above Qur'ānic text which imposed the atonement.[34]

Zihār consists of the words "You are to me as the back of my mother". The jurists are in disagreement whether mentioning another parts of the body constitutes *ẓihār*, or whether mentioning another unmarriageable women (*maḥram*) other than the man's mother constitutes *ẓihār*. According to Mālik ibn Anas both constitute *ẓihār*. Abū Ḥanīfa holds that mentioning any other parts of the body which is forbidden to see (*ʿawra*) constitutes *ẓihār*, while other jurists state that only using the word "*ẓahr*" (back) constitutes *ẓihār*.[35]

If a husband withdraws from his wife through *ẓihār*, he cannot have sexual intercourse with her before observing the atonement imposed upon him. The ruling is agreed by all jurists.[36]

The jurists unanimously agree that the atonement for a husband who withdraws from his wife by *ẓihār* is of three types such as are mentioned in the above Qur'ānic text, i.e. to give a slave his freedom, whether his own slave or one that he purchases and then sets free, or if that is not possible, to fast for two months consecutively, and, if that is not

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[34]Ibn Māja, *Sunan*, vol.i, p.666.

[35]Ibn Rushd, *Bidāyat al-Mujtahid*, vol.ii, p.124, Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.4, p.219, al-Sarakhsī, *al-Mabsūṭ*, vol.vi, p.226, al-Nafrāwī, *al-Fawākih al-Dawānī*, vol.ii, p.79.

[36]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.iv, p.219, Ibn Rushd, *Bidāyat al-Mujtahid*, vol.2, p.132, al-Nafrāwī, *al-Fawākih al-Dawānī*, vol.ii, p.79, al-Shīrāzī, *al-Muhadhdhab*, vol.ii, p.114, al-Ramlī, *Nihāyat al-Muḥtāj*, vol.vii, p.91.

possible, to feed sixty poor.[37]

v. Accidental Killing (*al-Qatl al-Khaṭ'*)

The jurists unanimously agree that the punishment for a case of accidental killing is either paying the blood money (*diya*) or atonement,[38] as mentioned in the Qur'ānic text:

> If one kills a believer by mistake, it is ordained that he should free a believing slave, and pay compensation (*diya*) to the deceased's family, unless they remit it freely ... for those who find this beyond their means, (is prescribed) a fast for two months running, by way of repentance to God, for God hath all knowledge and all wisdom.[39]

The jurists, however, have a difference of opinion in the case of the intentional killer who receives pardon from the victim's relative as to whether the atonement should also be imposed on him. According to Aḥmad ibn Hanbal, al-Thawrī and Mālik ibn Anas there is no atonement in the case of intentional killing.[40] A similar opinion is held by the Hanafīs.[41] Al-Nafrāwī adds that it is recommended to impose atonement on the

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[37] *Ibid.*

[38] Al-Ḥaṣkafī, *Sharḥ al-Durr al-Mukhtār*, vol.ii, p.437, al-Nafrāwī, *al-Fawākih al-Dawānī*, vol.ii, p.273, al-Ramlī, *Nihāyat al-Muḥtāj*, vol.vii, p.384, Ibn Qudāma, *al-Mughnī*, vol.viii, p.93, al-Bahutī, *Kashshāf al-Qinā'*, vol.vi, p.65.

[39] Qur'ān, 5;92

[40] Ibn Qudāma, *al-Mughnī*, vol.viii, p.96, al-Bahūtī, *Kashshāf al-Qinā'*, vol.vi, p.65.

[41] Al-Sarakhsī, *al-Mabsūṭ*, vol.xvii, p.84, al-Ḥaṣkafī, *Sharḥ al-Durr al-Mukhtār*, vol.ii, p.437.

killer in this case.[42] But another view of Aḥmad ibn Hanbal, as well as al-Zuhrī and al-Shāfiᶜī is that the atonement must be imposed for the intentional murder because it is a great sin and more dangerous compared to accidental killing.[43]

vi. Having Sexual Intercourse During *Haiḍ* (Menstruation)

Having sexual intercourse during *ḥaiḍ* is forbidden in Islam based on the Qurʾānic text:

> They ask thee concerning women's courses. Say: They are hurt and a pollution, so keep away from women in their courses, and do not approach them until they are clean.[44]

There is a *ḥadīth* of the Prophet reported by Ibn ᶜAbbās regarding a man who had had sexual intercourse with his wife during menstruation that he should give alms of one *dīnār*, (or, in another report of half a *dīnār*).[45] The majority of jurists however, hold that there is no atonement in such a case since they do not recognise this *ḥadīth*. Thus according to them, having sexual intercourse during menstruation is a religious disobedience (*maᶜṣiya*) which is neither punishable by *ḥadd* nor by atonement but for

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[42]Al-Nafrāwī, *al-Fawākih al-Dawāni*, vol.ii, p.273.

[43]Ibn Qudāma, *al-Mughnī*, vol.viii, p.96, al-Ramlī, *Nihāyat al-Muḥtāj*, vol.vii, p.384.

[44]Qurʾān, 2:222

[45]Ibn Māja, *Sunan*, vol.i, p.210.

which *taᶜzīr* punishment can be imposed.[46]

1.2.1.4 The Right of God (*Haqq Allāh*) and the Right of Individual (*Haqq al-ᶜIbād*)

According to the jurists, *taᶜzīr* punishments can be inflicted on the offender for the commission of *taᶜzīr* crime whether commission of such crime infringes the right of God or individuals. In the following paragraphs, the meaning of the right of God (*ḥaqq Allāh*) and the right of individuals (*ḥaqq al-ᶜibād*) and the significance of both rights as given by the jurists will be discussed.

What is meant by the right of God is something which has a relation with the public welfare (benefit) and something which protects them from harm. Thus, if a person commits a crime which is not included under *ḥadd* and does not infringe any individual's right, he should be punished with *taᶜzīr* punishment. This kind of *tdᶜzīr* punishment is considered as the right of God.[47]

What is meant by the right of individuals is something whose benefit is confined to a specific individual.[48]

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[46]Ibn Rushd, *Bidāyat al-Mujtahid*, vol.i, p.78, al-Marghīnānī, *al-Hidāya*, vol.i, p.18, al-Ramlī, al-Shīrāzī, *al-Muhadhdhab*, vol.i, p.38, *Nihāyat al-Muḥtāj*, vol.viii, p.20.

[47]ᶜĀmir, ᶜAbd al-ᶜAzīz, *al-Taᶜzīr fī al-Sharīᶜa al-Islāmiyya*, p.57.

[48]*Ibid.*

In fact, there is no clearcut distinction between these two rights. *Taᶜzīr* punishment can be imposed solely due to the right of God such as in the case of not performing daily prayer, or drinking intoxicants, or breaking the fast in the month of Ramaḍān without excuse. It is clear from all these cases that the *taᶜzīr* punishments are imposed due to the infringement of the right of God as the crime committed does not infringe the right of a specific individual.[49]

Some jurists state that there are certain cases where *taᶜzīr* punishments are imposed solely due to the infringement of the right of individuals. For example, if a child insults an adult, the *taᶜzīr* punishment is inflicted on the child only for the sake of the adult's right, as the child is not obligated to observe the precepts of religion (*mukallaf*).[50]

Taᶜzīr punishment can also be imposed due to both the infringement of the right of God and the right of individuals but the former is dominant as in the case of kissing someone else's wife. Sometimes the right of individuals is dominant such as in the case of insulting or cursing another person.[51]

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[49] *Ibid.*

[50] *Ibid.*

[51] *Ibid.*

The Significance of the Distinction Between the Right of God and the Right of Individuals.

It is clear that the distinction between the right of God and the right of individuals has its significance in a number of points, as follows :

1. *Taᶜzīr* punishment, which is due to the infringement of the right of an individual, or when this right is dominant such as in the case of insulting another person, cannot be imposed on the offender unless it is brought to the court by the plaintiff who has the right. Therefore, whenever there is an allegation concerning this type of *taᶜzīr* crime brought to the court, the judge cannot set it aside. It also cannot be waived by the ruler's pardon unless with the victim's permission. However, if *taᶜzīr* punishment is due to the infringement of the right of God, the ruler can forgive the offender if, according to his discretion, the public interest necessitates it, or if the offender has rectified himself before the infliction of punishment.[52]

   The difference of opinion among the jurists arises as to whether or not the implementation of *taᶜzīr* punishment is obligatory (*wājib*) on the ruler.

   According to Mālik ibn Anas, Abū Ḥanīfa and Aḥmad ibn Ḥanbal, *taᶜzīr* punishment must be implemented by the ruler in *taᶜzīr* cases which have already

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[52]Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.25, al-Māwardī, *al-Aḥkām al-Sulṭāniyya*, p.238.

been enacted in Islamic law.[53] Al-Shāffʿī states that the execution of *taʿzīr* punishment is not compulsory on the ruler.[54] This is based on the tradition which reports that a man came to see the Prophet and said that he had had an affair with a woman without having sexual intercourse with her. The Prophet asked him whether he prayed and he admitted this. The Prophet then read the Qurʾānic text as follows:

> Those things that are good remove those that are evil.[55]

Al-Shāfiʿī also based his opinion on the Hadīth of the Prophet who said (concerning the *Anṣār*),

> Let's accept their beneficence and forgive their shortcomings.[56]

Other jurists, including the Hanbalīs, hold the opinion that if a *taʿzīr* crime has already been mentioned in a text, for instance having sexual intercourse with one's wife's slave, or with a shared slave, the punishment for such crimes is a binding precedent. It means that the ruler or judge has to follow the punishment

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[53]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.330, al-Kāsānī, *Badāʾiʿ al-Sanāʾiʿ*, vol.vii, p.64, al-Qarāfī, *al-Furūq*, vol.iv, p.179, Ibn Qudāma, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol.x, p.349, al-Bahūtī, *Kashshāf al-Qināʿ*, vol.vi, p.124.

[54]Al-Khaṭīb, *Mughnī al-Muḥtāj*, vol.iv, p.193, al-Shīrāzī, *al-Muhadhdhab*, vol.ii, p.288.

[55]Qurʾān, 11:114.

[56]Ibn Qudāma, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol.x, p.349.

which has been executed before. On the other hand, if a *ta^{c}zīr* crime has not been mentioned in a text, or if the offence cannot be deterred without it, punishment should be imposed on the basis of *maṣlaḥa*. This is because, according to their opinion, *ta^{c}zīr* is legalized as the right of God and thus, like *ḥadd*, it becomes compulsory (*wājib*). The punishment, however, can be remitted if the judge finds that the offender is deterred without being punished and the ruler can also forgive on the basis of *maṣlaḥa*.[57]

From the above, it can be concluded that *ta^{c}zīr* punishment which is due to the infringement of the right of God is obligatory. The authorities should enforce it and should not pardon it . However, they may not impose the punishment if, according to discretion on the basis of *maṣlaḥa*, the offender's crime can be deterred without his being punished. This is based on the previous tradition concerning the man who told the Prophet what he had done with a woman. He would never have gone to see the Prophet if he had not repented and that is why the Prophet did not punish him. On the other hand, if the *ta^{c}zīr* crime is the infringement of the right of individuals, whether to forgive the offender or not depends on the victim's decision.

It should be remembered that though *ta^{c}zīr* punishment due to the infringement of the right of individuals can be remitted by the victim, the ruler can still punish

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[57] *Ibid.*

the offender in order to reform him.[58]

2. Another distinction between the right of God and the right of individuals is that the *tadākhul* rule, i.e. the punishment is combined whenever the crime is repeated, does not apply to the latter. Thus the punishment is repeated whenever the crime is repeated. For instance, if a person insults another person many times in different periods of time the judge may punish him repeatedly according to the different occurrences. However, if the crime is the infringement of the right of God, the *tadākhul* rule can be applied. For instance, if a person breaks the fast on many days of Ramaḍān, he will be punished only once. This rule is deduced from the discussion of the jurists concerning the *tadākhul* rule in the case of *ḥudūd* and *qiṣāṣ*.[59]

However, there is another view concerning the *tadākhul* rule which holds that there is no difference between *taᶜzīr* due to the infringement of the right of God and *taᶜzīr* due to the infringement of the right of individuals, i.e. it can be applied in both cases so long as the aim of *taᶜzīr* to serve as reformative and deterrent can be achieved.[60]

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[58]Al-Māwardī, *al-Aḥkām al-Sulṭāniyya*, p.238.

[59]For further details on this point, see: al-Kāsānī, *Badāᵓiᶜ al-Sanāᵓiᶜ*, vol.vii, p.65, Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.100, Ibn Qudāma, *al-Mughnī*, vol.viii, p.213, Abū Zahra, *al-ᶜUqūba*, pp.240-250.

[60]Al-Bahūtī, *Kashshāf al-Qināᵓ*, vol.vi, p.123.

3. A criminal who infringes the right of God can be punished by any person straight away on the basis of eliminating *al-munkar* (forbidden act),[61] based on the *ḥadīth* of the Prophet:

> If anyone of you see another person commits *al-munkar* (forbidden act), he should stop it with his hand (power); if he cannot, then with his tongue (advice), and, if he still cannot, then in his heart, and that is the weakest form of faith.[62]

In the case of infringing the right of individuals, punishment cannot be inflicted by any person, as it depends on the claim brought to the court. Thus it should be imposed by the judge. It is also said that the infliction of this kind of *taᶜzīr* punishment can be carried out by those who have the right as in *qiṣāṣ* punishment. In fact, the correct view is that such infliction must be carried out by the ruler, otherwise it will lead to exaggeration in *taᶜzīr* punishment which is not pre-determined, whilst *qiṣāṣ* is a pre-determined punishment.[63]

4. Among the distinctions between the right of God and the right of individuals - according to some views - is one concerning inheritance (*mīrāth*), where the punishment for the *taᶜzīr* crime, which infringes the right of individuals, can be inherited from the victim's side only, and not from the criminal's side. If the

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[61]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.330, Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.103.

[62]Ibn Māja, *Sunan*, vol.ii, p.1330.

[63]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.330, Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.103 .

victim dies, the right to claim should be handed down to his heir. Contrary to that, if the offender dies, the victim cannot claim to punish the heir of the criminal whereas in the case of a *taᶜzīr* crime which infringes the right of God, inheritance does not apply.[64]

These are among the significant distinctions between *taᶜzīr* crimes which infringe the right of God and those which infringe the right of individuals noted down by some jurists. It is interesting to note that *taᶜzīr* crimes which infringe the right of God are more than those which infringe the right of individuals. It is also to be noted that there is no crime which does not involve the right of God at all. In fact, in the case of *taᶜzīr* crimes which infringe totally the right of individuals, for instance in the case of insulting another person, the criminal still infringes the right of God, since obeying the law and preventing the criminal from violating others, and keeping all people in right order are the rights of God.

1.2.2 The Differences Between *Taᶜzīr* and *Hadd*

From the previous discussion, some points of agreement and differences between *taᶜzīr* and *ḥadd* can be traced. *Taᶜzīr* agrees with *ḥadd* in that both punishments are aimed at reforming the offender and preventing the commission of further offences, both by the offender and by other members of the society.

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[64]Al-Kāsānī, *Badāʾiᶜ al-Sanāʾiᶜ*, vol.vii, p.65, al-Sanhūrī, ᶜAbd al-Razzāq, *Maṣādir al-Haqq fī al-Fiqh al-Islāmi*, p.45.

The differences between *taᶜzīr* and *ḥadd* are as follows:

1. The punishments of *taᶜzīr* are not prescribed by the *Sharīᶜa*, whereas the *ḥudūd* are prescribed punishments which are stated in detail in the Qurʾān and the *Sunna*. Thus, they cannot be annulled, nor do they admit of degree, whereas *taᶜzīr* punishments can be enacted according to the ruler's discretion and may be adapted whenever possible.

2. The punishment of *taᶜzīr* can be waived by the ruler or the courts and the ruler should take into consideration the mitigating and aggravating factors. However, *ḥudūd* punishments are not susceptible of being waived by the ruler or the courts, whether by remission, pardon or abrogation and the mitigating and aggravating factors have no effect on *ḥudūd* punishments.

3. *Hudūd* are limited to certain punishments for certain offences whereas *taᶜzīr* offences are vast in number and their punishments unlimited. The *Sharīᶜa* gives the ruler considerable discretion in the determination of punishments which range in gravity from a warning to death.

1.3 The Classification of *Taᶜzīr*

Taᶜzīr crimes can be classified into three basic categories, as follows:

1. *Taᶜzīr* for religious disobedience (*maᶜṣiya*)
2. *Taᶜzīr* for the public interest (*maṣlaḥa ᶜāmma*)
3. *Taᶜzīr* for delinquencies (*mukhālafāt*)

1.3.1 *Taᶜzīr* for Religious Disobedience (*Maᶜṣiya*)

It is unanimously agreed by the jurists that *taᶜzīr* punishment must be delivered for the commission of any *maᶜṣiya* which is not included under a *ḥadd* punishment or an act of atonement whether it infringes the right of God or individuals.[65]

Maᶜṣiya means the commission of prohibited acts (*fiʿl al-muḥarram*) and the omission of obligatory acts (*tark al-wājib*) which are mentioned in the Qurʾān and the *Sunna* of the Prophet.[66] Thus any violation of a legal order or prohibition is called *maᶜṣiya* and is punishable according to Islamic criminal law. In other words, *maᶜṣiya* covers all acts which are considered as sins in Islam. However, it should be remembered that some sins are not punished if they relate to internal sin (i.e. sins committed in the

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[65] Al-Kāsānī, *Badāʾiᶜ al-Sanāʾiᶜ*, vol.vii, p.63, al-Qarāfī, *al-Furūq*, vol.iv, p.180, al-Shīrāzī, *al-Muhadhdhab*, vol.ii, p.288, al-Ramlī, *Nihāyat al-Muḥtāj*, vol.viii, p.19, Ibn Qudāma, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol.x, p.347.

[66] ᶜAwda, *al-Tashrīᶜ al-Jināʾī*, vol.i, p.128.

mind). Methods of proof in the execution of *taᶜzīr* punishments are very significant.[67] The obligatory commandments and prohibitions are recognised by studying Islamic Jurisprudence (*uṣūl al-fiqh*).[68] In fact, the principles of Islamic Jurisprudence propound clearcut distinctions between these classes of acts.

1.3.1.1 The Different Types of *Maᶜāṣī*

Maᶜāṣī can be classified into three types,[69] as follows:

i. *Maᶜāṣī* punished by *ḥadd*

ii. *Maᶜāṣī* punished by atonement

iii. *Maᶜāṣī* punished by neither *ḥadd* nor atonement

i. *Maᶜāṣī* Punished by *Hadd*

What is meant by *ḥadd* here is the prescribed punishment. This category includes all the *ḥudūd*, *qiṣāṣ* and *diya* crimes, for instance, theft, adultery, murder and so on. Originally, this group of *maᶜāṣī* had no connection with *taᶜzīr* punishment, but it is possible for a judge to substitute a *taᶜzīr* punishment for a *ḥadd* punishment whenever the latter is

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[67]See for example: Bahnasī, *Naẓariyyat al-Ithbāt fī al-Fiqh al-Jinā'ī al-Islāmī*, Wahba al-Zuhaylī, *al-Fiqh al-Islāmī wa Adillatuh*, vol.vi, p.209.

[68]See for example: al-Āmidi, *al-Iḥkām fī Uṣūl al-Aḥkām*, vol.i, pp.160-174, ᶜAbd al-Wahhāb Khallāf, *ᶜIlm Uṣūl al-Fiqh*, pp.79-89, al-Shāṭibī, *al-Muwāfaqāt fī Uṣūl al-Sharīᶜa*, vol.iii, pp.119-259, Ibn Hazm, *al-Iḥkām fī Uṣūl al-Aḥkām*, vol.i, pp.42-43.

[69]Ibn Qayyim, *Iᶜlām al-Muwaqqiᶜīn*, vol.ii, p.99, *al-Turuq al-Hukmiyya*, p.103.

waived or remitted, or for him to add the former to the latter, if the public interest necessitates it.[70] Hence the basis of *taᶜzīr* punishment here is the public interest. All the four legal schools support the possibility of combining a *taᶜzīr* punishment with a *ḥadd* punishment.

Imām Mālik holds that *taᶜzīr* punishment can be inflicted on a culprit who intentionally commits a *qiṣāṣ* crime which does not lead to death (i.e. injury).[71] According to him, *qiṣāṣ* punishment is inflicted as an equivalent for the crime he has committed and this concerns the right of the victim. However, as *taᶜzīr* aims at reforming the culprit, it also concerns with the right of the community. Imām Mālik, however, does not think that there is any benefit in combining *taᶜzīr* punishment with *qiṣāṣ* in the case of murder as death is already a capital punishment. If *qiṣāṣ* punishment is remitted, *taᶜzīr* can be imposed.[72]

The Shāfiᶜīs hold that combining *taᶜzīr* punishment with a *ḥadd* punishment is permissible, for instance, adding forty lashes to the original forty lashes for the crime of drinking intoxicants, as according to the Shāfiᶜīs the *ḥadd* punishment for the crime of drinking is flogging with forty lashes.[73]

[70ᶜ]Awda, *al-Tashrīᶜ al-Jināʾī*, vol.i, p.130.

[71]Al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, vol. vi, p.247.

[72]*Ibid.* p.268.

[73]Al-Ramlī, *Nihāyat al-Muḥtāj*, vol.viii, p.20. al-Anṣārī, *Asnā al-Maṭālib*, vol.iv, p.162.

The Hanbalīs and the Shāfiᶜīs share the same opinion that a thief's cut-off hand is to be dangled from his neck as a *taᶜzīr* punishment.[74]

The Hanafīs also view the punishment of exile for one year in the case of fornication (*zinā ghayr al-muḥṣan*) as a *taᶜzīr* punishment and not a *ḥadd* punishment.[75]

ii. *Maᶜāṣī* Punished by Atonements

Atonement is actually a kind of religious observance (*ᶜibāda*) as it is normally concerned with the command to release a slave, or fast, or feed the poor. However, if this order results from the commission of a *maᶜṣiya*, it is called *kaffāra*.[76] The *maᶜāṣī* of this group are in fact, clearly mentioned in the Qurʾān and *Sunna*. They are limited, and include such acts as spoiling the fast of Ramaḍān by having sexual intercourse during the day, the commission of the same during the period of *iḥrām*, the breach of an oath, *ẓihār*, killing, and having sexual intercourse with a woman who is menstruating. (See above, pp.15-22)

Although atonement is basically a religious act, some jurists hold that it has a penal aspect, as is quite clear in the case of expiation for accidental killing which is

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[74]Al-Ramlī, *Nihāyat*, vol.viii, p.20, Ibn Qudāma, *al-Mughnī*, vol.viii, p.261.

[75]Al-Kāsānī, *Badāʾiᶜ al-Sanāʾī*, vol.vii, p.39, Ibn al-Humām, *Sharḥ al-Fatḥ al-Qadīr*, vol.v, p.229.

[76]ᶜAwda, *al-Tashrīᶜ al-Jināʾī al-Islāmī*, vol.i, p.131, al-Khin, *al-Fiqh al-Manhajī*, vol.iii, p.113.

specifically mentioned in the Qur'ān:

> Never should a believer kill a believer; but (if it so happens) by mistake, (compensation is due): if one kills a believer, it is ordained that he should free a believing slave, and pay compensation to the deceased's family, unless they remit it freely... for those who find this beyond their means, (is prescribed) a fast for two months running: by way of repentance to God: for God hath all knowledge and all wisdom.[77]

The jurists are not in agreement as to the legality of combining *taᶜzīr* punishment with atonement. However, according to the majority, in the cases of *maᶜāṣī* punished by atonements, no additional *taᶜzīr* punishment is to be imposed.[78]

iii. *Maᶜāṣī* Punished by neither *Hadd* nor Atonement

This group of *maᶜāṣī* covers all those *maᶜāṣī* which are not punishable by either a *ḥadd* punishment nor atonement and is, in fact, infinite as there is no limitation in number for this group. It is unanimously agreed by the scholars that this group of *maᶜāṣī* must be punished only by *taᶜzir* punishment. No other punishment is allowed.[79]

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[77] Qur'ān, 4:92

[78] Ibn Qayyim, *Iᶜlām al-Muwaqqiᶜīn*, vol.ii, p.99, al-Ramlī, *Nihāyat al-Muḥtāj*, vol.viii, p.21, al-Anṣārī, *Asnā al-Maṭālib*, vol.iv, p.162, al-Bahūtī, *Kashshāf al-Qināᶜ*, vol.vi, p.121.

[79] Al-Kāsānī, *Badāᵓiᶜ al-Sanāᵓiᶜ*, vol.vii, p.64, Ibn Farḥūn, *Tabṣirat al-ḥukkām*, vol.ii, p.217, al-Ramlī, *Nihāyat al-Muḥtāj*, vol.viii, p.19, al-Khaṭīb, *Mughnī al-Muḥtāj*, vol.iv, p.191, Ibn Qudāma, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol.x, p.347, Ibn Qayyim, *Iᶜlām al-Muwaqqiᶜīn*, vol.ii, p.99.

Ma^{c}āṣī under this group can be roughly classified into three types, as follows:

a. *Ma^{c}āṣī* which are similar to those punishable by *ḥadd*, for instance, thefts which do not fulfil the conditions for the *ḥadd* punishment, such as when the value of the stolen property is less than *niṣāb* (the minimum value fixed by the law), or when it is not taken from *ḥirz* (a place where the goods are under custody), acts which are considered as preambles to adultery, and all cases where a certain *ḥadd* punishment lacks one condition or more. In these cases a *ta^{c}zīr* punishment should be imposed.[80]

b. *Ma^{c}āṣī* punishable by *ḥadd* but remitted due to doubt (*shubha*), such as in the case of stealing shared property, or in the case of adultery with a woman in a disputed marriage, or due to some other specific causes concerning the criminal, such as killing one's own child. In these cases, *ta^{c}zīr* punishments replace the *ḥadd*.[81]

c. *Ma^{c}āṣī* which are neither similar to those punishable by a *ḥadd* nor precluded from a *ḥadd* punishment. This type of *ma^{c}āṣī* covers a vast number of *ma^{c}āṣī*, for instance, breach of trust, bearing false testimony, dealing in bribery, *ribā*, and

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[80]Al-Kāsānī, *Badā'i^{c}*, vol.vii, p.64.

[81]*Ibid.*

so on.[82]

1.3.1.2 Recognising Ma^{c}āṣī

All types of *ma^{c}āṣī*, including those punishable by a *ḥadd* or *kaffāra* and those devoid of both *ḥadd* and *kaffāra*, are clearly mentioned in the *Sharī^{c}a* texts. Every person is able to recognise *ma^{c}āṣī* if he refers to the Qur'ānic texts and the traditions of the Prophet. Thus the method of recognising *ma^{c}āṣī* is similar to that of man-made law, i.e. through thorough study and investigation.[83]

Ma^{c}āṣī in the *Sharī^{c}a* are not specifically compiled in one chapter but are scattered around in many places in the Qur'ān and *ḥadīth*. However, this would not prevent the ruler or judge compiling the *ma^{c}āṣī* in one particular well organised book explaining them in detail.[84]

It cannot be denied that if one studies the *Sharī^{c}a* texts, one finds that for every single *ma^{c}ṣiya*, there is a text which explicitly states the punishment to be imposed where the *ma^{c}āṣī* are of the *ḥadd* or *kaffāra* types. If, however, the *mâ ṣiya* is of the *ta^{c}zīr* type, there are texts which prohibit the crime as well as texts which mention a

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[82] *Ibid.*

[83] ^{c}Awda, *al-Tashrī^{c} al-Jinā'ī*, vol.i, p.133.

[84] *Ibid.*

punishment of *ta^{c}zīr*.[85]

There are many examples of such cases, but it will help to give some of the most important ones.

1. Breach of Trust (*Khiyānat al-Amāna*)

The Qur$^{)}$ān states:

a. "God commands you to deliver trusts back to their owners." (4:58)

b. "O believers, betray not God and the Messenger and betray not your trusts." (8:27)

c. The Prophet said that a genuine hypocrite is characterised by four odious attributes, one of which is the breach of trusts.[86]

2. Usury (*Ribā*)

The Qur$^{)}$ān explicitly prohibits dealing in usury, as in the following verses:

a. "God has permitted trade and forbidden usury." (2:275)

b. "O ye who believe, devour not usury, doubled and multiplied, but fear God." (3:130)

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[85] *Ibid*, p.134.

[86] Al-Bukhārī, *Saḥīḥ*, vol.i, p.12.

c. The Prophet said, "God has cursed *ribā* (usury), those who devour it, those who give it, those who write it and those who witness it".[87]

3. False testimony (*Shahādat al-Zūr*)

False testimony is condemned in the Qur'ān as follows;

a. "Those who witness no falsehood..." (25:72)

b. "Conceal not evidence, for whoever conceals it his heart is tainted with sin." (2:283)

c. The Prophet said, "God affirms that the feet of a person who bears false witness will be in hell."[88]

4. Bribery (*Rashwa*)

God prohibits bribery in the following Qur'ānic texts:

a. "(They are fond of) listening to falsehood, of devouring anything forbidden." (5:42)

b. "And do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that ye may eat up wrongfully and knowingly a little of (other) people's property". (2:188)

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[87]Ibn Māja, *Sunan*, vol.ii, p.763.

[88]*Ibid.*, vol.ii, p.794.

c. The Prophet said, "God has cursed those who give and take bribes in judgement."[89]

5. Insults (*Sabb*)

God prohibits Muslims from insulting one another and using abusive language even in quarrelling. The Qur'ān commands:

a. "O ye who believe, let not some men laugh at others (sarcastically). It may be that the (latter) are better than the (former). Let not some women laugh at others ... nor defame nor be sarcastic to each other by (offensive) nicknames, ill-seeming is a name connoting wickedness." (49:11)

b. "God loveth not that evil should be noised abroad in public speech, except where injustice hath been done." (4:148)

c. The Prophet said, " A Muslim is the brother of another Muslim, so do not ill-treat him or disappoint him or look down upon him."[90]

These are just five examples. Others include partaking of banned food, espionage, gambling, unpermitted entrance to private homes, and fraud in measurements and weights.

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[89] *Ibid.*, vol.ii, p.775.

[90] Al-Tirmidhī, *Sunan*, vol.iv, p.325.

All the above-mentioned acts should be given priority in *taᶜzīr* punishment, regardless of variations of time and place.

1.3.2 *Taᶜzīr* for Public Interest (*Maṣlaḥa*)

Initially, *taᶜzīr* punishments were only for the commission of religious disobedience. However, in some exceptional cases the *taᶜzīr* punishment has been legalised in the *Sharīᶜa* for an act which is initially legal but then becomes illegal due to public interest.[91]

The jurists attest the legality of this type of *taᶜzīr* by invoking the *Sunna* of the Prophet who arrested a man accused of stealing a camel. When it was proved that the man was not a thief, he was released.[92] Thus it can be concluded that the accused's arrest is a type of *taᶜzīr* for the public interest. Another example of *taᶜzīr* punishment for the public interest is to banish an effeminate person, according to the *Sunna* of the Prophet.[93] The public interest here is to prevent the public from looking at him, as he looks like a female, and to deter other people from imitating him. But, in fact, effeminate conduct is a kind of *maᶜṣiya* since it is unlawful for a man to imitate a woman. ᶜ Umar ibn al-

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[91]Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.113, al-Qarāfī, *al-Furūq*, vol.iv, p.180, al-Ramlī, *Nihāyat al-Muḥtāj*, vol.viii, p.21, Hajāwī, *al-Iqnāᶜ*, vol.iv, p.269.

[92]Al-Tirmidhī, *Sunan*, vol.iv, p.28, al-Kāsānī, *Badāᶜiᶜ al-Sanāᶜiᶜ*, vol.vii, p.64, Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.335, al-Ramlī, *Nihāyat al-Muḥtāj*, vol.viii, p.21, Hajāwī, *al-Iqnāᶜ*, vol.iv, p.269.

[93]Al-Bukhārī, *Saḥīḥ*, vol.viii, p.142, al-Khaṭīb, *Mughnī al-Muḥtāj*, vol.iv, p.192.

Khaṭṭāb banished Naṣr ibn al-Ḥujjāj to Baṣra only due to his good looks is also a sort of *taᶜzīr* for public interest. A punishment which is inflicted on a child who has not yet reached puberty is also based on the public interest.[94]

What is being practised in many countries nowadays, such as fining one who fails to fasten his seat belt while driving a car, or who does not wear a helmet while riding a motorbike, is a sort of *taᶜzīr* punishment for the public interest. In fact, this type of punishment is the most popular as it is implemented frequently.

1.3.3 *Taᶜzīr* for Delinquencies (*Mukhālafāt*)

What is meant by *mukhālafāt* is the commission of disapproved of acts (*makrūh*) and the ommission of recommended acts (*mandūb*). Some jurists define recommended acts as those which we are required to do, while disapproved of acts are those which we are required to abstain from. The difference between recommended acts and obligatory acts (*wājib*) is that the omission of the latter will be rebuked but not the former. Similarly, the difference between disapproved of acts and prohibited acts (*ḥarām*) is that the commission of the latter will be rebuked but not the former. They, however, do not consider those who omit recommended acts and commit disapproved of acts as disobedient (*ᶜāṣ*) but rather as "not submissive" (*mukhālif*).[95]

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[94]Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.113, al-Qarāfī, *al-Furūq*, vol.iv, p.180, al-Khaṭīb, *Mughnī al-Muḥtāj*, vol.iv, p.192.

[95]Al-Ghazzālī, *al-Mustaṣfā*, vol.i, p.85, al-Āmidi, *al-Iḥkām fī Uṣūl al-Aḥkām*, vol.i, p.160, al-Haṭṭāb, *Mawāhib al-Jalīl*, vol.vi, p.320.

Another group of jurists hold that recommended acts are not included under obligatory acts and disapproved of acts are not included under prohibited acts. In other words, the former is merely recommended whilst the latter is merely abominated. Thus, according to them, the omission of a recommended act and the commission of a disapproved of act is not considered an act of disobedience (*maᶜṣiya*).[96]

Therefore, it can be concluded from both opinions that a person who omits a recommended act and commits a disapproved of act is not considered as committing religious disobedience (*maᶜṣiya*). If so, can a person who commits such an act be punished with *taᶜzīr* punishment?

The jurists are not in agreement on this matter following their differences regarding the definition of *mandub* and *makrūh* as discussed above. The first group of jurists hold that delinquencies may be punished. They base their opinion on the tradition that ᶜUmar punished a man who had laid down a goat in order to slaughter it and then sharpened his knife in front of the goat. Since this act is considered as disapproved of act, some jurists hold that delinquencies may be punished.[97]

The second group of jurists hold that there is no punishment for delinquencies. According to them, the condition of *taklīf* (i.e. being subject to the dictates of the

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[96]Ibn Hazm, *al-Iḥkām fī Uṣūl al-Aḥkām*, vol.i, p.43, Hajāwī, *al-Iqnāᶜ*, vol.iv, p.270.

[97]Al-Ghazzālī, *al-Mustaṣfā*, vol.i, p.85, al-Āmidī, *al-Iḥkām fī Uṣūl al-Aḥkām*, vol.i, p.160, Haṭṭāb, *Mawāhib al-Jalīl*, vol.vi, p.320, Ibn Farḥūn, *Tabṣirat al-Hukkām*, vol.ii, p.259, Ibn Hajar, *Tuḥfat al-Muḥtāj*, vol.viii, p.18.

Sharī^{c}a) must apply before any *ta^{c}zīr* punishment can be carried out. Thus, it is clear that in the case of delinquencies, there is no *taklīf* and therefore no punishment will be inflicted on those who commit disapproved of acts or omit recommended acts.[98]

From the above, it can be concluded that the scope of *ta^{c}zīr* offences is very wide. Unlike *ḥudūd* and *kaffāra*, the offences of *ta^{c}zīr* are unlimited and include those considered as *ma^{c}ṣiya* and non-*ma^{c}ṣiya* which are punishable on the basis of *maṣlaḥa*. Even delinquencies may be punishable with *ta^{c}zīr* punishments.

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[98]Ibn Hazm, *al-Iḥkām fī Uṣūl al-Aḥkām*, vol.i, p.43, al-Kāsānī, *Badā'i^{c} al-Sanā'i^{c}*, vol.vii, p.63, Hajāwi, *al-Iqnā'*, vol.iv, p.270.

CHAPTER TWO

The Punishments of *Taᶜzīr* in Islamic Criminal Law

2.1 Introduction

The *Sharīᶜa* gives the ruler or the judge considerable discretion in the infliction of *taʿzīr* punishments, which range in gravity from a warning to death. He has the authority to determine the punishment which he considers to be the most suitable to be inflicted on the offender, taking into account any mitigating or aggravating factors. However, it is to be remembered that though the *Sharīᶜa* gives the judge freedom to use his discretion, it must not contradict the general principles of the *Sharīᶜa*, for example, the offender should not be flogged naked, or be kept in prison without giving him a chance to perform the prayer.

The punishment of *taᶜzīr* can be one of the following:

1. Basic punishment (*al-ᶜuqūba al-aṣliyya*) - for crimes which have no fixed punishment, for example, in the case of bribery (*rashwa*), or *riba*, though both acts are considered as *maᶜṣiya* in the *Qurʾān* and *Hadīth*, there are no fixed punishments stated. Thus, the *taᶜzīr* punishments are considered as the basic punishments for these types of crime.

2. Substitutional punishment (*al-ʿuqūba al-badaliyya*) - for the crimes of *ḥadd* or *qiṣaṣ* which are remitted for certain reasons, for example, *ḥudūd* crimes which lack one or more conditions of *ḥadd* such as stealing good whose value is less than *niṣāb* (i.e. a minimum value fixed by the *Sharīʿa*).

3. Additional punishment (*al-ʿuqūba al-iḍāfiyya*) - means that *taʿzīr* punishment is imposed on the offender in addition to the basic punishment in the case of those crimes which deserve *ḥadd* or *qiṣaṣ* punishment which are clearly mentioned in the Qurʾān and *ḥadīth* of the Prophet, for example, exile for one year is considered as a *taʿzīr* punishment which is additional to the basic one (i.e. flogging with one hundred lashes) in the case of fornication (as held by Abū Ḥanīfa), or adding forty lashes to the basic forty lashes for the crime of drinking intoxicants (as held by al-Shāfiʿī). (For details, see above, p.34)

Since *taʿzīr* punishments may take various forms, this chapter attempts to identify the various types of *taʿzīr* punishments and their objectives.

2.2 The Objectives of *Taʿzīr* Punishment

The infliction of a *taʿzīr* punishment on an offender seems to be detrimental to him. However, it is intended to prevent harm, based on the legal principle which states: "Preventing harm (*mafsada*) is given priority over gaining benefit (*maṣlaḥa*)". Thus it

is legalized, not because of its detrimental effects but for its leading to other benefits.[1] *Taᶜzīr* punishments have the objective of preventing the commission of further offences, both by the offender and by other members of society. The word *taᶜzīr* itself literally means to prevent or to restrain. (See above, p.10) *Taᶜzīr* punishments are also intended to rectify the offender and to reform him.[2] In the following paragraph, a further discussion on the objective of *taᶜzīr* punishments will be explained.

2.2.1 Preventive and Deterrent (*al-Zajr*)

Al-Zaylaᶜī, in his discussion on *Matn al-Kanz* states that the objective of *taᶜzīr* punishments is to serve as a deterrent (*zajr*).[3] What is meant by the term *zajr* is to prevent the offender from the recommission of further offences and to deter other members of society from initiating the offences, realizing that the punishment which has been inflicted on the offender is not only confined to him alone but may also be imposed on any other potential offender whenever he commits the crime. In this regard Ibn al-Humām states in his discussion on *Fatḥ al-Qadīr* as follows:

> Punishment can serve as a preventive measure (*mawāniᶜ*) before the occurence of a crime, and serve as a deterrent (*zawājir*) after the occurrence of a crime. It means that the knowledge of the enforcement of the punishment could prevent

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[1]Muḥammad Abū Zahra, *al-ᶜUqūba fī al-Fiqh al-Islāmī*, p.8.

[2]See: al-Māwardī, *al-Aḥkām al-Sulṭāniyya*, p.236, al-Kāsānī, *Badāᵓiᶜ al-Sanāᵓiᶜ*, vol.vii, p.64, Ibn Farḥūn, *Tabṣirat al-Hukkām*, vol.ii, p.217, al-Shīrāzī, *al-Muhadhdhab*, vol.ii, p.265, Ibn Qudāma, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol.x, p.347.

[3]Al-Zaylaᶜī, *Tabyīn al-Haqāᵓiq*, vol.iii, p.210.

> any other potential criminal from carrying out his intention, or whenever a criminal is punished, it deters him from the recommission of further offence.[4]

The other schools of law are completely in agreement with the Hanafī school regarding the meaning of *zajr*.[5]

Since religious disobediences (*maʿāṣi*) which are punishable with *taʿzīr* can be either the commission of the prohibited acts or the omission of the obligatory acts, the meaning of *zajr* is, in the former, to prevent a person from committing such prohibited acts and, in the latter, to prevent him from omitting such obligatory acts. The offender will be punished until he obeys the religious duty. It is interesting to note that the punishment in the latter case should be stricter and stronger in degree since the objective of *taʿzīr* punishment in such cases is to compel the offender to observe the obligatory acts. Thus, the punishment can be repeated so long as he omits the obligatory acts.[6]

As a preventive measure, *taʿzīr* punishment should serve this objective within its limit. The infliction of such a punishment must not be too lenient or too strict, in accordance with the judge's discretion, taking into account any mitigating or aggravating

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[4]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.196.

[5]See: Ibn Farḥūn, *Tabṣirat al-Hukkām*, vol.ii, p.218, al-Māwardī, *al-Aḥkām al-Sulṭāniyya*, p.221, al-Shīrāzī, *al-Muhadhdhab*, vol.ii, p.265, al-Bahūtī, *Kashshāf al-Qināʿ*, vol.v, p.77.

[6]Ibn Farḥūn, *Tabṣirat al-Hukkām*,vol.ii, p.218, Ibn Taymiyya, *al-Siyāsa al-Sharʿiyya*, p.86, *al-Hisba fī al-Islām*, p.45.

factors.[7] However, if there is no *taᶜzīr* punishment which can serve as a deterrent other than the death sentence, such as in the case of repeated violent crimes, then that becomes necessary. Although most of the jurists legalize capital punishment in the case of *taᶜzīr* crimes, some of them do not recognise it.[8]

The recognition of the deterrent aspect in the Islamic Penal system is, in fact, deeper and stronger than in other systems of law. Here, deterrence is recognised as the predominant justification for the punishments. The jurists maintain that deterrent punishments promote the safety of society and the honour and interests of all. Deterrence is not pursued merely by proclaiming the crime and its punishments, but rather is based on the speed with which the accused is tried and punished, and on the public manner of the infliction of the punishment.[9]

2.2.2 Reformative (*al-Iṣlaḥ wa al-Tahdhīb*)

Another objective of *taᶜzīr* punishment is to reform and to rehabilitate the offender from committing the crime or sin. Al-Māwardī, in this regard, states that *taᶜzīr* is intended

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[7]Al-Zaylaᶜī, *Tabyīn al-Haqā'iq*, vol.iii, p.210, Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.104, Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.330, al-Qarāfī, *al-Furūq*, vol.iv, pp. 178 & 182, al-Ramlī, *Nihāyat al-Muḥtāj*, vol.viii, p.22, Ibn Taymiyya, *al-Siyāsa al-Sharᶜiyya*, p.84.

[8]See: Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.330, Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.108, Ibn Farḥūn, *Tabṣirat al-Hukkām*, vol.ii, p.223, al-Ramlī, *Nihāyat al-Muḥtāj*, vol.viii, p.22, al-Bahūti, *Kashshāf al-Qinā'*, vol.vi, p.126, Ibn Taymiyya, *al-Hisba fī al-Islām*, p.46, Ibn Qayyim, *al-Turuq al-Hukmiyya*, p.103.

[9]Lippman, Mathew, *Islamic Criminal Law And Procedure*, p.84.

to discipline, reform, and prevent a person from the recommission of the crime.[10] It means that disciplinary and reformative punishment can lead the offender to stop from the commission of a crime, motivated by his religious awareness and self-consciousness, which results from his abhorrence of the crime and not from the fear of the punishment, to seek God's pleasure since the crime is considered a *maʿṣiya*. This religious awareness is, indeed, the best way to confront the crime at its root when a person believes that every one of his actions is recorded by God and cannot go unresponded in the Hereafter.

The concept of reformation of the offender is obtained from the principle of repentance or *tawba* which is recognised by the Qurʾān. The most noticeable example of this objective can be traced from the punishment of imprisonment for an indefinite term where there is no limitation on the period of this punishment. It will last, either until the criminal's repentance, or until his death in the case of a dangerous criminal. Recourse has been had to imprisonment from a very early date. It is said that during the caliphate of ʿUmar ibn al-Khaṭṭāb a house was purchased in Medina to house prisoners. This practice was later followed by governors.(See below, p.99) Imprisonment came to be used mainly for discipline and correction, both of which objectives, it was thought, would be achieved by self-reflection.

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[10] Al-Māwardī, *al-Aḥkām al-Sulṭāniyya*, p.236.

2.2.3 Retributive

Since crime is a detested and undesired act that harms the sense of justice, and rouses the wrath of society against the offender, and sympathy with the victims, punishment is the reaction of society against the act of the offender. Therefore, *ta^{c}zīr* punishment is the general retaliation of society to maintain peace and social order. In the case of a *ta^{c}zīr* offence which infringes the right of individuals, the punishment provides satisfaction for the aggrieved parties by eliminating the ill feelings which they may bear against the offenders. Punishment prevents offenders from experiencing the consequences of the wrath that crime creates in society against them, and thus rehabilitation may be achieved.[11]

2.3 Types of *Ta^{c}zīr* Punishment

There is no specific punishment to be inflicted on a *ta^{c}zīr* offender. Any punishment which can serve the purpose of *ta^{c}zīr* may be used. *Ta^{c}zīr* punishment can be inflicted upon the offender's soul, body, property, and dignity. These penalties are graduated according to the school of law, morality and local custom. Types of *ta^{c}zīr* punishment can be of these following categories:

1. Corporal punishments (*al-^{c}uqūba al-badaniyya*). These include capital

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[11] Al-Bahūtī, *Kashshāf al-Qinā'*, vol.vi, p.122.

punishment, i.e. the death penalty, flogging, and crucifixion.

2. The withdrawal of one's freedom (*al-ᶜuqūba al-muqayyada li al-ḥurriyya*). This includes banishment, boycotting and imprisonment.

3. Financial punishments (*al-ᶜuqūba al-māliyya*). These include fines, seizure of property, and the modification or demolition of property.

4. Verbal punishments (*al-ᶜuqūba al-nafsiyya*). These include admonition, reprimand, and threat.

5. Other punishments. These include any punishment which can serve the purpose of *taᶜzīr* such as dismissal from office, and public disclosure.

2.3.1 Corporal Punishments

2.3.1.1 The Death Penalty (*al-Taᶜzīr bi al-Qatl*)

The death penalty is recognised in the *Sharīᶜa* as a means of punishment in the case of *qiṣāṣ,* i.e. the crime of intentional killing (*al-qatl al-ᶜamd*) and in the *ḥudūd* cases, i.e. the crimes of adultery (*zinā al-muḥṣan*), highway robbery (*ḥirāba*), apostasy (*ridda*), and rebellion (*baghy*). But in the case of *taᶜzīr*, is a capital punishment also recognised in the *Sharīᶜa*?

Originally, *ta^{c}zīr* punishment was intended to reform the offender and to take disciplinary action against him. Thus, it should not result in bad consequences such as death, or amputation of limbs.[12] However, many scholars hold that there is an exception from this general rule and hold that *ta^{c}zīr* by means of the death penalty can be imposed if the public interest necessitates it, or if the criminal offence cannot be prevented by means of other punishment.[13]

It should be noted that though the death penalty is allowed in some exceptional cases, it should be imposed in a very strict manner. The scholars do not legalize the death penalty as a *ta^{c}zīr* punishment except in cases of dire necessity and hold that it should be applied as little as possible.[14]

Some jurists have pointed out some *ta^{c}zīr* offences that may be awarded the death penalty, i.e.:

i. Murder Committed by a Heavy Instrument (*al-Qatl bi al-Muthaqqal*)

According to Abu Ḥanīfa, this type of killing is included under the crime of *al-qatl shibh al-^{c}amd* (quasi-deliberate intentional killing) because of the means used in the

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[12]Ibn Farḥūn, *Tabṣirat al-Ḥukkām*, vol. ii, p.217, Hajāwī, *al-Iqnā*, vol.iv, p.269.

[13]Ibn ^{c}Ābidīn, *Hāshiya*, vol.vi, p.108, Ibn al-Humām, vol.v, p.330, al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, vol.iii, p.357, al-Bahūtī, *Kashshāf al-Qinā*, vol.vi, p.126, Ḥajāwī, *al-Iqnā*, p.271, Ibn Qayyim, *al-Turuq al-Ḥukmiyya*, p.103, Ibn Taymiyya, *al-Siyāsa al-Shar^{c}iyya*, p.85.

[14]^{c}Awda, *al-Tashrī^{c} al-Jinā*ī , p.688.

crime and therefore *qiṣāṣ* cannot be imposed on the murderer.[15] However, the ruler can still impose the death penalty on such a murderer on the grounds of *taᶜzīr* if he thinks that public interest necessitates it. This penalty is called *al-qatl siyāsatan.*[16]

Conversely, according to the rest of the jurists, including Abū Yūsuf and al-Shaybānī, this crime is regarded as subject to *qiṣāṣ*, which of course, means that the next of kin have the right to waive the death penalty, either by forgiving the murderer or demanding *diya* in place of the death penalty.[17]

Abū Ḥanīfa supports his opinion by quoting the *ḥadīth* of the Prophet:

> One who dies as a victim of quasi-deliberate intentional killing (*al-qatl khaṭaʾ al-ᶜamd*) i.e. using cane, stick, or stone, should be paid *diya* (blood money).[18]

In the above *ḥadīth*, the words "stick" and "stone" are mentioned in a general way (*muṭlaq*) and therefore they cover all types and sizes of stick and stone. In addition, a heavy instrument such as stone does not normally kill a person. The intention of the killer, according to Abū Ḥanīfa, is based on the instrument used and whether it can kill

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[15]Examples of heavy instruments include a big stone or a huge piece of wood.

[16]Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.108, al-Kāsānī, *Badāʾiᶜ al-Sanāʾiᶜ*, vol.vii, p.233.

[17]Al-Sarakhsī, *al-Mabsūṭ*, vol.xxvi, p.122, Ibn Farḥūn, *Tabṣirat al-Ḥukkām*, vol.ii, p.345, Ibn Rushd, *Bidāyat al-Mujtahid*, vol.ii, p.486, al-Māwardi, *al-Aḥkām al-Sulṭāniyya*, p.231, al-Shīrāzi, *al-Muhadhdhab*, vol.ii, p.176, Ibn Qudāma, *al-Mughnī*, vol.ix, p.321, al-Bahūtī, *Kashshāf al-Qināᶜ*, vol.v, p.506.

[18]Al-Shawkānī, *Nayl al-Awṭār*, vol.vii, p.167.

or not. Thus, so long as the instrument used cannot normally kill a person, the intention of a killer is still in doubt.[19]

On the other hand, al-Shaybānī, Abū Yūsuf and the rest of the jurists of the other schools base their view on the Qurʾānic verse which says:

> And if anyone is slain wrongfully, we have given his heir authority (to demand *qiṣāṣ* or to forgive).[20]

According to them, one who is killed by a heavy instrument is also included, being murdered wrongfully. The Qurʾān says:

> Retaliation (*qiṣāṣ*) is prescribed for you in cases of murder.[21]

A big stone, or a huge piece of wood, or anything like that whenever used to kill has the same effect as a knife or sword. They are all instruments that can kill a person and, certainly, there is no error in considering a murderer who uses this type of instrument as an intentional killer. The Prophet once executed the death penalty on a woman who killed another woman with a piece of wood.[22] It is also reported from Anas

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[19]Al-Zaylaʿī, *Tabyīn al-Haqāʾiq*, vol.vi, p.100, al-Sarakhsī, *al-Mabsūṭ*, vol.xxvi, p.122.

[20]Qurʾān, 17:33

[21]Qurʾān, 2:178

[22]Al-Zaylaʿī, *Tabyīn al-Haqāʾiq*, vol.vi, p.100.

that a Jew was found guilty of killing a woman slave with a stone in order to take her jewellery, and the Prophet executed the death penalty on him.[23]

The jurists also have the same argument concerning murder by choking, or suffocating to death.[24] According to Abū Ḥanīfa, such a murderer cannot be subject to *qiṣāṣ*, although the death penalty should be imposed on the grounds of *taᶜzīr* in the case of repeated crimes in order to protect the state and society from his wickedness.[25] According to the rest of the scholars this crime is regarded as subject to *qiṣāṣ* since it is included under intentional killing (*al-qatl al-ᶜamd*).[26]

From the above discussion, it is clear that the opinion of the majority of the scholars is stronger since what is important in this case is the intent of the killer. If the killer is proved to have had an intention to kill, the rule of *qiṣāṣ* applies to him, regardless of the instrument used. However, if we accept Abū Ḥanīfa's view, we should still recognise the power of pardon by the heir of the victim, otherwise it might lead to injustice.

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[23]Al-Bukhārī, *Saḥīḥ*, vol.ix, p.5, al-Sarakhsī, *al-Mabsūṭ*, vol.xxvi, p.122.

[24]Also causing death by drowning, or hurling from a high place, or similar to that.

[25]Al-Sarakhsī, *al-Mabsūṭ*, vol.xxvi, p.152, al-Kāsānī, *Badāᵓiᶜ al-Sanāᵓiᶜ*, vol.vii, p.224.

[26]Al-Sarakhsī, *al-Mabsūṭ*, vol.xxvi, p.152, al-Kāsānī, *Badāᵓiᶜ al-Sanāᵓiᶜ*, vol.vii, p.235, al-Shīrāzī, *al-Muhadhdhab*, vol.ii, p.176, al-Bahūtī, *Kashshāf al-Qināᶜ*, vol.v, p.508, Ibn Taymiyya, *al-Siyāsa al-Sharᶜiyya*, p.103.

ii. Sodomy (*Liwāṭ*)

The jurists are in disagreement as to whether the offender of this crime is sentenced to death on the basis of *taᶜzīr* or on the grounds of *qiyās* with *ḥadd*. The disagreement on this matter also occurs within the Hanafī school, i.e. between Abū Ḥanīfa and his two disciples.[27]

Al-Shaybānī and Abū Yūsuf consider the act of sodomy to be classifed under the crime of adultery (*zinā*) and, is therefore, punishable by *ḥadd al-zinā*. It means that if the offender is married (*muḥṣan*) he has to be stoned to death and if he is not married (*ghayr muḥṣan*), he should be flogged with a hundred lashes. Abū Ḥanīfa, on the other hand, holds that this act is included under the crimes for which there is *taᶜzīr* which, of course, means that the ruler has the authority to determine its punishment. The punishment can possibly reach up to its maximum level, i.e. the death penalty, if the situation necessitates it, such as in the case of a repeated crime, or if the offender cannot be stopped by other punishments.[28]

The two disciples of Abū Ḥanīfa and other jurists base their view on the following Qurʾānic texts:

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[27]Ibn Qayyim, *Zād al-Maᶜād*, vol.iii, p.209.

[28]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.249, Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.38, Ibn Qayyim, *Zād al-Maᶜād*, vol.iii, p.209.

> Ye do commit lewdness (*fāhisha*), such as no people in creation (ever) committed before you.[29]

The word *fāhisha* is also used in the Qur'ān to describe *zinā* proper.[30] With regard to the general meaning of *zinā*, that is having sexual intercourse, i.e. penetrate the genitalia into the other genitalia in a prohibited way, without any doubt. Thus, this meaning does also exist in the crime of sodomy (*liwāṭ*) since the anus, or vagina and penis are all genitalia.[31]

Abū Hanīfa disagrees with the above reason and states that *liwāṭ* is not *zinā*. Only *zinā* proper is punishable by *ḥadd*. Likewise, *ḥadd al-sariqa* (theft) cannot be imposed on a plunderer (*muntahib*), or embezzler (*mukhtalis*). The fact that the Qur'ān describes it as *fāhisha*, still does not mean that *liwāṭ* is *zinā* because the Qur'ān also describes other great sins (*al-kabā'ir*) as *fāhisha*, as follows:

> Come not nigh to shameful deeds (*fawāhish*), whether open or secret.[32]

The Companions of the Prophet also had differences of opinion regarding its

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[29]Qur'ān, 29:28

[30]See: Qur'ān, 17: 32

[31]Al-Nafrāwī, *al-Fawākih al-Dawānī*, vol.ii, p.280, Ibn Qudāma, *al-Mughnī*, vol.viii, p.188.

[32]Qur'ān, 6:151

punishment which support the opinion that *liwāṭ* is a non-*ḥadd* crime.[33] Abū Bakr holds that those who practise sodomy should be burnt to death, ᶜAlī ibn Abī Tālib holds that they should be crushed under the wall, whilst Ibn ᶜAbbās states that they should be killed by stones thrown from a high place, based on the Qurʾānic text which says:

> We turned (the cities) upside down, and rained down on them brimstones.[34]

The majority of schools impose the death penalty on those who commit sodomy on the grounds of *qiyās* with *ḥadd*.[35] The Mālikīs hold that the offender can be punished up to the maximum limit of punishment. According to Imām Mālik, both parties in an act of sodomy should be stoned to death based on the *ḥadīth*:

> Stone both parties in an act of sodomy, the upper and the lower, *muḥṣan* or *ghayr muḥṣan*.[36]

Ibn Ḥabīb says that stoning to death is the general punishment for this crime regardless of whether the perpetrator is *muḥṣan* (married) or not, because Allah stoned the people of Lūṭ who commit *liwāṭ* without distinguishing between these two groups

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[33]Ibn Qayyim, *Zād al-Maᶜād*, vol.iii, p.209, Ibn Qudāma, *al-Mughnī*, vol.viii, p.188.

[34]Qurʾān, 11:82.

[35]Ibn Farḥūn, *Tabṣirat al-Ḥukkām*, vol.ii, p.197, al-Nafrāwī, *al-Fawākih al-Dawānī*, vol.ii, p.286, al-Shīrāzī, *al-Muhadhdhab*, vol.ii, p.268, al-Māwardī, *al-Aḥkām al-Sulṭāniyya*, p.213, Ibn Qudāma, *al-Mughnī*, vol.viii, p.188, Abū Yaᶜla, *al-Aḥkām al-Sulṭāniyya*, p.264, Ibn Taymiyya, *al-Siyāsa al-Sharᶜiyya*, p.78.

[36]Al-Shawkānī, *Nayl al-Awṭār*, vol.v, p.286.

of people.[37] Ahmad ibn Hanbal also agrees with Mālik regarding this matter.[38]

Al-Shāfiᶜī holds that the offender of this crime should be punished with the *ḥadd* penalty. However, there are two opinions on this *ḥadd* penalty. The first, which is more popular, is that the punishment is similar to that of *zinā*, i.e. flogging with one hundred lashes if the criminal is *ghayr muḥṣan*, and stoning to death if the criminal is *muḥṣan*, based on the *ḥadīth*:

> If a man has sexual intercourse with a man, both are adulterers (*zāniyān*) and if a woman has sexual intercourse with a woman, both are adulterers (*zāniyatān*).[39]

The second opinion is that both offenders should be killed based on the *ḥadīth*:

> Both who are found guilty of committing the act of the people of Lūṭ should be killed.[40]

This is due to the stronger prohibition of this crime than *zinā*, when we refer to its punishment in the Qurʾān concerning the people of Lūṭ.[41]

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[37]Ibn Farḥūn, *Tabṣirat al-Hukkām*, vol.ii, p.197, al-Nafrāwī, *al-Fawākih al-Dawānī*, vol.ii, p.286.

[38]Ibn Qudāma, *al-Mughnī*, vol.viii, p.188.

[39]Al-Shawkānī, *Nayl al-Awṭār*, vol.vii, p.287.

[40]Ibn Māja, *Sunan*, vol.ii, p.856.

[41]Al-Māwardī, *al-Aḥkām al-Sulṭāniyya*, p.224, al-Shīrāzī, *al-Muhadhdhab*, vol.ii, p.268.

iii. Espionage (*Tajassus*)

According to the Ḥanafīs and the Shāfiᶜīs, a spy who is a Muslim cannot be put to death.[42] This is based on the tradition which is reported by ᶜAlī who said:

> The Prophet commanded me, al-Zubayr and al-Miqdād: Go three of you to Rawḍa Khākh where you will find a woman with a letter, and then take that letter. So we went to the place and found the woman. She gave us the letter when we asked it and then brought it to the Prophet. The content of the letter is: From Ḥāṭib ibn Abi Baltaᶜa to the people of Mecca, telling them some matters of the Prophet. The Prophet asked: What is this O Ḥāṭib? He answered: Do not rush against me. I am a man who is in contact with my family and I would like them to be protected by the people of Mecca. I am not doing this because of apostasy, I am still a Muslim. Then the Prophet said: Verily he is telling the truth. Then ᶜUmar said: Let me behead this hypocrite. But the Prophet forbade him by saying: He witnessed the Battle of Badr.[43]

Some of the Ḥanbalīs have a tendency to accept this view.[44] Some of the Mālikīs state that the spy should be punished by flogging, imprisonment for a long period, or banishment to another place. It is said that the death penalty cannot be imposed if such a crime is not repeated.[45]

According to Imām Mālik, and some of the Ḥanbalīs, the death penalty may be

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[42]Abū Yūsuf, *al-Kharāj*, p.117, al-Shīrāzī, *al-Muhadhdhab*, vol.ii, p.242, Ibn Taymiyya, *al-Siyāsa al-Sharᶜiyya*, p.85, Ibn Qayyim, *Zād al-Maᶜād*, vol.iii, p.215.

[43]Ibn Faraj, *Aqḍiyat Rasūlillāh*, p.34.

[44]Ibn Taymiyya, *al-Siyāsa al-Sharᶜiyya*, p.85, Ibn Qayyim, *Zād al-Maᶜād*, vol.iii, p.215.

[45]Ibn Farḥūn, *Tabṣirat al-Hukkām*, vol.ii, p.223, Ibn Qayyim, *Zād al-Maᶜād*, vol.iii, p.215.

imposed on a Muslim spy if he is spying for the benefit of the enemy and against the Muslims. Saḥnūn holds that a Muslim who writes to the enemy (*ahl al-ḥarb*) giving them information about the Muslims should be killed without being asked to repent. Some Mālikīs however, say that the death penalty can be imposed only if he does not repent. It is also said that the death penalty may be awarded on the repeated crime of espionage.[46]

Regarding the non-Muslim spy, the jurists unanimously agree that *taᶜzīr* punishment by means of the death penalty should be imposed on him.[47]

The opinion of Mālik, i.e. the crime of espionage is punishable with the death penalty, seems more rational when we refer to its negative outcome which is threatening the safety of the Muslim community as well as the whole state. It is even worse if the spy who gives the information to the enemy against the Muslims is himself a Muslim.

iv. The Propagation of Heretical Doctrines (*al-Daᶜwa ilā al-Bidᶜa*)

Some of the heretical doctrines are completely false and divergent from the Islamic teachings and this can lead to infidelity (*kufr*), and those who propagate, or adopt these

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[46]Ibn Farḥūn, *Tabṣirat al-Hukkām*, vol.ii, p.223, Ibn Faraj, *Aqḍiyat Rasūlillāh*, p.34, Ibn Taymiyya, *al-Siyāsa al-Sharᶜiyya*, p.85, *al-Hisba fī al-Islām*, p.47, Ibn Qayyim, *Zād al-Maᶜād*, vol.iii, p.215.

[47]Abu Yūsuf, *al-Kharāj*, p.118, Ibn Taymiyya, *al-Hisba Fī al-Islām*, p.47, Ibn Farḥūn, *Tabṣirat al-Hukkām*, vol.ii, p.223, Wahba al-Zuhaylī, *al-Fiqh al-Islāmī wa Adillatuh*, vol.vi, p.201.

doctrines are considered apostates (*murtadd*), and punishable with *ḥadd* punishment, i.e. the death penalty. However, some of these heretical doctrines do not lead to *kufr* and are thus punishable by *taᶜzīr* punishment. The question arises as to whether the *taᶜzīr* punishment for this crime can reach its maximum limit, i.e. the death penalty.

Ibn ᶜĀbidīn mentions in his *Hāshiya* that *taᶜzīr* punishment should be inflicted on those who propagate or adopt heretical doctrines which do not lead to *kufr*. The punishment may vary depending on the situation. However, if there is no other way to stop the propagation of a heretical doctrine, its leader should be put to death for the sake of the public interest. If the propagator of a heretical doctrine which is not *kufr* furnishes the proof for his doctrine, which could possibly draw many people to embrace his doctrine, he should be also put to death for the public interest since his activity can affect the religion and this is even more menacing.[48]

According to the Mālikīs, the propagator of a heretical doctrines must be asked to repent first. If he repents he is acquitted but otherwise the death punishment should be imposed upon him.[49] Some of the Shāfiīs and the Hanbalīs agree with this opinion.[50]

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[48]Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.386.

[49]Ibn Farḥūn, *Tabṣirat al-Hukkām*, vol.ii, p.223.

[50]Ibn Taymiyya, *al-Siyāsa al-Sharᶜiyya*, p.85, Ibn Qayyim, *al-Turuq al-Hukmiyya*, p.103, al-Bahūti, *Kashshāf al-Qināᶜ*, vol.vi, p.126.

To sum up, the majority of the jurists agree that those who propagate heretical doctrines and disunite the Muslim community are punishable with *taᶜzīr* punishment by means of the death penalty, on condition that there is no other way of stopping them from furthering their activity. This is important to protect the whole Muslim community from any harm and impurity in their religion caused by such a propagation.

v. Drinking Intoxicants

All the schools of Islamic law hold that drinking intoxicants is included under *ḥadd* crime which is punishable with flogging. Although they disagree about the number of lashes which should be inflicted, they all claim it to have been fixed by the Prophet. According to the Shāfiᶜī and the Hanbalī view, the *ḥadd* punishment for drinking intoxicants is forty lashes based on the tradition of the Prophet who commanded the Muslims during his life-time to beat a man who drank intoxicants up to forty lashes.[51] According to the Hanafīs, the Mālikīs and another view of the Hanbalīs, the punishment for drinking is eighty lashes. They base their view on the tradition of ᶜUmar and ᶜAlī who imposed eighty lashes on those who drank intoxicants. They claim that this practice is in accordance with the tradition of the Prophet who used to beat those who drank intoxicants with two sticks forty times.[52] Some jurists hold the view that the

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[51] Al-Shīrāzī, *al-Muhadhdhab*, vol.ii, p.286, al-Māwardī, *al-Aḥkām al-Sulṭāniyya*, p.223, al-Nawāwī, *Minhāj al-Tālibīn*, p.124, Abū Yaᶜlā, *al-Aḥkām al-Sulṭāniyya*, p.269.

[52] Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.295, al-Kāsānī, *Badāᵓiᶜ al-Sanāᵓiᶜ*, vol.vii, p.39, Mālik b. Anas, *al-Mudawwana al-Kubrā*, vol.xvi, p.261, Ibn Rushd, *Bidāyat al-Mujtahid*, vol.ii, p.543, al-Nafrāwī, *al-Fawākih al-Dawānī*, vol.ii, p.289, Ibn Qudāma, *al-Mughnī*, vol.viii, p.307, al-Bahūtī, *Kashshāf al-Qināᶜ*, vol.vi, p.117.

ḥadd is forty lashes with another forty lashes as *taᶜzīr*.[53]

As to the recidivist who keeps on drinking intoxicants, *taᶜzīr* punishment should be imposed on him. It is reported that a man who drank intoxicants for the third time was brought before the Prophet who ordered him to be beaten, and when he committed it again for the fourth time, the prophet ordered him to be flogged.[54] It seems that flogging (*jald*) is stronger than beating (*ḍarb*) since there is a report about the beating being done with things like shoes, cloths, etc. whereas the flogging being done with particular devices such as canes, or whips.[55] In another *ḥadīth*, it is narrated by reliable transmitters that the Prophet said:

> If a person drinks wine, lash him for the first three times and put him to death for the fourth.[56]

It is clear from the above *ḥadīth* that repeating the crime will result in the stronger punishment, either by flogging which is stronger than beating as in the first *ḥadīth*, or by the death penalty as in the latter. However, it is worth mentioning here that the death penalty in the case of repeating the crime of drinking intoxicants has never been imposed in practice. The Prophet did not inflict the death penalty on a man who

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[53]Al-Māwardī, *al-Aḥkām al-Sulṭāniyya*, p.223, al-Khaṭīb, *Mughnī al-Muḥtāj*, vol.iv, p.192, al-Nawāwī, *Minhāj al-Tālibīn*, p.124.

[54]Abū Zahra, *al-ᶜUqūba*, p.256.

[55]Ibn Qudāma, *al-Mughnī*, vol.viii, p.315.

[56]Al-Tirmidhī, *Sunan*, vol.iv, p.48, al-Shawkānī, *Nayl al-Awṭār*, vol.vii, p.324.

was brought before him for the fourth time, but simply ordered him to be beaten.[57]

Most schools of Islamic law claim that the death penalty for a person who keeps on drinking intoxicants after having been sentenced for the third time has been abrogated and is no longer applicable. According to them, the *ḥadīth* which enacted this type of punishment was aimed at deterring the Muslims from drinking intoxicants during its early prohibition.[58] The Zāhiri school, however, holds that a person should be sentenced to death for the fourth offence because of the previously mentioned *ḥadīth*.[59]

Apart from the above offences, there are several other offences which may be punishable with the death penalty as discussed by the jurists, such as insulting the Prophet, habitual theft, sorcery and neglecting prayer after being asked to repent.[60]

The Summary of the Jurists' Discussion on *Taᶜzīr* Punishment by Means of the Death Penalty

From the above discussion, it can be concluded that if the public interest necessitates it,

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[57]Al-Shawkānī, *Nayl al-Awṭār*, vol.vii, p.325, Ibn Taymiyya, *al-Siyāsa al-Sharᶜiyya*, p.85, Ibn Qayyim, *al-Turuq al-Hukmiyya*, p.104.

[58]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.286, al-Kāsānī, *Badāᵓic al-Sanāᵓiᶜ*, vol.vii, p.57, al-Khaṭīb, *al-Iqnāᶜ*, p.531, al-Shawkānī, *Nayl al-Awṭār*, vol.vii, p.326.

[59]Ibn Hazm, *al-Muḥallā*, vol.xi, p.365.

[60]See: Ibn Qayyim, *Zād al-Maᶜād*, vol.iii, p.214, Ibn Farhūn, *Tabṣirat al-Hukkām*, vol.ii, p.150, Wahba al-Zuhaylī, *al-Fiqh al-Islāmī wa Adillatuh*, vol.vi, p.200, Ibn Taymiyya, *al-Siyāsa al-Sharᶜiyya*, p.85.

taᶜzīr punishment by means of the death penalty is recognised by all the four schools. Some of them make it easy to practise while others narrow down its practicability.

The Hanafī school legalizes this type of *taᶜzīr* punishment in the case of crimes which are similar to murder and crimes which affect the security of the Muslim community. Some Hanbalī scholars agree with the opinion of the Hanafīs.

The Mālikīs also recognise *taᶜzīr* punishment by means of the death penalty. Imām Mālik maintains that a propagator of a heretical doctrines and the spy against the Muslims can be put to death as they are very dangerous people who affect the strength of the Muslim community. Some Shāfiᶜīs also agree with the Mālikīs' opinion.

As a conclusion, *taᶜzīr* punishment by means of the death penalty should be accepted since it is impossible to be content solely with the *ḥadd* and *qiṣāṣ* for imposing the death penalty on the offender. There are many other crimes which are considered to be more harmful and dangerous to the public interest and the Muslim community than the crimes for which there are fixed punishments (i.e. *ḥudūd* and *qiṣāṣ*), and which cannot be deterred with punishments other than the death penalty. There is also an obstinate culprit who keeps on committing violent crime despite being punished again and again by the judge who can be stopped only with the death penalty. It is, in fact, no use to keep such a bad criminal alive in the society after making every effort to rectify his behaviour. That will also deter any potential criminal from committing the crime.

Some of these crimes might affect the security of the Islamic state and the whole Muslim community and some others might affect the Islamic religion and belief, while the rest might affect the individual interest.

It is to be remembered that though *taᶜzīr* punishment by means of the death penalty is determined by the ruler, he cannot exercise his power without any limitation. The ruler has to follow the *Sharīᶜa* guidelines when imposing the death penalty. Therefore, it can only be enforced in dire necessity and as little as possible.

In addition, when the discussion of the Muslim scholars concerning this punishment is thoroughly examined, it can be clearly noticed that *taᶜzīr* punishment, by means of the death penalty, should not be imposed on the first timer. Only those obstinate criminals who keep on repeating the crime deserve it. Thus, it can be said that the death penalty, as a *taᶜzīr* in Islamic criminal law, is enforced as a last resort.

Mode of Execution

The jurists have differences of opinion with regard to the devices that can be used to execute the death penalty in the case of *qiṣāṣ*.[61] Some jurists such as the Hanafīs and the Hanbalīs stipulate that only the sword be used, based on the *ḥadīth*:

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[61]See: Al-Kāsānī, *Badāᵓiᶜ al-Sanāᵓiᶜ*, vol.vii, p.245, al-Zaylaᶜī, *Tabyīn al-Haqāᵓiq*, vol.vi, p.106, al-Sarakhsī, *al-Mabsūṭ*, vol.xxvi, p.125, Mālik b. Anas, *al-Mudawwana al-Kubrā*, vol.vi, p.426, Ibn Rushd, *Bidāyat al-Mujtahid*, vol.ii, p.495, al-Shīrāzī, *al-Muhadhdhab*, vol.ii, p.186, al-Bahūtī, *Kashshāf al-Qināᶜ*, vol.v, p.538.

No *qiṣāṣ* can be executed unless with the sword.[62]

The reason the sword is chosen as a means to execute the death penalty is that it is practicable without imposing too much suffering on the offender and his death is of course, certain.[63] According to Mālik and al-Shāfiᶜī, the murderer should be killed in the same way as he killed his victim since *qiṣāṣ* means equality (*mumāthala*). They base their view on the *Sunna* of the Prophet who executed the death penalty on a Jew who killed a woman with a stone by crushing his head between two big stones.[64]

In the case of *taᶜzīr*, there is no definite device that can be used to execute the death penalty. If we refer back to the tradition of the Prophet and his Companions, it can be noticed that there are many types of devices used to execute the death penalty on the wrongdoer. For instance, the Prophet executed the death penalty on a Jew who killed a woman with a stone by crushing his head between two big stones, as above. Abū Bakr commanded that those who practise sodomy (*liwāṭ*) be burnt to death, whilst Ibn ᶜAbbās killed them by stones thrown from a high place. (See above, p.60) Abū Yūsuf states that someone spying against the Muslims should be beheaded. Ibn Farḥūn mentions in his book *Tabṣirat al-Hukkām*, when dealing with the punishment for an obstinate person

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[62]Al-Shawkānī, *Nayl al-Awṭār*, vol.vii, p.165.

[63]Al-Sarakhsī, *al-Mabsūt*, vol.xxvi, p.125, al-Bahūtī, *Kashshāf al-Qināᶜ*, vol.v, p.538.

[64]Mālik b. Anas, *al-Mudawwana al-Kubrā*, vol.xvi, p.426, Ibn Rushd, *Bidāyat al-Mujtahid*, vol.ii, p.495, al-Shīrāzī, *al-Muhadhdhab*, vol.ii, p.186.

who neglects the prayer, that he should be killed with the sword.[65]

From the above discussion, it can be concluded that for the purpose of execution of the death penalty in the case of *taᶜzīr*, any means can be used as long as it hastens the death of the offender and serves as a deterrent.

2.3.1.2 Flogging (*Jald*)

Flogging is considered as the main punishment in Islamic criminal law. It is the recognised punishment for the *ḥudūd* crimes of *zinā* (fornication) and *qadhf* based on the Qurʾānic injunctions as follows:

> The woman and the man guilty of fornication, flog each of them with a hundred stripes.[66]

> And those who launch a charge against chaste woman, and produce not four witnesses (to support their allegation), flog them with eighty stripes.[67]

It is also the recognised *ḥadd* punishment for drinking intoxicants based on the tradition of the Prophet who commanded the Muslims during his lifetime to flog a person who drank intoxicants. This practice was then acted upon by the caliphs and the

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[65]Ibn Farḥūn, *Tabṣirat al-Hukkām*, vol.ii, p.150.

[66]Qurʾān, 24:2

[67]Qurʾān 24:4

Muslims.[68]

Flogging is also recognised as the main punishment in the case of *taᶜzīr* crimes based on the Qurʾān and the *Sunna* of the Prophet.

i. Qurʾān:

> As to those women on whose part ye fear disloyalty and ill-conduct, admonish them (first), (next), refuse to share their beds, (and lastly) beat them (lightly).[69]

According to the above Qurʾānic text, beating is considered as one of the punishments of *nushūz* (disloyalty to one's husband). Since *nushūz* is a *maᶜṣiya*, the beating which is mentioned in the above text is considered as a *taᶜzīr* punishment, and beating is a type of flogging.[70]

ii. *Sunna*:

Abū Burda reported that he heard the Prophet says: Nobody can be flogged more

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[68]See: Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.295, Mālik b. Anas, *al-Mudawwana al-Kubrā*, vol.xvi, p.261, al-Shīrāzī, *al-Muhadhdhab*, vol.ii, p.286, Ibn Qudāma, *al-Mughnī*, vol.viii, p.307.

[69]Qurʾān, 4:34

[70]See: Bahnasī, *al-ᶜUqūba Fī al-Fiqh al-Islāmi*, p.186. According to him, the term *ḍarb* (beating) is used while dealing with *taᶜzīr* instead of *jald* (flogging) which is used while dealing with *ḥadd* punishments.

than ten lashes except in the case of a *ḥadd*.[71]

Regarding the above *ḥadīth* text, Ibn Farḥūn holds that it is a clear proof of *ta'zīr*.[72]

It is also reported that the Prophet inflicted one hundred lashes on a husband who had had sexual intercourse with his wife's slave with her permission.[73]

In another *ḥadīth*, the Prophet says:

Teach your child prayer at the age of seven, and beat him if he fails to do so at the age of ten.[74]

All the above *ḥadīth* texts indicate the legality of *ta'zīr* punishment by flogging.

a. The Scope of Flogging as a *Ta'zīr* Punishment

According to the jurists, flogging is an adequate punishment for dangerous offenders which causes no burden to the state. Flogging is also more advantageous to offenders

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[71]Abū Dāwūd, *Sunan*, vol.iv, p.167.

[72]Ibn Farḥūn, *Tabṣirat al-Ḥukkām*, vol.ii, p.217.

[73]Al-Shawkānī, *Nayl al-Awṭār*, vol.vii, p.290.

[74]Al-Kāsānī, *Badā'i' al-Sanā'i'*, vol.vii, p.64.

than other punishments as it will not deprive them of their productive capacity and their dependents will not suffer the feeling of loss as happens in the case of imprisonment. Moreover, it can be carried out quickly and decisively.[75] There are many precedents of flogging being inflicted on the offender as a *taᶜzīr* punishment throughout the first century of Islamic history. The Prophet, during his lifetime, imposed one hundred lashes on a man who had had sexual intercourse with his wife's slave with her permission, as mentioned earlier. He also imposed the punishment of flogging in cases of theft which are not included under the *ḥadd* punishment.[76]

Among the Companions who used to punish *taᶜzīr* offenders with flogging is ᶜUmar ibn al-Khaṭṭāb. He flogged Maᶜn ibn Zā'ida one hundred lashes and then repeated it for forging the property of *bayt al-māl*. ᶜUmar also flogged Dubaiᶜ ibn ᶜAsal for *bidᶜa* (heresy) and it is said that the number of lashes which was imposed upon him was more than that of *ḥadd*. Abū Bakr and ᶜUmar used to order that a man and a woman found sleeping in the same blanket be flogged one hundred lashes. It is also reported that ᶜAlī ibn Abī Tālib flogged al-Najāshī who drank intoxicants during the day of Ramaḍān eighty lashes as a *ḥadd* punishment with another twenty lashes as a *taᶜzīr* punishment for not fasting. He also flogged a man found sleeping with a woman without having sexual intercourse ninety-eight lashes.[77]

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[75]ᶜĀmir, *al-Taᶜzīr fī al-Sharīᶜa al-Islāmiyya*, p.343.

[76]Al-Shawkānī, *Nayl al-Awṭār*, vol.vii, p.300, Ibn Taymiyya, *al-Hisba fī al-Islām*, p.56.

[77]Ibn Qudāma, *al-Mughnī*, vol.viii, p.325, Ibn Taymiyya, *al-Siyāsa al-Sharᶜiyya*, p.84, *al-Hisba fī al-Islām*, p.46, Wahba al-Zuhaylī, *al-Fiqh al-Islāmi wa Adillatuh*, vol.vi, p.207.

Al-Māwardī mentions in his book *al-Aḥkām al-Sulṭāniyya* that there are many *taᶜzīr* crimes which are punishable with flogging. Among these are sexual crimes such as having sexual intercourse with a shared slave, with a married slave, or with a son's slave, or with a dead corpse, etc. It is reported that in these cases, the flogging imposed is one hundred lashes. Flogging can also be imposed in the case of a man found with a woman in the same blanket, and in similar cases which are considered as leading to *zinā*.[78]

Other *taᶜzīr* crimes which are punishable with flogging are theft of types which are exempted from *ḥadd* punishment such as stealing property which is not kept in its proper place of custody (*ḥirz*), or when the stolen property does not reach the necessary minimum value (*niṣāb*), or attempted (*shurūṭ*) theft. In these cases the criminal should be flogged and the number of lashes depends upon mitigating and aggravating factors.[79]

Al-Kāsānī holds in his book *Badāʾiᶜ al-Sanāʾiᶜ* that if *taᶜzīr* punishment is to be imposed for the commission of crimes which are not of the *ḥudūd* type, the ruler has the option to choose whether to impose flogging, or detention, or admonition. However, if the crimes are those of the type punishable by a *ḥadd* punishment but do not fulfil the elements of *ḥadd*, flogging must be imposed.[80]

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[78] Al-Māwardī, *al-Aḥkām al-Sulṭāniyya*, p.237.

[79] *Ibid.*

[80] Al-Kāsānī, *Badāʾiᶜ al-Sanāʾiᶜ*, vol.vii, p.64. See also: Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.335.

From the above discussion on the traditions of the Prophet and the Companions and also the opinions of the *fuqahā'*, it can be concluded that flogging is considered the main punishment in the cases of *taᶜzīr* crimes which are of the *ḥudūd* type, but in other cases flogging becomes optional. This can be a guiding precedent though not a binding one for the judge in making decisions on these matters. The judge can still impose another punishment in addition to flogging for certain reasons, for example in the case of a criminal offence whose perpetrator cannot be so stopped.[81]

With regard to criminals, the *fuqahā'* state that the punishment of flogging should be imposed upon a wicked person who cannot be stopped, and on a criminal who keeps on repeating the crime despite being punished with other types of *taᶜzīr* punishment. Concerning this matter, the *fuqahā'* have classified people into four categories, i.e. the most noble class (the highest rank), the noble class, the middle class, and the lower class. According to them, flogging can be inflicted only on lower class people.[82] (For further details on this point, see below, p.134)

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[81]This view is in fact, supported by the jurists who show a tendency to limit the maximum number of lashes in *taᶜzīr* cases as discussed below, p.... See: Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.336, Ibn ᶜĀbidin, *Hāshiya*, vol.vi, p.106, Ibn Qudāma, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol.x, p.347.

[82]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.336, al-Kāsānī, *Badā'iᶜ al-Sanā'iᶜ*, vol.vii, p.64, al-Zaylaᶜī, *Tabyīn al-Haqā'iq*, vol.iii, p.208, Ibnᶜ Ābidīn, *Hāshiya*, vol.vi, p.104, al-Māwardī, *al-Aḥkām al-Sulṭāniyya*, p.236.

b. The Number of Lashes in *Taᶜzīr* Cases

Though the scholars unanimously accept flogging for *taᶜzīr*, they are not in agreement as to the maximum number of lashes allowed in *taᶜzīr* cases, and whether it is possible to exceed the number of lashes in the *ḥadd* punishment or not.

According to the Mālikī school, the right to determine the maximum number of lashes in the case of *taᶜzīr* is left to the discretion of the ruler because it depends upon the public interest and the seriousness of the crime, and the criminal's condition. Therefore, the number of lashes allowed in the case of *taᶜzīr* may exceed that of the *ḥadd* punishment as long as the ruler thinks the circumstances require it.[83]

Abū Ḥanīfa and al-Shaybānī fix the maximum number of lashes in the case of *taᶜzīr* at thirty-nine, while Abū Yūsuf holds it to be seventy-five.[84] This controversy results from their differences in intepreting the *ḥadīth* of the Prophet which says:

> One who exceeds the limits of the *ḥadd* punishment in a non *ḥadd* crime is among the transgressors.

Abū Ḥanīfa and al-Shaybānī interpret the word "*ḥadd*" in the *ḥadīth* to be any

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[83]Ibn Farḥūn, *Tabṣirat al-Hukkām*, vol.ii, p.221, Ibn Qudāma, *al-Mughnī*, vol.viii, p.325.

[84]Al-Kāsānī, *Badāʾiᶜ al-Sanāʾiᶜ*, vol.vii, p.64, Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, pp.334-336.

ḥadd punishment and according to them, the complete *ḥadd* for a slave who commits adultery is forty lashes. Thus the maximum number of lashes in the case of *taᶜzīr* must not exceed forty lashes, i.e. thirty-nine or less. Abū Yūsuf, on the other hand, interprets the word "*ḥadd*" to be the *ḥadd* for a free man and the minimum number of lashes in a *ḥadd* punishment for a free man is eighty. Thus, according to him, in the case of *taᶜzīr* it must not exceed eighty lashes. Also, there was a tradition of ᶜAlī ibn Abī Tālib who fixed the maximum number of lashes in the case of *taᶜzīr* at seventy-five, so Abū Yūsuf follows this practice.[85]

The Shāfiᶜīs, in this context, have three different opinions; the first agrees with Abū Hanīfa, the second agrees with Abū Yūsuf, and the third states that the maximum limit might surpass seventy-five but should not exceed one hundred, on condition that each *taᶜzīr* crime is to be assessed by an analogical comparison (*qiyās*) with a *ḥadd* crime similar to it, for example the punishment for preparatory acts of adultery should be less than that for adultery though it may exceed the punishment for *qadhf*.[86]

Many Hanbalīs also have opinions in this regard which are similar to those of the Shāfiᶜīs. In addition, there is a fourth view of the Hanbalīs which states that the number of lashes in the case of *taᶜzīr* should not exceed ten lashes,[87] based on the

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[85] *Ibid.*

[86] Al-Ramlī, *Nihāyat al-Muḥtāj*, vol.viii, p.22, al-Shīrazī, *al-Muhadhdhab*, vol.ii, p.288, al-Māwardī, *al-Aḥkām al-Sulṭāniyya*, p.236.

[87] Ibn Qudāma, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol.x, p.347, al-Bahūtī, *Kashshāf al-Qināᶜ*, vol.vi, p.123, Abū Yaᶜlā, *al-Aḥkām al-Sulṭāniyya*, p.280.

ḥadīth of the Prophet which says:

> Nobody can be flogged more than ten lashes except in the case of *ḥadd*.[88]

From the above discussion, it seems that the view of the Mālikīs, i.e. the number of lashes in the case of *taᶜzīr* may exceed that of the *ḥadd* punishment is more preferable since it was practised by the Prophet and his Companions. (as discussed above, p.74)

c. Mode of Execution

i. Device

For the purpose of whipping in the cases of *taᶜzīr*, devices such as canes and sticks may be used as well as whip. A whip should have no knot upon it and must be neither wet nor dry, i.e. between two extremes, so that the objective of *taᶜzīr* can be achieved without imposing too much suffering or damage on the offender.[89]

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[88]Abu Dāwūd, *Sunan*, vol.iv, p.167.

[89]Ibn Farḥūn, *Tabṣirat al-Hukkām*, vol.ii, p.224, Ibn Qudāma, *al-Mughnī*, vol.viii, p.315.

ii. Whipping

According to the Shāfiᶜīs and the Hanbalīs, the stripe in the case of *taᶜzīr* should be less in degree than that of *ḥudūd*, while the Mālikīs hold that the stripe in both cases should be in the same degree so long as it serves as deterrent.[90] However, the Hanafī jurists hold that the stripe in the case of *taᶜzīr* can be stronger than that in *ḥudūd*. They base their opinion on the grounds that whipping in the case of *taᶜzīr* is to serve as a deterrent, and these cases have already been alleviated as to the number of lashes. Thus if the stripe is too delicate, such an objective will not be achieved.[91]

Al-Kāsānī adds another reason with regard to this matter: whipping inflicted on a *taᶜzīr* offender serves as a deterrent only and does not hold the concept of expiation (*kaffāra*) such as in the case of *ḥudūd*. This is based on the *ḥadīth* of the Prophet which says:

> *Hudūd* punishment can expiate (*kaffāra*) the sin of the convicted.[92]

The stripe should, therefore, be stronger in the case of *taᶜzīr* than that of *ḥudūd*.[93]

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[90]Al-Māwardī, *al-Aḥkām al-Sulṭāniyya*, p.238, Ibn Qudāma, *al-Mughni*, vol.viii, p.316, Ibn Taymiyya, *al-Siyāsa al-Sharᶜiyya*, p.86.

[91]Al-Zaylaᶜī, *Tabyīn al-Haqāiq*, vol.iii, p.210, al-Sarakhsī, *al-Mabsūṭ*, vol.xxiv, p.36, al-Kāsānī, *Badāiᶜ al-Sanāiᶜ*, vol.vii, p.64, Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.336.

[92]Al-Bukhārī, *Saḥīḥ*, vol.viii, p.133.

[93]Al-Kāsānī, *Badāiᶜ al-Sanāiᶜ*, vol.vii, p.64.

The Hanafī jurists are not in agreement regarding the interpretation of the meaning of the "strong" whip in the case of *taᶜzīr*. Some of them hold the opinion that the strong whip means that it is applied only on a certain part of the body without spreading it over the whole body of the convicted man as in the case of *ḥudūd*, whilst other jurists interpret the strong whip to refer to the whip itself, i.e. it should be strong and heavy. They base their opinion on the *ḥadīth* reported by Abū ᶜUbayda and some others that a man swore against Umm Salama, then ᶜUmar flogged him with thirty heavy lashes that caused his body to swell and bleed.[94]

Ibn ᶜĀbidīn in his *Hāshiya* also mentions that the strong whip in the case of *taᶜzīr* should not be applied beyond the maximum limit of the number of lashes permitted in the case of *taᶜzīr* i.e. thirty-nine. Otherwise it is considered as more than eighty lashes with respect to the suffering involved. He considers the whip is to be applied on a certain part of the body and it should be hard.[95]

The person who whips should not raise his hand above his head so as not to lacerate the skin of the convicted.[96]

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[94]Al-Zaylaᶜī, *Tabyīn al-Haqāiq*, vol.iii, p.210, al-Kāsānī, *Badāiᶜ al-Sanāiᶜ*, vol.vii, p.64, Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.336.

[95]Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.105.

[96]Mālik b. Anas, *al-Mudawwana al-Kubrā*, vol.xvi, p.249, Ibn Qudāma, *al-Mughnī*, vol.viii, p.314.

iii. The Situation of the Convicted

The stripes should be inflicted, in the case of a male, while he is standing and, in the case of a woman, while she is sitting. While flogging a man, it is necessary that his clothes be taken off except the girdle. This condition is laid down by Mālik ibn Anas and Abū Ḥanīfa. Conversely, al-Shāfiᶜī and Aḥmad ibn Ḥanbal hold that such clothes should be left on the body of the convict unless they prevent the effect of the punishment.[97]

The clothes of a woman are to be tied around her except the outward garment that would prevent the effect of the punishment.[98]

iv. Organs of the Body that Can or Cannot be Whipped

In the case of *taᶜzīr*, the face and the genitalia should be avoided, because these parts of the body are very sensitive and may cause the offender's death. With regard to the face, the Prophet said:

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[97]For further details on this point, see: Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.337, Mālik b. Anas, *al-Mudawwana al-Kubrā*, vol.xvi, p.215, Ibn Rushd, *Bidāyat al-Mujtahid*, vol.ii, p.535, Ibn Qudāma, *al-Mughnī*, vol.viii, pp.313-315, Abū Yaᶜlā, *al-Aḥkām al-Sulṭāniyya*, p.283, Ibn Taymiyya, *al-Siyāsa al-Sharᶜiyya*, p.86.

[98]Mālik b. Anas, *al-Mudawwana al-Kubrā*, vol.xvi, p.215, Ibn Qudāma, *al-Mughnī*, vol.viii, p.315.

If anyone of you flogs, the face must be avoided.[99]

This is because most of the human senses are on the face. Thus the stripes on the face may cause damage to the human senses, and causing damage in the case of *taᶜzīr* is prohibited.[100]

Abū Yūsuf adds that the chest and the stomach are also to be avoided since they may also lead to death. He holds that the stripes should be inflicted only on the back and the buttocks of the convicted.[101] Mālik ibn Anas and some other scholars agree with Abū Yūsuf on this point.[102]

From the above, it can be seen that flogging is the main form of punishment in Islamic criminal law. It is applied in a moderate way and which is not harmful to the offender. This is different from some other systems of law, for instance, Malaysian criminal law which considers flogging to be additional punishment for violent crimes and therefore, it is applied in a harsh manner which may cause serious injury to the offender. (See below, p.255)

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[99]Al-Tibrīzī, *Mishkāt al-Maṣābīḥ*, vol.ii, p.310.

[100]Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.105, Ibn Farḥūn, *Tabṣirat al-Hukkām*, vol.ii, p.203, al-Māwardī, *al-Aḥkām al-Sulṭāniyya*, p.238, Ibn Qudāma, *al-Mughnī*, vol.viii, p.314, Ibn Taymiyya, *al-Siyāsa al-Sharᶜiyya*, p.86.

[101]Al-Zaylaᶜī, *Tabyīn al-Haqā'iq*, vol.iii, p.210.

[102]Ibn Rushd, *Bidāyat al-Mujtahid*, vol.ii, p.535, al-Sarakhsī, *al-Mabsūṭ*, vol.xxiv, p.36.

2.3.1.3 Crucifixion (*Salb*)

Crucifixion (*ṣalb*) is originally a *ḥadd* punishment for the crime of highway robbery (*ḥirāba*) based on the following Qurʾānic text:

> The punishment of those who wage war against God and His Apostle, and strive with might and main for mischief through the land is : execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land.[103]

According to the Shāfiʿīs, the Hanbalīs and some of the Mālikīs, crucifixion is inflicted after the condemned man has been put to death in order to serve as a deterrent to others,[104] whilst the Hanafīs and some other Mālikīs hold that the condemned man is to be crucified alive before being killed.[105] Ibn Hazm, on the other hand, holds that crucifixion is a separate punishment which should not be inflicted in conjunction with any other punishment, whether before or after. Thus, if the judge chooses to impose this punishment, the offender should be crucified alive, left until he dies, and then taken down and buried.[106]

Unlike crucifixion as a *ḥadd* punishment, crucifixion for *taʿzīr* is not

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[103]Qurʾān, 5:36

[104]Al-Ramlī, *Nihāyat al-Muḥtāj*, vol.viii, p.5, Ibn Qudāma, *al-Mughnī*, vol.viii, p.290, Ibn Rushd, *Bidāyat al-Mujtahid*, vol.ii, p.559, Ibn Taymiyya, *al-Siyāsa al-Sharʿiyya*, p.66.

[105]Al-Zaylaʿī, *Tabyīn al-Haqāʾiq*, vol.iii, p.237, Ibnʿ Ābidīn, *Hāshiya*, vol.vi, p.186, Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.408, Mālik b. Anas, *al-Mudawwana al-Kubrā*, vol.xvi, p.299.

[106]Ibn Hazm, *al-Muḥallā*, vol.xi, p.317.

accompanied by the death sentence, whether before or after its infliction. It is not even a death penalty but is simply a type of corporal punishment which affects only the body of the offender and not his soul. The offender is crucified, i.e. hung up on a cross, alive and will be given food and drink. The offender also has the opportunity to make ablution and perform daily prayer. The jurists stipulate that *taᶜzīr* punishment by means of crucifixion should not exceed three days.[107]

The jurists attest the legality of crucifixion as a *taᶜzīr* punishment by mentioning the tradition of the Prophet who crucified alive a man called Abu Nāb.[108]

It is interesting to note that this type of punishment is intended to reform the offender and to give publicity to the whole society and thus it serves as a deterrent. As this is a *taᶜzīr* punishment, it is left to the discretion of the ruler whether to enforce it or not depending upon the suitability of its application according to place and time.

2.3.2 Withdrawal of Freedom

2.3.2.1 Banishment or Exile (*Nafy / Taghrīb*)

Banishment or exile in the Qurʾān and the *ḥadīth* is a punishment for the crime of

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[107]Al-Māwardī, *al-Aḥkām al-Sulṭāniyya*, p.239, al-Bahūtī, *Kashshāf al-Qināʿ*, vol.vi, p.125, Abū Yaᶜlā, *al-Aḥkām al-Sulṭāniyya*, p.283.

[108]Ibn Farḥūn, *Tabṣirat al-Hukkām*, vol.ii, p.224, al-Māwardī, *al-Aḥkām al-Sulṭāniyya*, p.239.

fornication (*zinā ghayr al-muḥṣan*) and the crime of armed robbery (*ḥirāba*). In the case of fornication the punishment of exile is based on the following *ḥadīth*:

> Abū Hurayra reported that the Prophet judged that an unmarried person who was guilty of illegal sexual intercourse should be exiled for one year and receive the *ḥadd* punishment.[109]

> In another *ḥadīth*, Zayd ibn Khālid al-Juhānī narrated: I heard the Prophet ordering that an unmarried person guilty of illegal sexual intercourse be flogged one hundred stripes and be exiled for one year. ʿUmar ibn al-Khaṭṭāb also exiled such a person and this practice is still valid.[110]

Based on the above *ḥadīth*, the majority of the jurists hold that banishment or exile is a *ḥadd* punishment for this crime. Abū Ḥanīfa, on the other hand, considers it as a mere *taʿzīr* since the Qurʾān mentions only flogging as a *ḥadd* punishment for the crime of fornication.(See above, p.35)

In fact, there are many *ḥadīths* of the Prophet concerning the punishment of exile in the case of fornication which are narrated in different ways. Sometimes the word *taghrīb* is used and sometimes the word *nafy* is used.[111]

Regarding the crime of armed robbery, the punishment of exile is prescribed

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[109]Al-Bukhārī, *Saḥīḥ*, vol.viii, p.142.

[110]*Ibid.*

[111]See: al-Bukhārī, *Saḥīḥ*, vol.viii, p.142, al-Tirmidhī, *Sunan*, vol.iv, pp.40-41, *Saḥīḥ Muslim*, vol.iii, p.106, Ibn Māja, *Sunan*, vol.ii, p.853.

based on the following Qur)ānic text:

> The punishment of those who wage war against God and His Apostle, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land.[112]

In the case of armed robbery, the punishment of exile is a translation of the word *nafy* rather than *taghrīb*. The jurists hold different opinions as to the meaning of *nafy* in the case of armed robbery, as discussed below.

Apart from the two *ḥadd* crimes which are mentioned above, banishment can be imposed for other crimes on the basis of *taᶜzīr*. This is unanimously agreed by the jurists.[113]

a. The Place for Banishment and Its Distance

The jurists have differences of opinion regarding the place for banishment and its distance, both in the case of armed robbery and fornication. In the case of the former, their differences result from the differences in interpreting the Qur)ānic verse concerning this punishment, i.e. "...or exile from the land".

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[112]Qur)ān, 5:33, The punishment for the crime of armed robbery can be classified into four types according to four classifications of this crime. For details, see: Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, pp.183-188, Ibn Rushd, *Bidāyat al-Mujtahid*, vol.ii, pp.558-560, al-Shīrāzī, *al-Muhadhdhab*, vol.ii, pp.284-285, Ibn Qudāma, *al-Mughnī*, vol.viii, pp.289-294.

[113]ᶜAwda, *al-Tashrīᶜ al-Jināʾī*, vol.i, p.699.

According to Mālik ibn Anas and some other jurists such as al-Ḥasan al-Baṣrī, Qatāda and al-Zuhrī, "exile from the land" means expelling a criminal to another place to be kept in imprisonment there until his repentance is proved. The distance between the two places should be less than two *marḥala*, i.e. less than the distance for which the prayer can be shortened (*qaṣr*), which possibly means that the place for banishment is inside the Muslim territory.[114] Another opinion states that the criminal should be banished from the Muslim territory (*dār al-Islām*) to non-Muslim territory (*dār al-ḥarb*).[115] According to Abū Ḥanīfa and another opinion of Mālik, the criminal is not to be taken anywhere but is to be kept in prison.[116] Al-Shāfiᶜī and Ibn ᶜAbbās, on the other hand, hold that what is meant by the punishment of exile, which is mentioned in the Qurʾān, is a demand to enforce the *ḥadd* punishment on the criminal and that if he runs away to another place, he should be chased until captured.[117]

As for fornication, the jurists only dispute on the distance of the place for banishment within Muslim territory. Some jurists stipulate that it should be far away from the place where the crime is committed, i.e. at least the distance of *qaṣr*. If it is nearer than that, the place is considered local since any news about him will be easily known. In addition, the main objective in putting the criminal away from his family and

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[114]Mālik b. Anas, *al-Mudawwana al-Kubrā*, vol.xvi, p.298.

[115]Ibn Rushd, *Bidāyat al-Mujtahid*, vol.ii, p.560.

[116]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.408, Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.184, Ibn Rushd, *Bidāyat al-Mujtahid*, vol.ii, p.559.

[117]Al-Shīrāzī, *al-Muhadhdhab*, vol.ii, p.284, Ibn Qudāma, *al-Mughnī*, vol.viii, p.294.

hometown is to isolate him and make him feel forlorn so that he realises his mistake and repents. The criminal may be banished farther than the distance of *qaṣr*, if it is necessary at the discretion of the judge, since the Prophet banished someone from Medina to Khaybar, ᶜUmar banished a criminal to Syria, ᶜUthmān banished someone to Egypt and ᶜAlī banished someone from Kūfa to Baṣra.[118]

Al-Ramlī, in his book *Nihāyat al-Muḥtāj*, stipulates that the place for banishment should be specified. The convicted man cannot be sent to any place without it being specified. Once the place for banishment is chosen, the convicted man cannot choose any other place. The place also should not be inside the border of the country where the convicted man lives. The duration of the sentence should also be definite.[119]

According to Ibn Abī Laylā, Abū Thawrī and Ibn Mundhir, the criminal should be banished to place which is different from the place where the crime was committed and the distance between the two places should be less than the distance of *qaṣr*.[120]

From the cases of armed robbery and fornication discussed above, we may consider the place for banishment in the case of *taᶜzīr* and its distance. An offender to be punished by *taᶜzīr* should be banished inside the borders of Muslim territory since

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[118]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.233, al-Nafrāwī, *al-Fawākih al-Dawānī*, vol.ii, p.281, al-Ramlī, *Nihāyat al-Muḥtāj*, vol.vii, p.428.

[119]Al-Ramlī, *Nihāyat al-Muḥtāj*, vol.vii, p.428.

[120]Ibn Qudāma, *al-Mughnī*, vol.viii, p.169.

it is a less serious crime when compared with armed robbery and fornication. If we look again at the practice of the Prophet and his Companions, it can be seen that the offender is banished inside the Muslim territory. It is reported that the Prophet exiled an effeminate man from Medina but still inside the border of the Muslim country.[121] ᶜUmar exiled Dubaiᶜ for fraud to Iraq, some jurists say to Baṣra, and also exiled Naṣr ibn Ḥujjāj to Baṣra. He also exiled a man who was guilty of drinking intoxicants, by way of *taᶜzīr*, to Khaybar. ᶜUthmān banished a criminal to Egypt and ᶜAlī banished one to Baṣra.[122]

From the above discussion, it can be concluded that the place for banishment should be anywhere inside Muslim territory. Since the aim of banishing an offender to another place is to serve as a deterrent and preventive measure, and also to be reformative, it is sufficient to take the offender away from his family and hometown to a specified place in the same country. Banishing a criminal to non-Muslim territory would seem to be ostracizing him. Furthermore, if a criminal is outside Muslim territory, it means he is outside the jurisdiction of the Muslim authority and this might jeopardize his soul and belief.

However, it is nearly impossible nowadays to enforce this type of punishment since the Muslim territory is not united. There are many Muslim countries in this world which are governed independently by individual governments. A criminal from Iraq for

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[121]Bahnasī, *al-ᶜUqūba Fī al-Fiqh al-Islāmī*, p.177.

[122]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, pp.232-233, al-Nafrāwī, *al-Fawākih al-Dawānī*, vol.ii, p.281, Ibn Taymiyya, *al-Hisba Fī al-Islām*, p.47.

example, cannot be banished to Egypt since no country would allow the criminal to enter his territory though it might be accepted as an exception on certain conditions. The only practicable way to enforce the punishment of banishment is to impose it internally. This means that a Malaysian criminal, for example, could only be banished somewhere in Malaysia. Only if Muslim countries were to have a mutual agreement to accept criminals from one another would enforcement of this type of punishment be possible.

Concerning the length of the distance, it depends on the discretion of the judge to determine how far it could be according to the seriousness of the crime, the situation of the offender and other mitigating and aggravating factors. For example, an offender of a more serious crime should be banished farther than that of a less serious one. (For details on mitigating and aggravating factors, see below, pp.128-146)

b. The Duration of Banishment

Regarding the duration of banishment, the Shāfiᶜī and Hanbalī schools confine it to one year or less, since the punishment of banishment prescribed in the case of fornication is one year. Thus banishment as a *taᶜzīr* punishment cannot exceed a *ḥadd* punishment,[123] because of the *ḥadīth* of the Prophet, similar to the one quoted earlier, (p.77.) which says:

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[123]Al-Ramlī, *Nihāyat al-Muḥtāj*, vol.viii, p.23, Ibn Qudāma, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol.x, p.347.

> One who exceeds the limit of the *ḥadd* punishment in a non-*hadd* crime is among the transgressors.

Abū Ḥanīfa, however, states that the period of banishment may exceed one year since, according to him, the punishment for fornication is not considered a *ḥadd* punishment but it is merely *taᶜzīr*. Thus the period of exile is left to the discretion of the judge and it can be discontinued upon the sentenced man's repentance.[124]

Mālik ibn Anas agrees that exile is a *ḥadd* punishment in the case of fornication, but he still holds that the duration of banishment in the case of *taᶜzīr* may exceed one year. According to him, since *taᶜzīr* is a discretionary punishment, it depends on the discretion of the judge to decide the duration of banishment and may therefore, exceed one year if the judge thinks it is necessary to serve as a deterrent.[125]

2.3.2.2 Boycott (*Hajr*)

This punishment requires all family members, friends, and the whole community to excommunicate the sentenced person and to sever contacts or dealings with him in any manner or form, either for a limited period or until he returns and repents. It is legalised as a *taᶜzīr* punishment based on the Qur'ānic text and the tradition of the Prophet. Boycott is mentioned in the following Qur'ānic text:

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[124]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, pp.229-232.

[125]Ibn Farḥūn, *Tabṣirat al-Hukkām*, vol.ii, p.221, Ibn Qudāma, *al-Mughnī*, vol.viii, p.325.

> As to those women on whose part ye fear disloyalty and ill-conduct, admonish them (first), (next) refuse to share their beds...[126]

The above text deals with the steps taken to treat disobedient wives. The second step of refusing to have sexual relations is considered boycott. If a husband may at his discretion boycott his disobedient wife, a judge also can impose this type of punishment at his discretion on any other offender.

The Prophet also enforced this punishment in the case of three men, namely, Kaᶜab ibn Mālik, Marāra ibn Rabīᶜa and Hilāl ibn Umayya who did not participate in the battle of Tabūk. They were boycotted by all the Muslims in Medina for fifty days. During that time, nobody kept in touch with them, or talked to them, or even greeted them until they repented; and their repentance was affirmed by a revelation from God.[127] This incident is mentioned in the Qurʾān as follows :

> (He turned in mercy also) to the three who were left behind; (they felt guilty) to such a degree that the earth seemed constrained to them, for all its speciousness, and their (very) souls seemed straitened to them...[128]

This type of punishment was also practised by ᶜUmar who ordered a person

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[126]Qurʾān, 4:34

[127]*Tafsîr al-Tabarî*, vol.v, p.57.

[128]Qurʾān, 9:118

known as Dubaiʿ to be boycotted for his inquiries regarding the chapters (*suwar*) of *al-Dhāriyāt*, *al-Mursalāt* and *al-Nāziʿāt* and other difficult words in the Qurʾān in order to confuse people, after having imposed the punishment of beating and exile on him.[129]

A judge may pass this punishment if, according to his discretion, he expects it will reform the offender. Boycott can be imposed by itself, as the Prophet did in the case of the three men who did not participate in the battle of Tabūk, or along with other complementary punishment, as ʿUmar did when he punished Dubaiʿ as mentioned above. All the people boycotting the offender must have high religious and moral standards if this punishment is to be effective.

In the present day world, this type of excommunication may not be easy to apply, except between a man and his wife, or within a family, or within a small community, since a powerful religious feeling among people no longer exists. It is possible to prevent the offender from communicating with other people, but it would then become a sort of imprisonment rather than the intended boycott.

2.3.2.3 Imprisonment (*Habs*)

It should be added that the Islamic conception of imprisonment according to those who hold it is different from the Western view. Imprisonment is a basic or fundamental

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[129]Ibn Faraj, *Aqḍiyat Rasūlillāh*, p.11.

punishment in the Western system, whereas in Islamic criminal law it is a preventive measure aimed at encouraging repentance or reformation. It is to be imposed only for simple offences for short periods. The judge shall not sentence the convict to imprisonment if it is not likely to reform the offender. More often flogging is considered as an adequate punishment for serious crime and dangerous criminals.

The jurists are not in agreement on the legislation of imprisonment. Those who do not recognise it hold that neither the Prophet nor the great Companion Abū Bakr had ever put a criminal in prison. The other jurists who support the legislation of detention affirm that the Prophet did impose this type of punishment, since there is a report that the Prophet confined a man accused of murder but then released him when it was revealed that he was not guilty. Another report also mentions that the Prophet inflicted the punishment of beating and detention at the same time.[130]

It is also reported that there was a prison during the time of ᶜUmar ibn al-Khaṭṭāb where he placed al-Ḥuṭayʾa who was guilty of defamation (*hajw*), and Subaigh who was guilty of raising doubt about the Islamic texts. ᶜUthmān ibnᶜ Affān imposed the punishment of life imprisonment on Dābiʾ ibn al-Hārith the robber. It is reported that ᶜAlī ibn Abī Tālib built a prison in Kūfa from cane sticks which was known as *Nāfiᶜ* in which he placed robbers and built another from clods of earth which was known as

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[130]Ibn Faraj, *Aqḍiyat Rasūlillāh*, p.11.

Makhīs.[131]

These jurists also support their view regarding the legislation of imprisonment by mentioning the following Qur'ānic texts:

> If any of your women are guilty of lewdness, take the evidence of four (reliable) witnesses from amongst you against them; and if they testify, confine them to houses until death do claim them.[132]

In the above text, the words "confine them to houses until death" mean imprisonment for life. The jurists, however, have differences of opinion regarding this punishment in the case of fornication or adultery. Some of them claim that it was abrogated and altered to a hundred stripes or stoning to death. Others hold that the above text is not abrogated but modified.[133]

Some jurists state that the word "*nafy*" (exile) in the Qur'ānic text concerning the punishment for armed robbery (*ḥirāba*), means imprisonment. (See above, p.88)

Another Qur'ānic verse which indicates the legality of imprisonment is as follows:

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[131] *Ibid.*

[132] Qur'ān, 4:15

[133] Al-Qurṭubī, *al-Jāmi' li Aḥkām al-Qur'ān*, vol.v, p.56, Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.230, Ibn Qudāma, *al-Mughnī*, vol.viii, p.156.

> ...Then fight and slay the pagans wherever ye find them, and seize them, and beleaguer them,...[134]

The word beleaguer (*ḥasr*) means to confine, i.e. captives are kept in the prison for a certain time.[135]

Besides the Qurʾānic texts, there are ample *ḥadīths* of the Prophet that confirm the application of this type of punishment during his lifetime, for examples as follows:

> It is reported that the Prophet says, "If one man holds another man to be killed by a third man, kill the murderer and keep the holder in prison".[136]

Based on this *ḥadith*, ᶜAlī ibn Abī Tālib imposed *qiṣāṣ* on the murderer and imprisoned a criminal who assisted the murderer by holding the victim until he died in the prison.[137] It is also reported that during the Battle of Badr (*ghazwa badr*) three men were punished with this type of penalty, i.e. Taᶜīma ibn ᶜAdī, Al-Naḍr ibn al-Ḥārith, and ᶜUqba ibn Abī Muᶜayṭ.[138] All these reports indicate the legality of the punishment of imprisonment.

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[134]Qurʾān, 9:5

[135]Ibn Kathīr, *Tafsīr al-Qurʾān al-ᶜAẓīm*, vol.ii, p.526.

[136]Al-Shawkānī, *Nayl al-Awṭār*, vol.vii, p.169.

[137]Al-Shawkānī, *Nayl al-Awṭār*, vol.vii, p.169, Ibn Faraj, *Aqḍiyat Rasūlillāh*, p.12.

[138]Al-Sanᶜānī, *Subul al-Salām*, vol.iv, p.55.

In another instance, it is reported that a man killed his slave, and the Prophet flogged him and imprisoned him, besides commanding him to free a slave.[139] It is also reported that the Prophet imprisoned some men from Banī Quraiẓa in the house of Bint al-Ḥārith, and imprisoned some others in the house of Usāma ibn Zayd before killing them due to their treachery.[140] The Mālikī jurist Ibn Shaᶜbān reported that the Prophet did impose the punishment of imprisonment.[141]

From the above discussion of the Qurʾānic texts and *hadīths* of the Prophet, it is clear that the punishment of imprisonment is recognised in Islamic law. The practices of the Companions also clearly show that they implemented imprisonment during their leadership. Thus the statement which says that there was no actual prison at the time of Prophethood and the claim that the Prophet had never imposed this type of punishment cannot be accepted.[142]

It is worth mentioning that the need for a proper prison as it is nowadays, during the life time of the Prophet, had not yet developed. The Prophet confined a criminal in the mosque, or in the house of one of the Companions, or even in a tent. However, the situation changed during the time of ᶜUmar ibn al-Khaṭṭāb, since the Muslim territory

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[139]Ibn Faraj, *Aqḍiyat Rasūlillāh*, p.11.

[140]Ibn Qayyim, *Zād al-Maᶜād*, vol.ii, p.74, al-Shawkānī, *Nayl al-Awṭār*, vol.vii, p.212.

[141]Ibn Faraj, *Aqḍiyat Rasūlillāh*, p.11.

[142]*Ibid.*

became larger and larger, and the need for a specific place to confine criminals in such places became essential in order to maintain the stability of the Muslim lands. Thus ᶜUmar bought a house in Mecca from Safwān for four thousand dinars to place criminals in. This practice was acted upon by other caliphs.[143]

a. The Classification of Imprisonment and its Scope

Imprisonment in Islamic law can be either administrative or punitive. The former, that is, the use of imprisonment as means of compulsion, is used primarily to compel a recalcitrant debtor to pay and also serves as a means of keeping contemptuous litigants under observation. Pre-trial detention, that is, keeping a suspect in jail until his or her trial commences can be included under this classification of imprisonment. The Prophet is reported to have ordered the arrest of persons on suspicion (*fī tuhma*).[144] Administrative imprisonment is, in the modern sense, not a true punishment but is a form of custody for public interest. Thus it will not be discussed in detail here.

The second form of imprisonment, i.e. punitive imprisonment, means incarceration following a conviction. Its purpose is to segregate a criminal from society and protect society from him. This type of imprisonment can be imposed following *ḥudūd* cases as well as *taᶜzīr* cases.

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[143]Bahnasī, *al-ᶜUqūba*, p.210.

[144]Al-Tirmidhī, *Sunan*, vol.iv, p.28.

The *fiqh* books mention that punitive imprisonment in the case of *ḥadd* should be imposed in the following cases:

1. In the case of murder, the murderer should be whipped a hundred times and imprisoned for a year if his offence is forgiven, that is, if the victim's family do not exact vengeance by killing him. This is the view held by the Mālikīs. The Shāfiᶜīs and the Hanbalīs, on the other hand, hold that there is no more punishment in this case.[145] Al-Māwardī and Abū Ya lā add that a *taᶜzīr* punishment may be imposed on the murderer if he is forgiven by the victim's relatives but neither specify any particular punishment which should be inflicted on him.[146]

2. In the case of highway robbery not involving murder, that is, when a person is waylaid or mugged, the robber may be imprisoned. This is the view held by the Hanafīs.[147] The Shāfiᶜīs and the Hanbalīs hold that the robber should be exiled. (For the meaning of exile in the case of robbery, see above, p.88) The Mālikīs hold that the punishment for the robber in this case depends on the discretion of the judge who has the option of imposing the death sentence, or crucifixion, or

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[145]Ibn Rushd, *Bidāyat al-Mujtahid*, vol.ii, p.494, al-Nafrāwī, *al-Fawākih al-Dawānī*, vol.ii, p.257, Ibn Qudāma, *al-Mughnī*, vol.vii, p.745.

[146]Al-Māwardī, *al-Aḥkām al-Sulṭāniyya*, p.238, Abū Yaᶜlā, *al-Aḥkām al-Sulṭāniyya*, p.282.

[147]Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.185.

amputation of limbs, or exile, or flogging.[148]

3. If a thief is caught red-handed or steals more than once, he may be imprisoned. If he has already lost his right hand and his left foot, he should pay the compensation (*gharm*) to the owner and then be imprisoned until he repents. This view is held by the Hanafīs and the Hanbalīs.[149] According to the Mālikīs and the Shāfiᶜīs, the left hand of a thief should be cut off if he steals a third time and if he steals again a fourth time, his right foot should be cut off. If he steals again after that, a *taᶜzīr* punishment, which depends on the discretion of the judge should be imposed on him.[150]

The punishments for the above crimes are all specified in the Qurʾān. However, the Qurʾānic *ḥudūd*-punishments are corporal in nature and any imprisonment imposed in connection with such a crime is imposed as a supplementary form of punishment. In other words, punitive imprisonment in *ḥudūd* cases is imposed in conjunction with corporal punishment and normally after the corporal punishment has been executed.

Punitive imprisonment in *taᶜzīr* cases, on the other hand, is meted out at the discretion of the judge in all crimes for which no *ḥadd* punishment is specified, whether

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[148]Ibn Rushd, *Bidāyat al-Mujtahid*, vol.ii, p.558, Mālik b. Anas, *al-Mudawwana al-Kubrā*, vol.xvi, p.298.

[149]Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.171, Ibn Qudāma, *al-Mughnī*, vol.viii, p.264.

[150]Ibn Rushd, *Bidāyat al-Mujtahid*, vol.ii, p.554, al-Ramlī, *Nihāyat al-Muḥtāj*, vol.vii, p.466.

they infringe the right of God or the individual.[151] Some jurists, however, restrict its application only to cases which infringe the right of God. In this regard, the Mālikī Qarāfī points out some situations where imprisonment as a *taᶜzīr* punishment can be imposed, i.e. as follows:

1. A person who refuses to fulfill his obligations to the one to whom he owes them, such as refusal of paying maintenance to his dependants.

2. A person who refuses to make decision on matters which cannot be replaced by anybody else such as a man who accepts a marriage to two sisters, or to both a mother and her daughter and he refuses to specify which one is his wife.

3. A person who confesses to something ambiguous without specifying it clearly.

4. A person who refuses to fulfill the right of God which cannot be replaced by anybody else, such as daily prayers, or fasting in the month of Ramaḍān.

5. A person who commits any *maᶜṣiya* which, at the judge's discretion, is punishable with imprisonment.[152]

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[151] Al-Māwardī, *al-Aḥkām al-Sulṭāniyya*, p.236, Ibn Taymiyya, *al-Siyāsa al-Sharᶜiyya*, p.84.

[152] Al-Qarāfī, *al-Furūq*, vol.iv, p.79.

b. The Period of Imprisonment

The minimum period of imprisonment is one day.[153] As for the maximum period, the jurists have different views. According to the Shāfiᶜīs, imprisonment should not exceed one year based on analogy with the punishment for fornication (i.e. exile for one year), since they hold that *taᶜzīr* should not exceed *ḥadd* punishment.[154] The majority of the jurists, however, state that there is no fixed maximum period for imprisonment since it is left to the discretion of the ruler or judge. Thus imprisonment as a *taᶜzīr* punishment may last from one day to a lifetime.[155]

As regards imprisonment for an unlimited term, it has been prescribed by Islamic law only for habitual criminals or dangerous recidivists who cannot be deterred by normal punishments. Such prisoners should remain in detention so that the society is relieved of their wrongdoings. They should always be treated as human beings till repentance or reformation is proved, then the prisoner should be discharged. However, if repentance or reformation is not achieved, the prisoner should remain in detention for

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[153]Ibn Farḥūn, *Tabṣirat*, vol.ii, p.240, al-Māwardī, *al-Aḥkām al-Sulṭāniyya*, p.236, Abū Yaᶜlā, *al-Aḥkām al-Sulṭāniyya*, p.279.

[154]Al-Ramlī, *Nihāyat al-Muḥtāj*, vol.viii, p.22, al-Khaṭīb, *Mughnī al-Muḥtāj*, vol.iv, p.192, al-Nawāwī, *Minhāj al-Tālibīn*, p.118.

[155]Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.106, Ibn Farḥūn, *Tabṣirat al-Hukkām*, vol.ii, p.240, al-Māwardī, *al-Aḥkām al-Sulṭāniyya*, p.236, al-Bahūtī, *Kashshāf al-Qināᶜ*, vol.vi, p.126, Abū Yaᶜlā, *al-Aḥkām al-Sulṭāniyya*, p.279.

life.[156] There is a *ḥadīth* of the Prophet, similar to the one quoted earlier,(p.97) which says:

> Kill a murderer and put his assistant in prison for life.[157]

History also records that ᶜUmar ibn al-Khaṭṭāb imprisoned a sorcerer (*sāḥir*) until he died in prison. Similarly, ᶜUthmān ibn ᶜAffān sent Ṣābiʾ ibn al-Hārith, who was an infamous robber, to prison for the entire of his life. ᶜAlī ibn Abī Tālib also imprisoned a person who had assisted in the commission of manslaughter for life.[158]

c. Mode of Execution

Al-Zaylaᶜī mentions in his book, *Tabyīn al-Haqāʾiq*, that there should be no mattress or pillow in a prison. The prisoner should be left alone without being accompanied by anybody. He cannot go out to perform the Friday prayer nor any *jamāᶜa* prayer. He is not allowed to perform *ḥajj*, nor attend a funeral, nor even celebrate the ᶜEīd feast. If he is sick, treatment should be carried out inside the prison. This is to ensure that the objective of imprisonment, i.e. to withdraw the offender's freedom in order to make him

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[156]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.338, Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, pp.110-113,Ibn Farḥūn, *Tabṣirat al-Hukkām*, vol.ii, pp.222,241, al-Ramlī, *Nihāyat al-Muḥtāj*, vol.viii, p.22, al-Bahūtī, *Kashshāf al-Qināᶜ*, vol.vi, p.126.

[157]Al-Shawkānī, *Nayl al-Awṭār*, vol.vii, p.169.

[158]Ibn Faraj, *Aqḍiyat Rasūlillāh*, p.12, Ibn Farḥūn, *Tabṣirat al-Hukkām*, vol.ii, pp.233.

feel forlorn and thus realise his mistake and repent, is achieved.[159]

Abū Yūsuf, in his *Kitāb al-Kharāj*, also discusses the treatment of prisoners. He states that a prisoner cannot be locked up in a very small place where he cannot stand up to perform the prayer. His feet cannot be chained unless he is to be executed with the death penalty. The state should also provide a prisoner with suitable clothes according to whether it is winter or summer. If a prisoner dies and he has no relatives, the state should prepare the deceased for burial. When a prisoner is discharged, he cannot be left without any source of income which will cause him to live poverty-stricken and force him to beg from other people.[160]

Since the prisoner's right to free movement is withdrawn, the state should provide food, clothing and medical care, as well as other maintenance which is essential to his life.[161] Some jurists argue that wives should be allowed to visit male prisoners occassionally for "conjugal privileges". This is the practice today in Saudi Arabia, where both sexes may have conjugal visits. Some jurists hold that the prisoner's dependants should also be supported by the state.[162]

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[159]Al-Zaylaᶜī, *Tabyīn al-Haqāʾiq*, vol.iv, p.182.

[160]Abū Yūsuf, *al-Kharāj*, p.151.

[161]Al-Bahūtī, *Kashshāf al-Qināʿ*, vol.vi, p.126, al-Ramlī, *Nihāyat al-Muḥtāj*, vol.viii, p.22.

[162]Al-Alfi, *Punishment in Islamic Criminal Law*, p.236.

2.3.3 Financial Punishment

The jurists are not agreed upon the legality of financial punishment as *taᶜzīr*. According to Abū Ḥanīfa and al-Shaybānī, financial punishment is illegal. Abū Yūsuf, however, holds that the ruler may enforce a *taᶜzīr* punishment of taking property from an offender if the public interest necessitates it.[163] The same opinion is held by the school of Mālik ibn Anas, Aḥmad ibn Ḥanbal and is one of the two opinions of al-Shāfiᶜī.[164] What is meant by financial punishment according to the view of Abū Yūsuf, as explained by the Ḥanafī commentators, is seizing some of the offender's property for a certain period and then returning it to him whenever he repents. This means that the judge does not take the property for himself or for the public treasury but it is in fact, intended to threaten him. They support this view by saying that no one is allowed to take another's property without legal reason. The judge may keep the offender's property until his repentance is proved. However, if it later appears that the offender will not repent, then the property may be sold and the proceeds spent on the public welfare according to the judge's discretion.[165]

The jurists who do not recognise financial punishment as a legal *taᶜzīr* punishment claim that although financial punishment was legalised during the lifetime

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[163]Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.105, Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.330.

[164]Ibn Farḥūn, *Tabṣirat al-Hukkām*, vol.ii, p.221, Ibn Taymiyya, *al-Hisba fī al-Islām*, p.49, Ibn Qayyim, *al-Turuq al-Hukmiyya*, p.235, *Iᶜlām al-Muwaqqiᶜīn*, vol.ii, p.98.

[165]Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.106.

of the Prophet, it was later abrogated on the basis that there was the fear that its legality would be abused by unjust rulers who might take the chance of taking someone else's property invalidly.[166] This claim of abrogation is in fact confusing since it is not supported by any conclusive proof. Ibn Taymiyya and his student, Ibn Qayyim, strongly reject the claim of abrogation and furnish their proof with the practices of the Prophet and decisions of some of his Companions.[167] The following is a *ḥadīth* which says:

> From ᶜAmr ibn Shuᶜayb from his father from his grandfather from the Messenger of God that he was asked about the dates hanging on the tree. He said: `Whoever has eaten because of extreme hunger and no more than that, he will be responsible for nothing, and whoever has taken more than that, he must be fined with double the amount of the value of the dates taken and also be liable for punishment,[168] and whoever steals dates after they have been laid down to dry floor and their value amounts to the value of a shield, his hand must be cut off, and whoever has stolen less than that, he must be fined with double the amount of the value of the dates stolen and also be liable for punishment.'[169]

The above-mentioned *ḥadīth* is unanimously accepted by consensus of scholars (*ijmāᶜ*) as authenthic and as a proof that the concept of fining is not strange in Islamic law. It is also reported that the Prophet imposed a fine on a thief who had stolen less than the *niṣāb*, the fine being double the value of the stolen goods. Similarly, he said that the fine imposed on anyone who had hidden lost property should be double the

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[166]*Ibid.*

[167]Ibn Taymiyya, *al-Hisba fī al-Islām*, p.49, Ibn Qayyim, *al-Turuq al-Hukmiyya*, p.236, *Iᶜlām al-Muwaqqiᶜīn*, vol.ii, p.98.

[168]The punishment here is a *taᶜzīr* punishment, normally whipping.

[169]Al-Nasāʾī, *Sunan*, vol.viii, p.85.

amount of the property. The Prophet also gave orders to destroy wine jugs and places such as pubs etc., where wine is supplied or sold. He also told a person wearing a gold ring to throw it away. He also declared that the catches of a hunter who went hunting within the protected areas of Medina be confiscated.[170] This type of punishment was also practised by the four caliphs and the great Companions after the demise of the Prophet. For example, both ᶜUmar and ᶜAlī gave orders to burn down the places where alcoholic drink was sold and to seize half of the property of those who refused to pay *zakāt*. ᶜUmar had set fire to the palace of Saᶜd ibn Abī Waqqāṣ, since the palace had isolated the governor (Saᶜd) from the people. He also poured away milk which was mixed with water by the seller. All these instances reject the opinion which claims the abrogation of financial punishment. Furthermore, there was no proof from the Prophet that he had prohibited all kinds of financial punishment.[171]

Based on the above, Ibn Taymiyya and Ibn Qayyim accept that they are facts which are not easy to be denied and thus, whoever has said that financial punishment was abrogated, ascribing this to Mālik and Aḥmad, has made a mistake. Whoever said it was absolutely abrogated is completely confused. There is no legal evidence to support their claim either from the Qurʾān or from the *Sunna* or *ijmāᶜ*. Even if there were *ijmāᶜ*, it would have no power to abrogate the *Sunna*.[172]

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[170]See: Ibn Farḥūn, *Tabṣirat al-Ḥukkām*, vol.ii, p.220, Ibn Taymiyya, *al-Ḥisba fī al-Islām*, pp.49-56, Ibn Qayyim, *al-Turuq al-Ḥukmiyya*, p.235.

[171]*Ibid.*

[172]Ibn Taymiyya, *al-Ḥisba fī al-Islām*, p.50, Ibn Qayyim, *Iᶜlām al-Muwaqqiᶜīn*, vol.ii, p.98, *al-*

Those facts are not only mentioned in the classical legal texts such as mentioned above, but they have also been accepted by the contemporary scholars.[173] Therefore the statement of Joseph Schacht that "there are no fines in Islamic law"[174] is incorrect and baseless.

2.3.3.1 The Classification of Financial Punishment

From examples given above, it can be noticed that financial punishments, at the time of Prophethood and four Caliphs after him were imposed in two forms: firstly, through the way of fining; and secondly, through the seizure or destruction of the property concerned. Based on this, Ibn Taymiyya classifies financial punishments into three categories, i.e. destruction (*itlāf*), modification (*taghyīr*) and fine (*tamlīk*).[175]

i. Destruction (*Itlāf*)

The meaning of this punishment is to destroy the offending items (*munkarāt*), for example, to demolish an idol by breaking or burning it, or destroy musical instruments (according to the majority of jurists), or break a container of alcohol, or burn a wineshop

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Turuq al-Hukmiyya, p.236.

[173]Such as ᶜAbd al-Qadīrᶜ Awda, *al-Tashrī al-Jinā'ī al-Islāmī*, vol.i, p.705, Aḥmad Fatḥī Bahnasī, *al-ᶜUqūba*, p.215, El-Awa, *Punishment in Islamic Law*, p.103.

[174]Joseph Schacht, *An Introduction to Islamic Law*, p.176.

[175]Ibn Taymiyya, *al-Hisba fī al-Islām*, pp.51-56. Ibn Taymiyya's term *tamlīk* seems more fitting to be translated to `fine' when we look through the examples given by him.

(according to Ibn Hanbal and Mālik and other jurists) based on the practice of ᶜUmar who burnt down a wineshop and of ᶜAlī who burnt down a village where alcoholic drink was sold. ᶜUmar also poured away milk which was mixed with water by the seller. Another example is to destroy debased goods from a factory such as damaged clothes.[176]

Destruction of certain things as a *taᶜzīr* punishment is not always necessary or obligatory. Regarding this matter some jurists hold the opinion that if the offence involves food, this food may be donated to the poor. It is even the best way to punish the offender, according to Mālik, since it also gives benefit to other people simultaneously.[177]

ii. Modification (*Taghyīr*)

This was practised by the Prophet who modified a sculptured image in his house by cutting off its head which made the image then seemed like a tree. The Prophet also cut up curtains which had images on them, and turned them into cushion covers.[178]

The jurists unanimously agree that modification can be made to any forbidden

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[176]*Ibid.*, p.52.

[177]*Ibid.*, p.53.

[178]*Ibid.*, p.55.

object, for example, musical instruments, or the complete image of something alive.[179]

iii. Fining (*Tamlīk*)

The literal translation of *tamlīk* is transfer of ownership or taking possession of someone's property. The example of this type of financial punishment, as illustrated by Ibn Taymiyya, is that the Prophet punished a thief who stole dates still on the tree by flogging him and fining him double the value of the dates. Similarly, the Prophet flogged a thief who stole cattle and fined him double the value of the cattle. ᶜUmar also inflicted a fine on the owner of a hungry slave who stole a camel, the fine being double the value of the camel. In another case, ᶜUmar fined a person who had hidden lost property double the value of that property.[180]

2.3.3.2 The Amount of the Fine

In some cases, the amount of the fine is determined by the Prophet's practice, for example, in the case of theft in which the value involved does not reach the *niṣāb*, refusing payment of *zakāt*, etc. But in other cases it is not so determined, and it is left to the judge to decide how much the offender should be fined. In fact, there is nothing to stop the lawmaker of any Muslim country from listing crimes and their fines as he

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[179] *Ibid.*, p.56.

[180] *Ibid.*

requires them to be applied by the court.

In determining the fine to be imposed on the offender, it is worth mentioning that fines, according to Ibn Qayyim, can be divided into two types, i.e., definite (*maḍbūṭ*) and indefinite (*ghayr maḍbūṭ*).[181]

A definite fine means the exact fine imposed as an equivalent for the losses incurred due to the commission of the offence, whether such an offence violates the right of God such as destroying an animal hunted during the period of *iḥrām*, or the right of a person such as destroying his property. Another example of a definite fine is to punish the criminal by giving him the opposite of his original intention in committing the crime, such as excluding him from inheritance if he has killed his testator; not giving him the bequeathed if he has killed his mandator (*mūṣī*), and refusing a disloyal wife of her maintenance.[182] It is worth mentioning that though the fine is definite, it is still relative (*nisbī*) in that the exact amount cannot be determined beforehand since it depends on the situation and the amount of the loss incurred from the commission of such an offence.

The amount of an indefinite fine is not determined but it is left to the judgement of the jurists according to the public interest (*maṣlaḥa*). In fact, there is no clear

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[181]Ibn Qayyim, *Iʿlām al-Muwaqqiʿīn*, vol.ii, p.98.

[182]*Ibid.*

statement in the *Sharī'a* texts regarding this matter which leads to the difference of opinion among the jurists as to whether this type of fine is abrogated or not. The more acceptable opinion is that indefinite fines vary according to the public interest and to the decision of the jurists of a certain time and place since there is no proof (*dalīl*) of abrogation. Moreover, it was also practised by the leading Companions and by scholars after them.[183]

2.3.4 Verbal Punishment

2.3.4.1 Admonition (*Wa'ẓ*)

Admonition means reminding a person who has committed *ma'ṣiya* that he has done an unlawful thing. It is recognised as a means of *ta'zīr* punishment in Islamic law. This type of punishment is mentioned in the following Qur'ānic text:

> As to those women on whose part you fear disloyalty and ill-conduct, admonish them...[184]

The above text deals with the punishment for disobedient wives (*nushūz*). It is clear that *nushūz* is not included under *ḥadd* or atonement but under *ta'zīr* crime, thus admonition is a type of *ta'zīr* punishment. A judge may admonish negligent or ignorant

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[183] *Ibid.*

[184] Qur'ān, 4:34

offenders about their responsibilities and duties towards society if he feels that admonition is sufficient to reform them.

The purpose of admonition is to remind the offender if he has forgotten, or to inform him if he is unaware that he has done something wrong. This type of punishment should be imposed on those who commit minor offences for the first time, if the judge thinks it is sufficient to reform the offender and prevent him from recommitting the offence.[185]

2.3.4.2 Reprimand (*Tawbīkh*)

Reprimand is a more severe measure than admonition. Admonition is a sort of advice or reminder whereas reprimand takes the form of a severe reproof. It is recognised as a *taᶜzīr* punishment in Islamic law. It is reported that during the lifetime of the Prophet, one of his Companions, ᶜAbd al-Raḥmān ibn ᶜAwf insulted a servant by calling him "son of a black mother". The servant complained to the Prophet. On hearing the complaint the Prophet got very angry and raised his finger saying: "Sons of white mothers have no superiority over those of black mothers, except on the basis of justice and God-fearing". ᶜAbd al-Raḥmān ibn ᶜAwf was so ashamed that he placed his cheek on the ground asking the servant to trample on it until he was satisfied.[186]

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[185]Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.107.

[186]ᶜAwda, *al-Tashrīᶜ al-Jināʾī al-Islāmī*, vol.i, p.703.

It is also reported that ᶜUmar ibn al-Khaṭṭāb sent a troop of soldiers to battle and they gained victory over their enemy and captured booty. When they came back, they were wearing silk. On seeing them, his face changed and he turned his face away from them. They wondered why ᶜUmar did that. ᶜUmar said, "Take off the clothes of the people of hell". Then they realized their mistake and took off the silk clothes. This shows that reprimand is a *taᶜzīr* punishment and if a judge considers that it will suffice, it can be resorted to.[187]

Reprimand may be made through any word or act so long as the judge thinks that it is sufficient to reform the offender. Words or acts as a means of reprimand will vary according to the offence and the offender. It can be made through a judge's turning his face away from the offender or looking at the offender with a look of disgust as ᶜUmar ibn al-Khaṭṭāb did to a group of his army. A judge may also rebuke an offender using words which he hopes will prevent him from recommitting the offence, on condition that such words do not indicate *qadhf*. The words stupid, or oppressor, or transgressor, or sinner and so on may be used to reprimand an offender.[188]

This type of punishment should be imposed on a first timer who has no record of involvement in any crime before, provided the offence committed is not of a serious type.

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[187]ᶜĀmir, *al-Taᶜzīr fī al-Sharīᶜa al-Islāmiyya*, p.442.

[188]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.329, al-Kāsānī, *Badāᵓiᶜ al-Sanāᵓiᶜ*, vol.vii, p.64, Ibn Taymiyya, *al-Hisba fī al-Islām*, p.45, al-Māwardī, *al-Aḥkām al-Sulṭāniyya*, p.236, Abū Yaᶜlā, *al-Aḥkām al-Sulṭāniyya*, p.279.

2.3.4.3 Threatening (*Tahdīd*)

Taᶜzīr punishment by means of threat is imposed to prevent an offender from committing further offences. He is induced to mend his behaviour out of fear of punishment. The jurists stipulate that in order to make this punishment effective, the threat should be imposed only if it is meant seriously and is sufficient to reform the offender according to the judge's discretion. It can be carried out by warning the offender of the imposition of a harsher punishment if the offence is repeated, or by administering a sentence against him and then instantly staying its execution for a certain period in order to warn the offender not to repeat the offence.[189]

2.3.5 Other Punishments

2.3.5.1 Dismissal From Office (*ᶜAzl*)

This can be carried out by terminating those employed in public service from their posts and consequently, bringing their salary to an end. It is recognised as a form of *taᶜzīr* punishment and was practised by the Prophet and his Companions.[190]

Dismissal is applied in the case of authorised persons or public servants who fail

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[189]ᶜAwda, *al-Tashrīᶜ al-Jināʾī*, vol.i, p.703.

[190]Ibn Taymiyya, *al-Siyāsa al-Sharᶜiyya*, p.84.

to render their duties due to negligence or dishonesty, or take bribes, or practice corruption, or commit any other similar offences. Ibn Taymiyya mentions in his book, *al-Siyāsa al-Sharʿiyya* that dismissal may be imposed on any officer who acts irresponsibly against the nature of his profession, for example, a treasurer of the *bayt al-māl* (public treasury) or a *waqf* (endowment fund) who is dishonest, an officer who takes a gift for his duty, a tax collector who takes the people's property as he likes and gives it to anyone he likes,[191] an army who runs away from fighting the enemy and a ruler who suppresses his people.[192] Ibn Taymiyya also states that an officer or a judge who does not follow God's rule or does not prevent the *munkarāt* should be dismissed, for example, an officer who accepts a sum of money from a criminal in order to prevent him from being punished with a *ḥadd* punishment, or a governor who uses his power to protect a criminal.[193]

It can be concluded from the above discussion that this type of punishment is applied in the case of breach of trust in relation to one's duty. Dismissal can be imposed by itself or along with any other complementary punishment.

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[191] *Ibid.*, p.42.

[192] *Ibid.*, p.p. 83, 84.

[193] *Ibid.*, p.p. 59, 60.

2.3.5.2 Public Disclosure (*Tashhīr*)

This is the disclosure of the conviction of the sentenced person. The aim of this punishment is to draw the attention of the public to the fact that the offender has committed *maᶜṣiya*. It may be imposed for offences in which the offender has depended on or has exploited the trust of people, such as bearing false witness, breach of trust, cheating, forgery, perjury or fraud.[194] Public disclosure is recognised as a form of *taᶜzīr* punishment in Islamic law. It was practised during the lifetime of the Prophet and his Companions. It is reported that the Prophet sent a man to collect *zakāt*. When he returned to Medina he gave some of what he had collected to the Prophet but kept the rest, claiming it had been given to him as a gift. The Prophet then announced the people, saying:

> "I appointed one of you to do some public services. Afterwards he divided what he had collected into two portions: one for the public treasury and the other for himself. If the appointed man had stayed in his father's or his mother's home, would anyone have given him a gift or not?"[195]

ᶜUmar ibn al-Khaṭṭāb punished a person guilty of bearing false witness (*shahādat al-zūr*) by taking him around the town on the back of a donkey announcing what he had committed. According to Shurayḥ, a well-known judge who served under ᶜUmar and

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[194]Ibn Farḥūn, *Tabṣirat al-Hukkām*, vol.ii, p.230.

[195]Fazlul Karim, *Mishkāt al-Maṣābīḥ: An English Translation and Commentary*, vol.i, p.560, Ibn Taymiyya, *al-Siyāsa al-Sharᶜiyya*, p.42.

ᶜAlī, one bearing false witness must be publicly identified in order to warn people not to trust him.[196] On this point, all the schools of Islamic law are agreed.[197]

Public disclosure can be carried out by taking the offender by the authority concerned to every part of the country and informing the society that he has committed an offence for which he has received a *taᶜzīr* punishment. It is reported that Shurayḥ took a person guilty of bearing false witness to his community after *ᶜAṣr* (the mid-afternoon prayer), and announced, " Here with us is a person who bears false witness, so keep yourself away from him."[198] Ibn Farḥūn also mentions in his *Tabṣirat* that an offender of certain crimes may be disclosed and his commission of crime can be registered and compiled.[199] All these measures are taken in order to shame the offender and make the community aware of the crime committed by him.

That is the mode of execution of public disclosure in the past. Nowadays, however, public disclosure may be applied in different ways so long as its objective can be achieved effectively. Since the media of public information are modernised, public disclosure can be made by publishing the court judgement in the newspaper, or by broadcasting it on the radio or television, or by other means which provide information

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[196]Al-Sarakhsī, *al-Mabsuṭ*, vol.xvi, p.145.

[197]Ibn ᶜĀbidin, *Hāshiya*, vol.vi, p.105, al-Sarakhsī, *al-Mabsūṭ*, vol.xvi, p.145, Ibn Farḥūn, *Tabṣirat al-Hukkām*, vol.ii, p.230, al-Khaṭīb, *Mughnī al-Muḥtāj*, vol iv, p.192, al-Bahūti, *Kashshāf al-Qināᶜ*, vol.vi, p.125, Ibn Taymiyya, *al-Siyāsa al-Sharᶜiyya*, p.84.

[198]Al-Sarakhsī, *al-Mabsūṭ*, vol.xvi, p.145.

[199]Ibn Farḥūn, *Tabṣirat al-Hukkām*, vol.ii, p.230.

to the public regarding the offence committed.

From the above, it can be seen that there are various types of punishments which can be imposed as *ta'zīr* punishments in Islamic criminal law as discussed by the jurists. It is agreed that the jurists do dispute on the legality of some of these punishments, particularly financial punishment and imprisonment. However, as they are all *ta'zīr* punishments, they are left to the discretion of the ruler or the authority concerned to legislate *ta'zīr* laws depending upon the suitability of their application according to place and time.

CHAPTER THREE

Rules Governing the Implementation of *Ta^{c}zīr* Punishment in Islamic Criminal Law

3.1 Introduction

The method of implementing *ta^{c}zīr* laws in practical terms is an important issue which needs to be elucidated since it is left to the discretion of the ruler to legislate these laws while at the same time the scope of *ta^{c}zīr* crimes and punishments is very wide. Therefore, in this chapter we discuss the general rules governing the implementation of *ta^{c}zīr* punishments, particularly on the factors which influence the degree of *ta^{c}zīr* punishment since this is the most common problem faced by judges in making judgements concerning punishments of discretionary types. In addition, the extent of the discretionary power of the judge, the effect of previous judgements on the judge's decision, and the codification of *ta^{c}zīr* laws will also be discussed.

3.2 Preliminary Steps Toward Implementing a Comprehensive Islamic Punishment

Islam tries to wipe out all channels leading to the commission of a crime by imposing two kinds of controls, the internal and external.

3.2.1 Internal Controls

All Muslims accept the existence of God and the life hereafter. They are reminded that they are being witnessed permanently by Allah and every one of their actions is being recorded. This record will be placed before each and every individual on the Day of Judgement. Whether one is rewarded or punished will depend upon the nature of one's actions. Muslims accept that an act done in the thick layers of darkness may remain a secret in this world but cannot go unresponded in the Hereafter. Even the feelings and passions that occur in the innermost recesses of the heart are known to Allah and cannot go unnoticed. Hence, when a Muslim has such a strong belief, he surely would obey God's commands and abstain from His prohibitions. The Qurʾān says:

> Or do they think that We cannot hear their secrets and their private counsels? Indeed (We do), and our Messengers are by them, to record.[1]

The observation of *ʿibāda* plays an important role to restrict ways leading to the commission of crime. Daily prayers, for example, if performed with *khushūʿ* (humility) can restrain Muslims from doing shameful deeds,[2] as stated in the following Qurʾānic verse:

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[1]Qurʾān, 43:80

[2]Abū Zahra, *al-ʿUqūba*, p.24, For further details on the wisdom behind doing the prayer, see for example, Yūsuf al-Qaraḍāwī, *al-ʿIbāda fī al-Islām*, pp.225-242.

> And establish regular prayer: for prayer restrains from shameful and unjust deeds.[3]

Similarly, fasting can be a shield (or protection) from the commission of crime, as mentioned in the following *ḥadith*:

> Muᶜādh ibn Jabal reported that the Prophet said, "Fasting is a shield", in other words, a shield against wrong action.[4]

Paying *zakāt* (obligatory alms) may promote Muslims to help their less fortunate brothers. *Zakāt* is the allocation of wealth which is taken compulsorily from the rich and distributed amongst the poor. This obligation will help to close the gap between them. Thus the bad consequences which result from poverty could be avoided.[5]

Furthermore, Muslims are required to carry out the duty to enjoin the right and forbid the wrong (*al-amr bi al-maᶜrūf wa al-nahy ᶜan al-munkar*), as mentioned in the following Qurʾānic verse:

> Let there arise out of you a bond of people inviting to all that is good, enjoining what is right, and forbidding what is wrong: They are the ones to attain felicity.[6]

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[3]Qurʾān, 29:45

[4]Al-Nasāʾī, *Sunan*, vol.iv, p.163.

[5]For further details on this point, see for example, Yūsuf al-Qaraḍāwī, *al-ᶜIbāda fī al-Islām*, pp.255-294.

[6]Qurʾān, 3:104

Muslims should encourage one another to acts of piety and the restraint of evil. This would lead a Muslim community to live in unity and harmony. These internal controls help closing all the channels which lead to the commission of crime.[7]

3.2.2 External Controls

Attempts have been taken in Islam to eradicate all the causes which lead to the commission of crimes. First of all, the government of a Muslim state is responsible for the support of every citizen, regardless of his caste, race, language, colour or social status. It should try as far as possible to ensure that the citizens get their basic needs (*ḍarūriyyāt*) such as food, clothing, shelter, medical treatment and education. The government should also make an attempt to provide sufficient jobs for all citizens. Where a job is not available or if an individual is incapable of working, aid should be given to him from the *bayt al-māl* (public treasury).[8] This would block the way to the commission of theft and robbery. Regarding this matter, Muhammad Asad, as quoted by M.Siddiqi, explains:

> In a community or state which neglects or is unable to provide complete social security for all its members, the temptation to enrich oneself by illegal means often becomes irresistable ... If the society is unable to fulfil its duties with regard to every one of its members, it has no right to invoke the full sanction of

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[7]See: Abū Zahra, *al-ʿUqūba*, p.25.

[8]Muhammad Husayn al-Dhahabî, *Athar Iqāmat al-Hudūd Fî Istiqrār al-Mujtamaʿ*, p.12.

> Criminal Law (*ḥadd*) against the individual transgressor, but must confine itself to milder forms of administrative punishment...[9]

Islam recognises the sexual need of an individual and thus gives him a permissible way to satisfy it through marriage. The institution of marriage in Islam has been made as easy as possible and a great stress has been laid upon living in a married state, as confirmed by the *ḥadith* of the Prophet which says:

> When a servant of Allah marries, he perfects half of his religion.[10]

If anyone wishes to get married yet cannot afford to do so, aid should be provided from the *bayt al-māl*.[11] Furthermore, several measures are taken to purify a Muslim community from evil temptations which excite the passions that may lead to the commission of sexual offences, for example, prohibiting celibacy; allowing a man to marry four wives, if not satisfied with one, two or three; allowing widows to remarry; forbidding women from displaying their beauty and ornaments, and so on.[12]

There are several other measures taken in Islam to block the channels which lead to the commission of further crimes, for example, prohibiting dealing with intoxicants

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[9]Siddiqi, Muhammad Iqbal, *The Penal Law of Islam*, p.136.

[10]Fazlul Karim, *Mishkāt al-Maṣābīḥ: An English Translation and Commentary*, vol.ii, p.619.

[11]Muhammad Husayn al-Dhahabī, *Athar Iqāmat al-Hudūd fī Istiqrār al-Mujtamaᶜ*, p.13.

[12]*Ibid.*

either drinking or selling, prohibiting backbiting, insulting, entering private homes without permission, spying on others, gambling, and so on.

In view of this comprehensive system of internal and external controls, one can easily visualize the general environment in which committing an offence itself becomes almost impossibble. The last measure taken in this system, however, is a warning of the infliction of punishments. If one still turns to crime despite the above mentioned safeguards, then he deserves to be punished, either by a *ḥadd* punishment or *qiṣāṣ* or *taʿzīr*, depending upon the crime that he has committed. It should be remembered that before the infliction of any punishment, certain conditions and procedures should be followed by the court.

3.3 Conditions of Punishment in Islam

In order for a punishment to be valid in Islamic criminal law, it must fulfil the following conditions:

1. It should be legal in the sense that it should be based on one of the sources of Islamic law, i.e. Qurʾān, *Sunna* or a legislation issued by a competent body in conformity with the laws of Islam.

2. It should be strictly individualised, i.e. inflicted on the offender, and should in no way affect others, as confirmed in the following Qurʾānic verse:

Nor can the bearer of a burden bear another's burden.[13]

Based on the above text, a punishment on a pregnant woman must be deferred since the foetus which is still in its mother's womb should be protected from any possible harm caused by the infliction of a punishment on its mother.[14]

3. It should be common in the sense that it should be awarded to any offender irrespective of sex, status or position. The ruler and the ruled, the rich and the poor - all should be equal before justice without any discrimination between them. Absolute equality is required in the case of a *ḥadd* or *qiṣāṣ*. As for *taᶜzīr*, equality is not required in the magnitude, quality or type of punishment. Equality is required in the effect of the punishment on the offender, the desired effect being prevention, reformation and deterrence. Some persons are deterred by reprimand, whereas others can be deterred only by imprisonment or bodily pain, each according to his or her nature, age, circumstances, status, or any other mitigating and aggravating factors. It is a discretionary matter which is left entirely to the judge.[15]

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[13]Qurʾān, 35:18

[14]See:Bahnasi, *Al-ᶜUquba*, pp.230-231.

[15]ᶜAwda, *al-Tashrīᶜ al-Jināʾī al-Islāmī*, vol.i, p.631.

3.4 Mitigating And Aggravating Factors

Before deciding whether or not a criminal should be punished, the extent of his responsibility for the offence should be determined. It should be noted that in Islam this is all taken into account when the question of crime and punishment is considered. All conditions and circumstances connected with the offence are examined. The mitigating and aggravating factors are also taken into consideration before making any decision regarding the sentence.

It is worth mentioning that the question of mitigating and aggravating factors does not arise in *ḥudūd* punishments since *ḥudūd* are prescribed punishments. The status of offenders or other circumstances are not considered in inflicting *ḥudūd* punishments. Once the offender is convicted with a *ḥadd* crime, the judge has no choice other than to impose the prescribed punishments neither more nor less. However, though mitigating and aggravating factors have no effect on *ḥudūd* punishments, there is a strong tendency to narrow down the applicability of these punishments as much as possible based on the *ḥadīth* of the Prophet which says:

> Set aside the execution of *ḥudūd* punishments in cases of doubt.[16]

This is clearly reflected in the strict nature of proof required to establish *ḥudūd*

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[16]Al-Shawkānī, *Nayl al-Awṭār*, vol.vii, p.272.

offences, for instance, high demands are made of the witnesses as regard to their numbers, qualifications and the content of their statements. If there is doubt in proving the crime, even the slightest one, a *ḥadd* punishment may not be imposed.

When any reasonable doubt is found in the case of a *ḥadd* punishment, the benefit of doubt is given to the accused. A *ḥadd* punishment is not imposed and may instead be reduced to one of *taᶜzīr*. Doubt in this context seems to be considered as a mitigating factor of punishment. (The effect of doubt on punishment will be discussed later, see below, pp.147-159). The members of the society are also discouraged from exposing the offence committed by any member of the society as far as they can, as advised by the Prophet who said:

> Forgive each other among you for *ḥudud* offences (if committed). When an offence of *ḥūdūd* reaches (informed to or tried by) me, it becomes enforceable.[17]

> Avoid condemning a Muslim to a *ḥadd* punishment whenever you can, and when you can find a way out for a Muslim then release him for it. If the imam errs, it is better that he errs in favour of innocence (pardon) then in favour of guilt (punishment).[18]

The above *ḥadīth*s show that in implementing *ḥudūd* punishments there are no questions of mitigating and aggravating factors when a *ḥadd* crime has been committed

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[17]Al-Tibrizī, *Mishkāt al-Maṣābīḥ*, vol.ii, p.292.

[18]Ibn Māja, *Sunan*, vol.ii, p.850, al-Tirmidhī, *Sunan*, vol.iv, p.33.

and the offender has been found guilty and convicted. The prescribed punishments have to be imposed on him regardless of his status or conditions. However, there is an exception to this rule, namely, when the punishments of *ḥudūd* can be deferred because the offender is sick or pregnant, or the weather is too hot or too cold. If the offender is too old or too weak , or suffers from an incurable illness, and his offence is not a capital one, the punishment should be inflicted in a manner that would not be fatal.[19] These are the circumstances which seem to be mitigating factors in the case of *ḥadd* punishments.

It is to be noted that if a *ḥadd* crime is repeated by the same offender, a severer punishment should be imposed on him, either by imposing additional punishment or by substituting a stronger one.[20] It therefore seems that repetition of the offence can be an aggravating factor in *ḥudūd* punishments. This can be deduced from the *ḥadīth* of the Prophet, which has been mentioned earlier (p.66), which warns that a person who keeps on drinking intoxicants after having been sentenced for the third time should be put to death. There is also a *ḥadīth* which reports that if a thief steals for the second time his left foot should be cut off, which is stronger than the punishment for committing theft for the first time, i.e. amputation of the right hand. There is even a *ḥadīth* which states that the death penalty may be imposed on a thief who has already lost both hands and feet for that offence. Though the jurists claim that the death penalty for repetition of the

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[19]For details, see: ᶜAwda, *al-Tashrīᶜ al-Jināʾī*, vol.i, p.380, Siddiqi, *The Penal Law of Islam*, p.86.

[20]For further details, see: Abū Zahra, *al-ᶜUqūba*, pp.250-262.

above crimes is abrogated,[21] it clearly indicates that repetition of *ḥudūd* crimes may aggravate the punishments.

From the above discussion, it can be concluded that the punishments of *ḥudūd* are unchangeable and in no way will mitigating and aggravating factors affect them whenever the crimes have been established. However, the application of *ḥudūd* punishments is narrowed down by a strict method of proof and procedure, and the punishments are mitigated or aggravated by factors which already exist internally, i.e. in the elements of the crime and its conditions. A lot more could be said on this matter, but the focus here is more on *taᶜzīr*. Indeed, this hesitancy to inflict *ḥadd* punishments is presumably a cause for more *taᶜzīr* punishments.

With regard to *taᶜzīr* punishments, mitigating and aggravating factors are considered in inflicting the punishments since a judge has the discretionary power to determine a suitable punishment for a convicted man. Two men who commit the same offence may be punished with different punishments, depending upon the factors which mitigate or aggravate the punishment inflicted on both of them.[22] There are several factors that may be taken into consideration in the infliction of *taᶜzīr* punishments, of which are:

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[21] Al-Shawkānī, *Nayl al-Awṭār*, vol.vii, p.325, Ibn Rushd, *Bidāyat al-Mujtahid*, vol.ii, p.555, Ibn Qayyim, *Zād al-Maᶜād*, vol.iii, p.213, Fazlul Karim, *Mishkāt al-Maṣābīḥ: An English Translation and Commentary*, vol.ii, p.557.

[22] Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.106, al-Qarāfī, *al-Furūq*, vol.iv, p.178, al-Ramlī, *Nihāyat*, vol.viii, p.22, Ibn Qudāma, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol.x, p.348.

1. The seriousness of the offence
2. The status of the offender
3. First offenders
4. Circumstances before the commission of a crime
5. The age of the offender
6. Confession
7. Repetition of an offence

3.4.1 The Seriousness of the Offence

If the offence committed is not serious, the punishment imposed should be lighter. Conversely, the more violent the crime is the more severe is the punishment that will be inflicted.[23] This is supported by the following Qurʾānic text which says:

> The recompense for an injury is an injury equal thereto (in degree).[24]

The above text is the guiding rule for the judge in passing sentence on *taʿzīr* offenders. The punishment should be equal to the degree of the crime committed.[25] This means that though a judge has full discretionary power in determining the

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[23]Ibn Farḥūn, *Tabṣirat al-Hukkām*, vol.ii, p.218, Ibn Taymiyya, *al-Siyāsa al-Sharʿiyya*, p.84.

[24]Qurʾān, 42:40

[25]Al-Tabarī, *Tafsīr*, vol.xxv, p.37.

punishment, he still has to follow the guidelines without going beyond the general conditions of the implementation of *ta'zīr* punishments. Therefore, a slight harm made by an offender should be punished with a lenient punishment, such as admonition, or other light punishment of *ta'zīr* which is equal to the seriousness of the offence that has been committed. However, if the offence is serious, the severer punishment is provided for the offender. In certain cases, the *ta'zīr* punishment can reach up to its maximum limit, such as imprisonment for life or even the death sentence if the offence is very serious.

3.4.2 The Status of the Offender

The status of the offender is relevant in considering the imposition of *ta'zīr* punishments since some people can be deterred from the commission of further offence by a light punishment but others are not deterred unless they are severely punished.[26] Being a respectable man can be considered a mitigating factor in *ta'zīr* punishment, as one *ḥadīth* states:

> Forgive or be lenient towards the faults of respectable men (*dhawī al-haiʾāt*) except the ordained crimes.[27]

Based on the above *ḥadīth*, some jurists have classified offenders, or rather

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[26]Ibn Farḥūn, *Tabṣirat al-Hukkām*, vol.ii,p.225, al-Māwardī, *al-Aḥkām al-Sulṭāniyya*, p.236, Ibn Taymiyya, *al-Siyāsa al-Sharʿiyya*, p.84.

[27]Aḥmad b. Hanbal, *al-Musnad*, vol.vi, p.181.

citizens, into four classes:

1. The most distinguished of the upper classes, i.e. scholars and officers of the highest rank.[28] They should only be punished with the lightest *taᶜzīr* punishment. Therefore, a personal communication from the judge through a confidential messenger would suffice as penalty.

2. The upper classes, i.e. the leaders or commanders, who may be summoned before the judge and admonished by him.

3. The middle classes, i.e. the merchants, for whom punishment can reach up to imprisonment.

4. The lower strata of people who can be punished by any type of *taᶜzīr* punishments including imprisonment or flogging.[29]

Other jurists, however, reject this classification according to social status and lay stress on the inner worth of the individual, his attitude towards religion, and his mode

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[28]According to Ibn Farḥūn, the high status of a person is judged by his expertise in the Qurʾān, knowledge and good behaviour and not by his property and position, while the lower status of a person is judged by his lack of knowledge, rude manners and stupidity. See: *Tabṣirat al-Hukkām*, vol.ii, p.225.

[29]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.330, al-Kāsānī, *Badāʾiᶜ al-Sanāʾiᶜ*, vol.vii, p.64, Ibn ᶜĀbidin, *Hāshiya*, vol.vi, p.104.

of life.[30] Anyway, it should be remembered that those who favour the classification of offenders, base their opinion on the custom (*ᶜurf*) of their time, since upper class people rarely commit a crime and if there is a case, it is normally not of a serious nature.[31] In this regard, al-Shāfiᶜī defines the meaning of `respectable people' as those who have no record of committing wrong (*sharr*), and the minimum punishment is only applicable if they commit a small offence for the first time. Conversely, if they commit a serious offence or repeat a similar offence more than once, they are no longer considered as respectable people, and a judge may, consequently punish them with any other suitable punishment according to his discretion.[32]

This is the situation that can be considered to mitigate a punishment on high ranking people, otherwise it might lead to injustice and contradict the rules of the Qurʾān and the *Sunna* which allow for alleviation of a *ḥadd* punishment on weak people (i.e. slaves). This can be seen in the Qurʾānic text which deals with the *ḥadd* punishment for the crime of *zinā* in the case of slave-girls:

> ... if they fall into shame, their punishment is half that for free women.[33]

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[30]Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.107.

[31]Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.107, Abu Zahra, *al-ᶜUqūba*, p.298.

[32]Al-Ramlī, *Nihāyat al-Muḥtāj*, vol.viii, p.19, al-Khaṭīb, *Mughnī al-Muḥtāj*, vol.iv, p.191.

[33]Qurʾān, 4:25

It is clear from the above text that the punishment for a slave is lighter, i.e. half of that for a free man. The jurists hold that if the slave is to be flogged, the stripe should be less severe than that of a free man. It is a widely accepted rule in the *Sharīᶜa* that any person who has any sign of weakness should be treated as moderately as possible. Therefore, since the sign of weakness in our time is not slavehood, but inferiority, inferior people can be considered as weak in the determination of *taᶜzīr* punishment.[34] A poor man, for example, who commits theft which does not amount to a *ḥadd* crime should be punished with a less severe punishment than a rich one who commits a similar offence. Similarly, a breach of trust or corruption committed by a high level or a powerful figure deserves to be punished with a severer punishment than an ordinary person who commits a similar offence. Regarding this matter, we may refer to the following Qurʾānic text:

> O wives of the Prophet, if any of you were guilty of evident unseemly conduct, the punishment would be doubled to her, and that is easy for God.[35]

The above text shows that if any of the Prophet's wives had behaved in an unseemly manner, it would have been a worse offence than in the case of ordinary women, on account of their special position. Thus, it implies that the status of an offender is relevant in considering his or her sentence.

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[34]Abū Zahra, *al-ᶜUqūba*, p.297.

[35]Qurʾān, 33:30

In the case of sexual offence, the marital status of an offender plays a significant role in passing sentences of *taᶜzīr*. This is derived from the judgement for *zinā* where a man or woman who is married (*muḥṣan*) and commits *zinā* will be sentenced with a severer *ḥadd* punishment than one who is not married (*ghayr muḥṣan*), i.e. stoning to death for the former as opposed to a flogging of one hundred stripes for the latter.

3.4.3 First Offenders

If an offender has committed a crime for the first time, this is taken into account in assessing the punishment of *taᶜzīr*. This mitigating factor can be derived from the Qurʾānic text which deals with the treatment of disobedient wives (i.e.*nushūz*), as follows:

> As to those women on whose part ye fear disloyalty and ill-conduct, admonish them (first), (next) refuse to share their beds, (and last) beat them (lightly).[36]

The above text shows that there are several steps taken in dealing with disobedient wives. In the beginning, it is sufficient to impose a light punishment on them, i.e. admonition first, in order to gain back their loyalty. If it is not sufficient, then a stronger one can be imposed gradually. Thus, it can be concluded from the text that being a first offender should be taken into consideration in alleviating the punishment.

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[36]Qurʾān, 4:34

What is meant by a first offender is when the commission of the crime takes place before he or she has been warned officially by a court, even if such a crime has been committed many times. Once an offender has been warned by a judge, he or she is no longer considered a first offender if he or she commits the same offence again. Therefore, a request for a lighter punishment on the grounds of being a first offender would not apply in such a case.[37]

3.4.4 Circumstances Before the Commission of a Crime

Circumstances prior to the commission of a crime can be considered in the determination of *taᶜzīr* punishments. A sudden provocation before the crime takes place or the motive of the crime may mitigate the sentence. Though there is no specific discussion on the effect of provocation on the infliction of *taᶜzīr* punishment by the jurists, the following case, which occurred during the time of ᶜUmar, where a man immediately killed his wife and her partner on seeing her having intercourse with someone might help in guiding the judgement:

> It is narrated that while ᶜUmar ibn al-Khaṭṭāb was having his breakfast, a man came harshly with a sword in his hand covered with blood. The man came nearer to ᶜUmar as well as a group of people. The people said, `O commander of the faithful! This man has killed our friend together with his wife'. ᶜUmar said to the man, `What did those people say?' The man replied, `I have cut off two thighs of my wife with this sword, if there was a man in between them (the two thighs), surely I would have killed him. ᶜUmar spoke to the people, `What

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[37]ᶜĀmir, *al-Taᶜzīr fī al-Sharīᶜa al-Islāmiyya*, p.494. See also: al-Ramlī, *Nihāyat al-Muḥtāj*, vol.viii, p.19.

> did the man say?' The people replied, `The man has slashed the two thighs of his wife and (that slash) has cut off the body of the man (who commits *zinā* with his wife) and the body is cut off by two. ᶜUmar said to the man (killer), `If those people went home, you go home!'[38]

ᶜUmar ordered the man (the killer) to go home, when the people of the victim (the murdered) had returned without asking the blood-money. The significance of this narration is that the occurence of *zinā* committed by a wife with another man in front of her husband's eyes is a sufficient provocation to the husband resulting in the murder of the adulterer by the husband, and thus the husband cannot be sentenced with *qiṣāṣ*. Some jurists, however, stipulate that the killer can only be excused from punishment if the original crime of the murdered man has been legally proven.[39]

Thus, if provocation is considered in the infliction of a punishment in the case of *qiṣāṣ* crimes, such as mentioned above, it should be even more so in the case of *taᶜzīr* crimes since their punishments depend on the discretion of a judge. A judge should consider whether there is sufficient provocation to the offender which contributes to his commission of the crime before he determines a suitable sentence for the offender.

The general principles of Islamic criminal law do not recognise the effect of a motive behind the commission of a crime in determining the punishment. However, a

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[38]Ibn Qudāma, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol.x, p.353, Abu Zahra, *al-ᶜUqūba*, p.394.

[39]Al-Ramlī, *Nihāyat al-Muḥtāj*, vol.viii, p.19, al-Khaṭīb, *Mughnī al-Muḥtāj*, vol.iv, p.191, Ibn Qudāma, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol.x, p.353, Abū Zahra, *al-ᶜUqūba*, p.394.

motive can still be considered in determining a punishment of *ta^{c}zīr*. A judge may mitigate or aggravate a *ta^{c}zīr* punishment if he finds that the accused has committed the crime based on a reasonably strong motive or otherwise.[40]

3.4.5 The Age of the Offender

The age of the offender is relevant when considering punishment of *ta^{c}zīr*. Criminal responsibility in Islamic law is based on understanding (*idrāk*) and free-will (*ikhtiyār*) and its degree varies according to a person's age. There are three stages which any ordinary person will experience from the very beginning of his life until he reaches the age of puberty, namely:

1. Absence of understanding when a child is unable to distinguish between right and wrong or between good or bad. A child at this stage is known as a *ṣabiy ghayr mumayyiz*. This stage begins from the day a child is born until he reaches seven years old. In fact, there is no specific age that a child is regarded as capable of distinguishing something since some children might do so earlier than others. However, the jurists limit it to the age of seven based on average occurrence, in order to standardise the judgement and to facilitate the judge in making any decision in relation to this matter. If a child at this stage commits any crime, he will not be accountable for any punishment, either *ḥadd* or *qiṣāṣ*

[40c] Awda, *al-Tashrī^{c} al-Jinā'ī al-Islāmī*, vol.i, p.411.

or *taᶜzīr*, so long as he has not reached the age of seven.[41]

2. Infirm understanding, when a child is already able to distinguish between right and wrong or between good or bad but not in a full way. A child, at this stage, is known as a *ṣabiy mumayyiz*. This stage begins from the age of seven until the child reaches the age of puberty, i.e fifteen years old as fixed by the Shāfiᶜīs, the Hanbalīs and some of the Mālikīs. Whenever a child reaches the age of fifteen he is considered as having reached puberty legally even though he might not have done so physically. Abū Hanīfa, however, fixes the age of puberty at eighteen, and in another report, he fixes it at nineteen years old for a boy and seventeen years old for a girl. The dominant opinion of the Mālikī school agrees with the opinion of Abū Hanīfa which fixes it at eighteen, while some others fix it at nineteen.[42]

If a child of this age commits a crime, he will not be accountable for a crime of *ḥadd* or *qiṣāṣ*, but he should be disciplined (*taʾdīb*) with a *taᶜzīr* punishment. This means that he may be punished again whenever he repeats a crime but he will not be considered a criminal. The type of *taᶜzīr* punishments which can be inflicted on a *ṣabiy mumayyiz* are no more than reprimand or beating.[43]

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[41] *Ibid.*, p.601.

[42] *Ibid.*

[43] *Ibid.*, p.602.

3. Full power of understanding, i.e. when a person can distinguish everything in as complete way as possible. At this stage, he is known as *bāligh wa rāshid* (a mature person). This stage begins when a person reaches fifteen years old, according to the majority of the jurists, or eighteen years old according to Abū Ḥanīfa and the dominant view of the Mālikīs.

   A person at this age is fully responsible for any crime that he has committed, whether it is of a *ḥadd* or *qiṣāṣ* or *taᶜzīr* type.[44]

From the above discussion of the different stages of a human-being and his criminal responsibility, it can be concluded that being a child or a young person is considered as mitigating factor. A young person who commits a crime cannot be called a criminal even though he has been punished more than once. This means that if he commits the offence again after the age of puberty, he is considered as a first offender. The punishment imposed also should be moderate.

3.4.6 Confession

Confession can mitigate the punishment of *taᶜzīr* though it has no effect on the sentencing policy of *ḥudūd* punishments. There is no specific discussion by the jurists on the effect of confession on *taᶜzir* punishments but some *ḥadiths* concerning *ḥadd* and

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[44] *Ibid.*

qiṣāṣ as stated below give some indications about this matter. One of the *ḥadīths* says:

> ᶜAlqama ibn Wā)il reported on the authority of his father, "While I was sitting in the company of Allah's Messenger, a person came there dragging another one with the help of a strap and said: God's Messenger, this man has killed my brother. The Prophet said to him: Did you kill him? And the man said: If he does not confess, I shall bring a witness and evidence against him. The murderer said: Yes, I have killed him. The Prophet asked: Why did you kill him? He answered: He and I were striking down the leaves of a tree and he insulted me and so I struck his head with an axe and killed him, whereupon the Prophet said: Have you anything with you to pay blood-wit on your behalf? He said: I do not have any property but this robe of mine and this axe of mine. The Prophet said: do you think your people will pay ransom for you? He said: I am more insignificant among my people than this (that I would not be able to get this benefit from my tribe). The Prophet threw the strap towards the claimant of the blood-wit saying: Take away your man. The man took him away and as he returned, the Prophet said : If he kills him, he will be like him. He returned and said: God's Messenger, it has reached me that you have said that, `If he killed him, you would be like him'. I caught hold of him according to your command, whereupon the Prophet said: Don't you like that he should take upon him (the burden) of your sin and the sin of your companion (your brother)? He said: Why not? The Prophet said: If it is so, then let it be. He threw away the strap (around the offender) and set him free."[45]

The significance of the *ḥadīth* can be said that among other things that the confession of a murderer can be used as a mitigating factor to seek remission. This conclusion can only be drawn in the cases of *qiṣāṣ* not in *ḥudūd* since *ḥudūd* offences are fixed by God and their punishments are prescribed by Qur)ān and *ḥadīth*, while the *qiṣāṣ's* victims are entitled either to pardon the murderer or claim blood-money or inflict *qiṣāṣ*.

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[45]Muslim, *Saḥīḥ, Sharḥ al-Nawawī*, vol.xi, p.172.

However, there was one occasion where a confession of a *ḥadd* offence was accepted by the Prophet and he granted the confessor forgiveness and remission. The *ḥadīth* is as follows:

> Isḥaq ibn ᶜAbd Allāh ibn Abī Talḥa reported with the authority of Anas ibn Mālik, he said: "While I was sitting with the Prophet a man came to him and said: O Messenger of God, I had committed an offence of *ḥadd*, so impose it on me; He (the narrator) said: The Prophet did not ask him (the confessor) about that (the particular offence). He (the narrator) said: The praying time has come and the man (the confessor) performed the prayer together with the Prophet. When the Prophet has finished praying the confessor came to him and said: O Messenger of God, that I have had committed a *ḥadd* offence, so impose on me the Book of Allah. The Prophet said: Wasn't that you who had been praying with us? The confessor said: Yes. The Prophet said: Allah had forgiven (remitted) your guilt (*dhanb*) or (the narrator) said, your *ḥadd*.[46]

Three significant points can be drawn from this *ḥadīth*:

1. The confession of a *ḥadd* offence was considered by the Prophet as a mitigating factor when the offence was unspecified.

2. A confession made in an unspecific way can be considered if it is accompanied by the good behaviour and character of the confessor by showing his repentance, as in the above *ḥadīth*, by his doing the prayer together with the Prophet.

3. A judge is not required to ask the confessor on what offence he confesses. The

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[46]Al-Bukhārī, *Saḥīḥ*, vol.viii, p.139.

doubt raised by this is of benefit to the confessor.

These are the cases of *ḥadd* and *qiṣāṣ* where confession, in certain conditions, can mitigate the punishments. Therefore, there is no reason to say that confession cannot affect the punishment of *taᶜzīr*. The judge should take into account the confession of an offender in determining the punishment. Regarding this matter, there is a *ḥadīth* of the Prophet which states that:

> A man came to the Prophet and said, `I have kissed a woman'. Then the Qurʾānic verse was revealed (And establish regular prayers at the two ends of the day and at the approaches of the night: For those things that are good remove those that are evil)[47] Then the man asked, `Is this verse addressed to me?' The Prophet said, `It is addressed to anyone of my *umma* who is in a similar situation'.[48]

The significance of the above *ḥadīth* is that the judge can, at his discretion, remit the punishment of *taᶜzīr* or mitigate it if the confession of an offender is accompanied with good behaviour which indicates that he has repented.

3.4.7 Repetition of an Offence (*ᶜAwd*)

Repetition of an offence is considered as an aggravating factor in *taᶜzīr* punishment. If an offender keeps committing a crime even after having been punished, it means that the

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[47]Qurʾān, 11:114

[48]Ibn Qayyim, *Iᶜlām al-Muwaqqiᶜīn*, vol.iv, p.370.

previous punishment imposed was not effective enough to stop him from repeating the offence. He, therefore, deserves a severer punishment. According to Ibn Taymiyya, the punishment of *taᶜzīr* is determined by a judge who should consider the situation of the offender. If he continuously commits the offence, a severer punishment should be imposed on him since the *taᶜzīr* punishments are intended to discipline the offender and to serve as deterrent.[49]

Ibn Farḥūn mentions in his book *Tabṣirat al-Hukkām*, that an apostate who repents cannot be punished for the first time but if he repeats similar offence and then repents again, he would be punished.[50] In certain cases, a recidivist can be punished with capital punishment (*al-taᶜzīr bi al-qatl*) if the offences are of a serious nature, such as repeated acts of sodomy, or espionage, etc, as discussed above in Chapter Two. (See above, pp.53-67)

From the above, it can be concluded that there are certain factors which influence the degree of *taᶜzīr* punishments. The judge should take these factors into consideration before making any judgement concerning *taᶜzīr* punishments. Thus, the generalisation made by Joseph Schacht, that the concept of mitigating circumstances does not exist in Islam,[51] cannot be accepted.

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[49]Ibn Taymiyya, *al-Siyāsa al-Sharᶜiyya*, p.84. See also: Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.332, Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.135.

[50]Ibn Farḥūn, *Tabṣirat al-Hukkām*, vol.ii, p.230.

[51]Joseph Schacht, *An Introduction to Islamic Law*, p.187.

3.5 The Effect of Doubt (*Shubha*), Repentance (*Tawba*) and Pardon (*ᶜAfw*) on *Taᶜzīr* Punishments

3.5.1 The Effect of Doubt (*Shubha*) on *Taᶜzīr* Punishments

Doubt (*shubha*), in the Islamic penal context, means something which is ambiguous or something that is very close to certain but is not certain.[52] The following examples may help to illustrate what is meant by *shubha* in Islamic criminal law:

1. *Shubha* relating to the possession of the property in the case of stealing shared property. Anyone who steals something which he shares with another person will not be liable to the *ḥadd* punishment as the definition of theft, that is punishable by the *ḥadd* punishment, is taking someone else's property by stealth. A *shubha* exists in this case since he does not really take the property of others because he has a share in it.[53]

2. *Shubha* relating to the right of possession in the case of stealing one's own child's property. If a father takes his child's property by stealth, it means that he commits the crime of theft which is punishable by amputation of the hand.

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[52]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.237, Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.26.

[53]Al-Kāsānī, *Badāᵓiᶜ al-Sanāᵓiᶜ*, vol.vii, p.66, Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.364, Ibn Rushd, *Bidāyat al-Mujtahid*, vol.ii, p.552, al-Ramlī, *Nihayat al-Muḥtāj*, vol.vii, p.444, Ibn Qudāma, *al-Mughnī*, vol.viii, p.277.

However, the *ḥadd* punishment cannot be imposed in this case due to the *shubha* relating to the right of possession of the property. This is based on the *ḥadith* of the Prophet which says, "You and your property are owned by your father".[54]

3. *Shubha* relating to the right of possession in the case of *liwāṭ* with one's own wife. Having anal intercourse (*liwāṭ*) with one's own wife is prohibited and the jurists consider it as *zinā*, but it is exempted from the *ḥadd* punishment because marriage puts the wife in the possession of the husband and thus gives him the right to take the benefit of the whole body of his wife. The right to possess that the husband has in this case is considered as *shubha*, that he could have anal intercourse with his wife. Therefore, the existence of this *shubha* leads to remittance of the *ḥadd* punishment.[55]

4. *Shubha* relating to the uncertainty of the evidence. For instance, one who confesses that he has committed a *ḥadd* crime in the absence of evidence to establish his crime other than his confession. In this case, the *ḥadd* punishment should be inflicted on him based on his confession. However, if he withdraws his confession, the punishment should be remitted. This is because the withdrawal of a confession leads to the *shubha*, that the confession might not be

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[54]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.368, Ibn Rushd, *Bidāyat al-Mujtahid*, vol.ii, p.553, al-Ramlī, *Nihāyat al-Muḥtāj*, vol.vii, p.444, al-Shīrāzī, *al-Muhadhdhab*, vol.ii, p.281, Ibn Qudāma, *al-Mughnī*, vol.viii, p.274.

[55]Al-Nafrāwī, *al-Fawākih al-Dawānī*, vol.ii, p.286, Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.38, Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.250, al-Ramlī, *Nihāyat al-Muḥtāj*, vol.vii, p.424, Ibn Qudāma, *al-Mughnī*,vol.viii, p.189.

true. The same rule applies if the witnesses withdraw their testimony in a case which depends solely on the testimony of witnesses.[56]

Though the Muslim jurists are in consensus regarding the remittance of *ḥudūd* punishments due to *shubha*, they are not in agreement concerning all *shubha* matters. Some jurists consider that the existence of a particular *shubha* remits the infliction of a *ḥadd* punishment, while others do not think so. The proof of this statement is discussed in the following paragraphs.

According to Mālik, al-Shāfiᶜī and Aḥmad ibn Ḥanbal, one who has had sexual intercourse with a woman who sleeps in his bed, believing that she is his wife, is excused from being punished by the *ḥadd* punishment since they hold that a woman found sleeping in his bed constitutes a *shubha*, which supports his claim that he believes that she is his wife.[57] Abū Ḥanīfa, on the other hand, does not consider the existence of a woman in the man's bed to be *shubha*.[58]

One who marries his *maḥram* (a woman within the forbidden degrees of marriage) is excused from the *ḥadd* of *zinā* due to the *shubha* relating to the *ᶜaqd*

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[56]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.278, al-Nafrāwī, *al-Fawākih al-Dawānī*, vol.ii, pp.282,285, Ibn Rushd, *Bidāyat al-Mujtahid*, vol.ii, p.536, al-Ramlī, *Nihāyat al-Muḥtāj*, vol.vii, p.230, Ibn Qudāma, *al-Mughnī*, vol.viii, pp.203, 212.

[57]Al-Zurqānī, *Sharḥ al-Zurqānī*, vol.viii, p.78, al-Shīrāzī, *al-Muhadhdhab*, vol.ii, p.368, Ibn Qudāma, *al-Mughnī*, vol.viii, p.184.

[58]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.245.

(marriage contract). The same rule applies to any marriage which is unanimously agreed to be null and void, such as marriage to a fifth wife, or a married woman, or a woman who is still in her *ᶜidda* (waiting period following divorce or death of the husband) or a divorcee after the third time (*bāʾin*). This view is held by Abū Ḥanīfa.[59] Abū Yūsuf and al-Shaybānī, on the other hand, hold the same view as Mālik, al-Shāfiᶜī and Aḥmad ibn Hanbal, who hold that the *ḥadd* of *zinā* must still be imposed in these cases because the *shubha* relating to the *ᶜaqd* is null and void, as long as the offender knows of the prohibition of such marriages.[60] Similarly, if a man hires a woman to have sexual intercourse with, he is excused from the *ḥadd* punishment for *zinā* according to Abū Ḥanīfa, due to the *shubha* relating to the *ᶜaqd* (lease contract).[61] On the contrary, Abū Yūsuf and al-Shaybānī agree with Mālik, al-Shāfiᶜī and Aḥmad ibn Hanbal, who hold that the *ḥadd* punishment cannot be remitted due to the *shubha* relating to the *ᶜaqd* as it will enable a man to make use of a woman sexually.[62]

In the case of stealing something originally permissible, for instance, stealing water that is being stored, or an animal carcass after it has been hunted, Abū Ḥanīfa states that the *ḥadd* punishment for theft cannot be imposed because it is originally public property which is shared by all people. The public share of such things originally

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[59]Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.33, Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.246.

[60]Ibn Rushd, *Bidāyat al-Mujtahid*, vol.ii, p.531, al-Shīrāzī, *al-Muhadhdhab*, vol.ii, p.268, Ibn Qudāma, *al-Mughnī*, vol.viii, p.183.

[61]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.249.

[62]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.249, Ibn Rushd, *Bidāyat al-Mujtahid*, vol.ii, p.530, al-Shīrāzī, *al-Muhadhdhab*, vol.ii, p.268, Ibn Qudāma, *al-Mughnī*, vol.viii, p.211.

is a *shubha* that the share still exists after the thing has been possessed.[63] Mālik, al-Shāfiᶜī and Aḥmad ibn Hanbal, however, do not remit the *ḥadd* punishment in this case since they do not think that there is a *shubha* regarding property which is originally permissible.[64]

Abū Ḥanīfa also considers the state of something being of insignificant value (*tāfih*) as a *shubha* which can remit the infliction of the *ḥadd* punishment on those who steal things such as sand, mud, gypsum, wood, grass and so on. According to Abū Ḥanīfa, these things are of insignificant value because people are not normally interested in them. Thus Abū Hanifa refers to custom and common practice in society to identify which things are of insignificant value. However, if such things are modified and become valuable, for example, wood which has been modified and become furniture, then in this case amputation of the hand should be imposed on the one who steals them.[65]

Abū Yūsuf, however, disagrees with Abū Ḥanīfa on this matter. He holds that the *ḥadd* punishment for theft can be remitted only in the case of stealing sand and manure. In other cases, the *ḥadd* punishment must be imposed as long as the thing is

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[63]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.351, Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.152.

[64]Ibn Rushd, *Bidāyat al-Mujtahid*, vol.ii, p.552, al-Shīrazī, *al-Muhadhdhab*, vol.ii, p.281, Ibn Qudāma, *al-Mughnī*, vol.viii, p.246.

[65]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, pp.350,359, Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.151.

valuable, i.e. can be bought or sold.[66]

In contrast to the Hanafī school, Mālik, al-Shāfiᶜī and Aḥmad ibn Hanbal do not think that there is any *shubha* with regard to things of insignificant value as long as their value reaches the prescribed amount above which the *ḥadd* punishment for theft applies (*niṣāb*).[67]

Abū Hanīfa also holds that the *ḥadd* punishment for theft is excused in the case of stealing something which rots quickly, for instance, vegetables, meat and bread.[68] Abū Yūsuf, however, disagrees with Abū Hanīfa and holds the same view as Mālik, al-Shāfiᶜī and Aḥmad ibn Hanbal who do not think that something which rots quickly is a cause for any *shubha*.[69]

Similarly, Abū Hanīfa exempts the *ḥadd* punishment for theft in the case of stealing the mosque door due to the *shubha* relating to the custody of the property.[70] On the other hand, Mālik, al-Shāfiᶜī and Aḥmad hold that the mosque door is kept in a proper place and thus there is no *shubha* to exempt anyone who steals it from being

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[66]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.352.

[67]Ibn Rushd, *Bidāyat al-Mujtahid*, vol.ii, p.552, al-Shīrāzī, *al-Muhadhdhab*, vol.ii, p.281, Ibn Qudāma, *al-Mughnī*, vol.viii, p.246.

[68]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.352, Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.142.

[69]Ibn Rushd, *Bidāyat al-Mujtahid*, vol.ii, p.552, al-Shīrāzī, *al-Muhadhdhab*, vol.ii, p.281, Ibn Qudāma, *al-Mughnī*, vol.viii, p.246.

[70]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, 356, Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.154.

punished with the *ḥadd* punishment.[71]

3.5.1.1 Types of *Shubha*

The Shāfiᶜīs and the Hanafīs are concerned about classifying the different types of *shubha* in detail whilst the Mālikīs and the Hanbalīs are content with mentioning the cases which are considered as *shubha* in general. According to the Shāfiᶜīs, *shubha* can be classified into three types, namely:

1. *Shubha* concerning where the act takes place (*al-maḥall*).

   An example of this is someone having sexual intercourse with his own wife during her menstrual period or during the day in the month of fasting, or having anal intercourse with her. All these acts are prohibited in Islamic law but in these cases a *shubha* exists in the object (i.e. the wife) as she belongs to the husband and he has the right to have sexual intercourse with her as he wishes. The right that the husband has is the *shubha* which remits the infliction of *ḥadd* punishment on him, regardless of whether or not he knows the prohibition of such acts.[72]

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[71] Al-Nafrāwi, *al-Fawākih al-Dawānī*, vol.ii, p.295, al-Shīrāzī, *al-Muhadhdhab*, vol.ii, p.281, Ibn Qudāma, *al-Mughnī*, vol.viii, p.253.

[72] Al-Ramlī, *Nihāyat al-Muḥtāj*, vol.vii, p.424.

2. *Shubha* concerning the doer (*fāʿil*).

An example of this is a person has sexual intercourse with a woman whom he believes to be his wife but then he finds out that she is not his wife. The basis of *shubha* here is the doer's belief, i.e. he commits the unlawful act while thinking it is legal. Thus, the infliction of the *ḥadd* punishment is remitted in this case due to the *shubha* relating to the doer's belief.[73]

3. *Shubha* concerning the legal assessment of the act itself.

What is meant by this matter is the *shubha* as to whether a certain act is lawful or prohibited. The basis of this *shubha* is the difference of opinion among the jurists on the legality of certain acts. Therefore, if someone commits a certain act whose legality is disputable, the *ḥadd* punishment is remitted. For instance, a dispute between schools arises because Abū Ḥanīfa accepts that a marriage without a guardian as legal, Mālik accepts that a marriage without any witnesses as legal, Ibn ʿAbbās accepts that temporary marriage (*mut ʿa*) as legal. Thus, having sexual intercourse in these disputable marriages is not considered as *zinā* (adultery), since there is a *shubha* which can remit the infliction of the *ḥadd* punishment, even though the doer himself believes that it is illegal.[74]

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[73]Al-Shīrāzī, *al-Muhadhdhab*, vol.ii, p. 368.

[74]Al-Ramlī, *Nihāyat al-Muḥtāj*, vol.vii, p.425.

The Hanafīs also classify *shubha* into three types, namely:

1. *Shubha* concerning the act (*fiʿl*).

This *shubha* means that one is confused as to whether certain acts are lawful or prohibited, for example, having sexual intercourse with a wife who is divorced for the third time during her waiting period, or having that with a wife's slave. It is stipulated that *shubha* concerning the act can be an excuse if there is no original provision (*dalīl*) which prohibits certain acts and the criminal believes that it is lawful; otherwise this *shubha* cannot be an excuse to avoid the *ḥadd* punishment.[75]

The other three jurists, however, disagree with Abū Hanīfa regarding this matter and do not recognise the legality of *shubha* concerning the act in the case of *zinā*.[76]

2. *Shubha* concerning where the act takes place (*al-maḥall*).

This *shubha* results from the rules of the *Sharīʿa*; for example, theft is unlawful based on the following Qurʾānic verse:

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[75]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, pp.238-239, Ibn ʿĀbidīn, *Hāshiya*, vol.vi, p.29.

[76]Al-Zurqānī, *Sharḥ al-Zurqānī*, vol.viii, p.86, al-Anṣārī, *Asnā al-Maṭālib*, vol.iv, p.127, Ibn Qudāma, *al-Mughnī*, vol.viii, p.183.

As to the thief male and female, cut off his or her hand.[77]

but there is a *ḥadīth* of the Prophet which says:

You and your property are owned by your father.

If circumstances arise in which a father takes his son's property, a *shubha* arises in applying the former rule.[78]

3. *Shubha* concerning the contract (*ᶜaqd*).

According to Abū Ḥanīfa, if a *shubha* arises due to a contract (*ᶜaqd*), this can remit the infliction of the *ḥadd* punishment even though such a contract is unanimously agreed to be illegal and the criminal has knowledge of the prohibition.[79]

His disciples and the other jurists disagree with him regarding this matter and hold that the contract is not considered as causing a *shubha* unless the criminal

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[77]Qurʾān, 5:38

[78]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, pp.239, Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.26.

[79]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.241.

believes that it is legal.[80]

3.5.1.2 The Consequences of the Rule "Avoid *Hudūd* Punishments in Cases of *Shubha*"

The rule "avoid *ḥudūd* punishments in cases of *shubha*" has two different consequences, i.e. whether the accused is totally acquitted from the charge, or the *ḥadd* punishment is remitted from him but is replaced by a *taᶜzīr* punishment.

The accused is totally acquitted from the charge on the following three conditions:

1. If the *shubha* persists in the element of the crime. For example, a man has had sexual intercourse with a woman, believing that she is his wife; he is excused from both the *ḥadd* punishment for *zinā* or punishment of *taᶜzīr*, due to the absence of criminal intent which is one of the elements of a crime.[81]

2. If the *shubha* persists in the application of the prohibitive text of the Qurʾān or the *ḥadīth* of the Prophet. For example, in the case of a marriage without the presence of a guardian, or a witness, since some of the jurists accept it as legal

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[80]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.241, Ibn Rushd, *Bidāyat al-Mujtahid*, vol.ii, p.531, al-Shīrāzī, *al-Muhadhdhab*, vol.ii, p.268, Ibn Qudāma, *al-Mughnī*, vol.viii, p.182.

[81]Al-Zurqānī, *Sharḥ al-Zurqānī*, vol.viii, p.78, al-Shīrāzī, *al-Muhadhdhab*, vol.ii, p.368, Ibn Qudāma, *al-Mughnī*, vol.viii, p.184.

while some of them do not. In such a case, no punishment - neither *ḥadd* nor *taᶜzīr* - will be imposed on the accused.[82]

3. If there is a *shubha* in establishing the crime. For example, if the crime of adultery is established by the testimony of four men but then one of them withdraws his testimony, the accused is acquitted from the charge and will not be punished, either by *ḥadd* or by *taᶜzīr*.[83]

Apart from these three conditions, the rule "avoid *ḥudūd* punishments in cases of *shubha*" is still applied, but the *ḥadd* punishment is reduced to a *taᶜzīr* punishment. For example, a father who steals his son's property is excused from the *ḥadd* punishment for theft but the punishment of *taᶜzīr* is still to be inflicted on him. Similarly, *tá zīr* punishment is to be applied in cases where a man has anal intercourse with his wife, or steals something which is of insignificant value (according to Abū Ḥanīfa), or marriage to a *maḥram* (according to Abū Ḥanīfa) or withdrawing one's confession for a *ḥadd* crime after having made it.

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[82]Ibn Rushd, *Bidāyat al-Mujtahid*, vol.ii, p.531, al-Ramli, *Nihāyat al-Muḥtāj*, vol.vii, p.425, Ibn Qudāma, *al-Mughnī*, vol.viii, p.184.

[83]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.278, Ibn Rushd, *Bidāyat al-Mujtahid*, vol.ii, p.536, al-Ramlī, *Nihāyat al-Muḥtāj*, vol.vii, p.430, Ibn Qudāma, *al-Mughnī*, vol.viii, pp.203,212.

3.5.1.3 The Application of the Rule "Avoid *Hudūd* Punishments in Cases of *Shubha*" on *Taᶜzīr* Cases.

Originally, the rule "avoid *ḥudūd* punishments in cases of *shubha*" was applicable to *ḥudūd* crimes only but it can also be applied to *taᶜzīr* crimes, since this rule is intended to maintain justice and to guarantee the accused's interest.

Regarding *taᶜzīr* crimes, this principle results in the acquittal of the accused on the same three conditions as those for *ḥudūd* crimes i.e. *shubha* due to absence of the element of crime, *shubha* due to the conflict of the jurists as to the legality of certain acts, and *shubha* in establishing the crime. This rule, however, does not apply in cases where the *ḥadd* punishment has already been reduced to a *taᶜzīr* punishment.[84]

3.5.2 The Effect of Repentance (*Tawba*) on *Taᶜzīr* Punishments

A person who makes an attempt to commit a crime, may further his attempt up to the end, and thus, he should be sentenced with a full punishment provided for that crime. If he does not complete his commission of the crime, but quits in the middle of it, this may be due to a compulsory reason or a voluntary one. A criminal who quits from committing a crime compulsorily normally withdraws his intention when there are some factors which urge him to do so, for example, he is being watched by other people, or he is arrested by the police and so on. In this case, the criminal cannot be sentenced with

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[84]ᶜAwda, *al-Tashrīᶜ al-Jināʾī al-Islāmī*, vol.i, p.216.

the full punishment stipulated for the crime but should be punished with a suitable *taᶜzīr* punishment. His crime, at this stage, is called attempted crime (*shurūᶠ*).[85]

However, if a person withdraws his intention from completing the crime voluntarily, this could be due to his anxiousness about punishment or becoming conscious of the existence of God and His punishment, and this is known as repentance (*tawba*). It may also be that a criminal commits a crime but then repents afterwards. Whether or not he should be punished depends on the type of crime he has committed, the degree of his repentance, and other factors which might affect the punishment.[86]

The majority of the jurists agree that repentance remits the prescribed punishments in the case of *ḥirāba* if the robber repents before being arrested.[87] This is based on the Qurʾānic verse which follows immediately after the verse regarding the punishment of *ḥirāba*, as follows:

> Except for those who repent before they fall into your power: In that case, know that Allah is Oft-Forgiving, Most Merciful.[88]

They also agree that repentance does not remit the punishment of *qadhf* since

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[85]*Ibid.*, pp.342-351.

[86]*Ibid.*, p.352.

[87]Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.188, Ibn Rushd, *Bidāyat al-Mujtahid*, vol.ii, p.560, al-Shīrāzī, *al-Muhadhdhab*, vol.ii, p.285, Ibn Qudāma, *al-Mughnī*, vol.viii, p.295.

[88]Qurʾān, 5:34

qadhf concerns the rights of people, regarding their dignity and integrity, and it cannot be remitted by the repentance of an offender.[89] The jurists, however, have differences of opinion with regard to offences other than *ḥirāba* and *qadhf*, whether the repentance of an offender can remit the punishment or not. These offences also include *taᶜzīr* offences.

According to some of the Hanbalīs and one opinion of the Shāfiᶜīs, the repentance of an offender before his being arrested remits the punishment. This opinion is based on an analogy (*qiyās*) with the crime of *ḥirāba*, the punishment for which can be remitted by repentance. Therefore, it is more fitting for the punishment of offences other than *ḥirāba* which are less serious.[90] They also base their opinions on the Qurʾānic verses which remit the punishment of *zinā* due to repentance, i.e. as follows:

> If any of your women are guilty of lewdness, take the evidence of four (reliable witnesses) from amongst you against them; and if they testify, confine them to houses until death claims them, or Allah ordains for them some (other) way.[91]

> If two men among you are guilty of lewdness, punish them both, if they repent and amend, leave them alone: for Allah is Oft-Forgiving, Most Merciful.[92]

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[89]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.411.

[90]Al-Shīrāzī, *al-Muhadhdhab*, vol.ii, p.285, Ibn Qudāma, *al-Mughnī*, vol.viii, p.296, Ibn Qayyim, *Iᶜlām al-Muwaqqiᶜīn*, vol.ii, p.78.

[91]Qurʾān, 4:15

[92]Qurʾān, 4:16

This opinion is also supported by the verses of the Qur'ān which mention that repentance can also set aside the punishment prescribed for theft, as follows:

> As to the thief male or female, cut off his or her hand: A punishment by way of example from Allah for their crime: and Allah is Exalted in Power. But if the thief repents after his crime, and amends his conduct, Allah turneth to him in forgiveness; for Allah is Oft-Forgiving, Most Merciful.[93]

In addition, this view is supported by a *ḥadīth* of the Prophet which has already been mentioned before (see above, p.144) regarding a person who came to the Prophet confessing his crime besides showing his repentance and the Prophet forgave him.

This group of jurists stipulate that the repentance of an offender can only remit the punishment for crimes other than *ḥirāba* if these crimes involve the rights of God such as *zinā*, theft or drinking intoxicants or any *taᶜzīr* crime which touches the public interest (*maṣlaḥa ᶜāmma*). But if the crime involves private or personal rights (*ḥaqq al-ᶜibād*) such as murder or injury, or beating or insulting others, the repentance of an offender has no effect in remitting the punishments. Another condition for enabling repentance to be considered is that the repentant offender must behave correctly, but this condition is seen as recommended rather than compulsory.[94]

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[93]Qur'ān, 5:38,39

[94]Al-Ramlī, *Nihāyat al-Muḥtāj*, vol.viii, p.6, al-Shīrāzī, *al-Muhadhdhab*, vol.ii, p.285, Ibn Qudāma, *al-Mughnī*, vol.viii, p.291, Ibn Qayyim, *Iᶜlām al-Muwaqqiᶜīn*, vol.ii, p.78.

According to another group of jurists, comprising the Hanafīs, the Mālikīs and some of the Shāfiᶜīs and Hanbalīs, the repentance of an offender does not remit the punishments of *ḥudūd* other than *ḥirāba*. This rule is also applied to *taᶜzīr* offences. They say that, unlike other crimes, the punishment for *ḥirāba* can be remitted by repentance because of the valid and clear evidence of the Qurʾānic verse. A *qiyās* which relates *ḥirāba* with other crimes is also irrelevant since the nature of the former is different from the latter. They state that *ḥirāba* is a very serious crime which affects the stability of the whole community and it is normally hard to capture the robber. Thus, in order to encourage the robber to stop committing further crime, Allah grants forgiveness to the robber who repents before being arrested. However, if he is caught before that, this rule would not apply and he is treated like any other criminal regardless whether he repents after that or not. It is worth mentioning here that the repentance of the robber can only remit the prescribed punishment if his commission of crime does not involve the right of any individual, i.e. if he does not kill or take another's property while committing *ḥirāba*. If he kills while committing robbery, he should still be liable for *qiṣāṣ* unless he is forgiven by the kin of the victim, and if he takes another's property, he should return it to the owner and thus, a *ḥadd* punishment will not be inflicted on him.[95]

This group also holds that the stories of Māᶜiz and the Ghāmidiyya woman show clearly that the punishment of *zinā* had been imposed on them even though they came

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[95]Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.188, Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.411, Ibn Rushd, *Bidāyat al-Mujtahid*, vol.ii, p.561, al-Qarāfī, *al-Furūq*, vol.iv, p.182, al-Shīrāzī, *al-Muhadhdhab*, vol.ii, p.285, Ibn Qudāma, *al-Mughnī*, vol.viii, p.296.

to the Prophet with complete confession and repentance. The Prophet said, concerning the Ghāmidiyya woman, "She has repented in such a way that if her repentance were to be allocated to seventy people of Medina, there would still be a surplus".[96]

This group of jurists also argue that if convicted criminals can be freed from any punishment on the grounds of repentance, this will lead to a hazardous state of instability in society. Crimes may become routine activities since the criminals can expect freedom when they plead repentance. It is not difficult to claim repentance when circumstances demand it.[97]

From the above argument, it is clear that despite the jurists' disagreement on the effect of repentance on punishment, they all agree that the claim of repentance cannot be considered if the crime involves the right of individuals or if it happens after the offender is arrested.

3.5.3 The Effect of Pardon (*ʿAfw*) on *Taʿzīr* Punishment

Pardon can remit a punishment whether it comes from the victim's side or the ruler's side. However, not all punishments can be remitted whenever pardon is granted. Some crimes are not affected by pardon, such as crimes which are punishable with a *ḥadd*

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[96] *Ibid.*

[97] Al-Kāsānī, *Badāʾiʿ al-Sanāʾiʿ*, vol.vii, p.96, al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, vol.vi, p.316, Ibn Rushd, *Bidāyat al-Mujtahid*, vol.ii, p.561, al-Anṣārī, *Asnā al-Maṭālib*, vol.x, p.316.

punishment. This is because the *ḥudūd* punishments are considered part of the right of God and are pre-determined and unchangeable. Therefore, nobody can remit the punishment of *ḥadd* or change it. However, the jurists have a difference of opinion concerning the effect of pardon in the case of *qadhf*. This difference results from their conflicts on whether *qadhf* infringes the right of God or that of an individuals. According to Abū Ḥanīfa, al-Thawrī and Awzāᶜī, pardon in the case of *qadhf* is not considered since they hold that *qadhf* is an offence which merely infringes the right of God.[98] The Shāffīs, on the other hand, hold that *qadhf* is an offence which merely infringes the right of an individual and therefore, the pardon of the victim may remit the punishment.[99] Another opinion states that pardon may remit the punishment of *qadhf* only if the case is not brought to the court. The Mālikīs, in this context, have two opinions; the first agrees with the Shāfiᶜīs, and the second agrees with the opinion that pardon may remit the punishment of *qadhf* if the case is not brought to the court.[100]

Pardon in the case of *qiṣāṣ* is considered in remitting the punishment from an offender only if it is granted from the victim's side and not from the ruler's side. Thus, when the victim or his relatives forgive the offender, the prescribed punishment cannot be inflicted on him. However, the pardon of the victim and his relatives does not affect the right of the ruler to impose a *taᶜzīr* punishment on the offender after that, if the

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[98]Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.93.

[99]Al-Ramlī, *Nihāyat al-Muḥtāj*, vol.viii, p.23.

[100]Ibn Rushd, *Bidāyat al-Mujtahid*, vol.ii, p.541.

public interest necessitates it. The ruler, on the other hand, cannot remit the prescribed punishment of *qiṣāṣ* on the offender by granting his pardon, if the victim does not allow him to do so.[101] The right of the victim or his relatives to forgive the offender from the punishment of *qiṣāṣ* is derived from the Qur'ānic verses which say:

> O ye who believe! The law of equality is prescribed to you in cases of murder...But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude. This is a concession and a mercy from your Lord.[102]

> We ordained therein for them: a life for a life, an eye for an eye ... But if any one remits the retaliation by way of charity, it is an act of atonement for himself.[103]

Regarding *ta'zīr* crimes, the jurists unanimously agree that the ruler has the right to forgive the offender, either by overlooking the crime or letting him off the punishment.[104] This agreement is based on the *aḥādith* of the Prophet, as quoted earlier, (pp.26,133) which say:

> Forgive or be lenient towards the faults of respectable persons (*dhawī al-hai'āt*).

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[101] Al-Haṣkafī, *Sharḥ al-Durr al-Mukhtār*, vol.ii, p.445, Ibn Rushd, *Bidāyat al-Mujtahid*, vol.ii, p.494, al-Shīrāzī, *al-Muhadhdhab*, vol.ii, pp.188-190, al-Bahūtī, *Kashshāf al-Qinā'*, vol.v, p.542.

[102] Qur'ān, 2:178

[103] Qur'ān, 5:45

[104] Ibn 'Ābidīn, *Hāshiya*, vol.vi, p.94, Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.331, Ibn Farḥūn, *Tabṣirat al-Hukkām*, vol.ii, p.224, al-Ramlī, *Nihāyat al-Muḥtāj*, vol.viii, p.23, Ibn Qudāma, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol.x, p.349.

Let's accept their (the *Anṣār*) good qualities and forget their bad ones.

They, however, dispute as to whether the right of granting pardon that the ruler has, covers all *taᶜzir* crimes or only some of them. According to some jurists, the ruler has no right to forgive an offender of *ḥudūd* and *qiṣāṣ* crimes when the prescribed punishment for them has been reduced to a *taᶜzīr* punishment due to certain reasons, which have been discussed above under the sub-topic "*shubha*" (see above, pp.147-159). Apart from the above crimes, the ruler may, at his discretion, forgive an offender for a crime or a punishment if he thinks that the public interest necessitates it.[105]

According to some other jurists, the ruler has full power to grant his pardon to an offender of any *taᶜzīr* crime whether it involves the right of God or the right of an individual as long as it conforms with the public interest.[106]

Regarding crimes which involve the right of an individual, for example, beating or insulting others, the victim of such crimes can forgive the offender, but his personal pardon cannot affect the right of the public to discipline an offender with a suitable *taᶜzīr* punishment. This means that in such a case the ruler can still use his discretion either to punish an offender or forgive him, according to the public interest. However,

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[105]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.331, Ibn Farḥūn, *Tabṣirat al-Ḥukkām*, vol.ii, p.224, al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, vol.vi, p.320, Ibn Qudāma, *al-Mughnī*, vol.x, p.349, al-Bahūtī, *Kashshāf al-Qināᶜ*, vol.vi, p.124.

[106]Al-Ramlī, *Nihāyat al-Muḥtāj*, vol.viii, p.23, al-Khaṭīb, *Mughnī al-Muḥtāj*, vol.iv, p.193.

if the victim does not grant his pardon and demands the infliction of a punishment, the ruler has no right to forgive an offender but to inflict a suitable punishment on him.[107]

From the above, it can be concluded that the pardon of the ruler does affect the degree of *taᶜzīr* punishments regardless of whether the crime infringes the right of God or infringes that of individuals and even if the victim forgives the offender.

3.6 The Discretion of The Judge

The jurists all agree that the determination of the punishment of *taᶜzīr* is left to the discretion of the judge. Therefore, a judge has full power to pass a suitable punishment on an offender besides taking into account the condition of the offence and the offender.[108] The question, however, arises as to whether the discretion of the judge in the determination of *taᶜzīr* punishment is absolute or limited.

According to the Hanafīs, the discretion of the judge is not fully absolute. It is accepted that the right to determine a punishment in the case of *taᶜzīr* is left to the discretion of the judge and therefore, he is free to choose any type of *taᶜzīr* punishment which is suitable to the condition of the offence and the offender. If, however, he opts

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[107]Ibn Farḥūn, *Tabṣirat al-Hukkām*, vol.ii, p.224, al-Māwardī, *al-Aḥkām al-Sulṭāniyya*, p.237, al-Ramlī, *Nihāyat al-Muḥtāj*, vol.viii, p.23, al-Bahūtī, *Kashshāf al-Qināᶜ*, vol.vi, p.124.

[108]Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.106, Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.330, Ibn Farḥūn, *Tabṣirat al-Hukkām*, vol.ii, p.221, al-Ramlī, *Nihāyat al-Muḥtāj*, vol.viii, p.22, Ibn Qudāma, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol.x, p.347.

for inflicting the punishment of whipping on an offender, then the judge's discretion is limited with regard to the number of lashes which can be allowed. The maximum number of lashes allowed in *taᶜzīr* cases is either thirty-nine as fixed by Abū Ḥanīfa and al-Shaybānī, or seventy-five as fixed by Abū Yūsuf. (See above, p.77) Thus, when a judge inflicts the punishment of whipping, he may determine the number of lashes which he believes is enough to achieve the aim of *taᶜzīr* punishment, but it must not exceed the maximum number of lashes mentioned above. However, if a judge thinks that whipping an offender with the maximum number of lashes is insufficient to serve as deterrent, a judge still cannot exceed the maximum limit, but he may choose another suitable punishment in addition to whipping.[109]

The Shāfiᶜīs agree with the Hanafīs concerning this matter. They accept that it is left to the discretion of the judge to determine a suitable punishment to be imposed on a *taᶜzīr* offender taking into account mitigating and aggravating factors. However, this power is not absolute since if a judge opts to choose the punishment of whipping, he must not exceed the maximum number of lashes as fixed by the Shāfiᶜī jurists.(See above, p.78) In addition, if a judge chooses to banish an offender, the duration of banishment should not exceed one year since banishment as a *ḥadd* punishment prescribed in the case of *zinā* of an unmarried culprit is one year. A similar opinion is held by the Ḥanbalīs.[110]

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[109]Ibn ᶜĀbidīn, *Hāshiya*, vol.vi, p.104, Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.335.

[110]Al-Ramlī, *Nihāyat al-Muḥtāj*, vol.viii, p.23, al-Khaṭīb, *Mughnī al-Muḥtāj*, vol.iv, p.192, Ibn Qudāma, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol.x, p.347.

The Mālikīs, on the other hand, have a different view concerning this matter. According to them, the discretion of the judge in the determination of *taᶜzīr* punishment is absolute and total. Therefore, a judge is given full power to determine a suitable punishment to be imposed on an offender, even if it exceeds one hundred lashes in whipping or more than one year banishment. However, a judge cannot go beyond the necessary punishment, i.e. if a judge thinks that a light punishment such as a reprimand is sufficient to deter an offender, a judge cannot choose another punishment which is stronger than that.[111]

From the above, it can be concluded that according to the majority of the jurists, the discretionary power that the ruler has is not absolute if he chooses the punishment of flogging or banishment; the Mālikīs, however, hold that this power is absolute. This disagreement results from their conflicts on whether *taᶜzīr* punishments, particularly flogging and banishment, may exceed *ḥudūd* punishments or not. (See above, pp.77 and 91-92) Even the Mālikīs, who claim that the discretion of the judge is absolute, hold that there is still a limit that a judge cannot go beyond.

3.7 The Effect of Previous Judgements on The Judge's Decision

The jurists do not discuss the effect of previous judgements on the judge's decision directly. However, it can be implied that this matter is included when they discuss the

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[111] Ibn Farḥūn, *Tabṣirat al-Hukkām*, vol.ii, p.222.

role of the ruler in the implementation of *taᶜzīr* punishment. According to the Mālikīs, Hanafīs and Hanbalīs, *taᶜzīr* punishment must be implemented by the ruler in *taᶜzīr* cases which have already been mentioned in the *Sharīᶜa* texts.[112] They confirm that if a *taᶜzīr* crime has already been mentioned in a text, for example, having sexual intercourse with one's wife's slave, or with a shared slave, the punishment is binding. There is no pardon in a case where the crime is punishable with a *ḥadd* punishment which is reduced to a *taᶜzīr* punishment due to certain causes. If a *taᶜzīr* crime is not mentioned in a text, the punishment is imposed on the basis of *maṣlaḥa*.[113] This means that previous judgements do affect the decision of the judge but in certain cases only.

When the subject of precedent is involved, it is essential to look through the historical facts concerning this matter. When the Islamic state rose in Medina, the primary source of Islamic law referred to in making judgements was the Qurʾān. The Prophet firstly referred to the Qurʾān and what God revealed to him (*waḥy*) in making his judgement. He also used his own wisdom in making judgement (*ijtihād*) and quite often he asked his Companions' opinions (*mushāwara*) on certain issues when there was no revelation from God. Then after the demise of the Prophet, his *Sunna* became the second source of Islamic law.[114]

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[112]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol.v, p.330, al-Kāsānī, *Badāʾiᶜ al-Sanāʾiᶜ*, vol.vii, p.64, al-Qarāfī, *al-Furūq*, vol.iv, p.179, al-Bahūtī, *Kashshāf al-Qināʿ*, vol.vi, p.124, Ibn Qudāma, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol.x, p.349.

[113]*Ibid.*

[114]Maḥmūd ibn Muḥammad, *Tārīkh al-Qaḍāʾ fī al-Islām*, p.19.

It is reported that Abū Bakr, whenever there was an incident which needed to be settled, would refer to the Qur'ān first; if he got the answer in it he would make his judgement based on the Qur'ān, but if not, he would base it on the *Sunna* of the Prophet concerning that matter which he knew himself. If he did not know any *Sunna* concerning that case, he would ask the Muslims if any of them knew whether there was a tradition of the Prophet concerning the matter, and would base his judgement on this *Sunna*, but if there were no single *Sunna* concerning the matter, he would gather the leaders and the distinguished people among the Muslims and ask their opinions on the matter. If they achieved a consensus of opinion on that, he would make his judgement following this consensus of opinion (*ijmā'*). Similarly, 'Umar followed the same way as Abū Bakr did in making his judgement. If he did not get the answer in the Qur'ān and *Sunna* he would first refer to the judgements of Abū Bakr on similar cases and base his judgement on that precedent. Again, if there was no previous judgement, he would base his judgement on the consensus of opinion concerning that matter.[115] Thus, it can be concluded that previous judgements do have an effect in the determination of punishment. The judge should first refer to any previous judgments before making his own decision on *ta'zīr* matters. However, previous judgements are not binding and may be adapted according to time and place.

It is worth mentioning that the judiciary power was originally held by the caliph himself who also held an executive power. Therefore, it is his right to be directly

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[115] *Ibid.*, p.20.

involved in making judgement himself or to delegate this power to his representative i.e. a judge.[116]

3.8 The Enactment of *Taᶜzīr* Laws

As discussed earlier in Chapter One, unlike *ḥudūd* and *qiṣāṣ* crimes, not all *taᶜzīr* crimes are mentioned in the *Sharīᶜa* texts. Only some are mentioned while the greater part of *taᶜzīr* crimes are left to be considered by the ruler. Hence, it is the ruler's duty to prohibit the commission of a certain act, or make it compulsory, with the intention of protecting the whole community and keeping it in order and well-organized. This legislative power that the ruler has concerning *taᶜzīr* matters should always comply with the *Sharīᶜa* texts and its principles.

Regarding the way of punishing *taᶜzīr* crimes, the *Sharīᶜa* has laid down a list of types of punishments which vary between the lightest punishment and the severest one. Once again, it is left to the discretion of the ruler or the judge to choose a punishment from this range which is the most suitable for the condition of the offence and the offender, as done by the judges in the early days of Islam such as Abū Mūsa al-Ashᶜarī, Shurayḥ, Ibn Abī Layla, Ibn Shabrama, ᶜUthmān al-Battī, Abū Yūsuf, Muhammad al-Shaybānī and Zufar ibn al-Huzayl.[117]

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[116] *Ibid.*, p.24.

[117] Abū Zahra, *al-ᶜUqūba*, p.69.

If this is a general rule that the *Sharīᶜa* has set down concerning the matter of *taᶜzīr*, where a ruler has a jurisdiction in the legislation of *taᶜzīr* crimes and punishments from the very beginning, there is, thus, no restriction for the ruler to lay down certain guidelines either in the forms of rules or enactments or in other words, to codify the law of *taᶜzīr* in advance and pre-determine a certain punishment for a certain crime and fix its degree within its maximum and minimum limit. Then, it is left to the judge to apply this law besides giving him freedom in choosing the punishment and making judgement within the two limits.[118] The codification of *taᶜzīr* crimes and punishments is even rational when compared to the crimes whose punishment has already been prescribed, such as *ḥudūd* and *qiṣāṣ*, since the number of crimes of this type are very small while the offences that are punishable with *taᶜzīr* punishments are abundant. The enactment of *taᶜzīr* laws is, therefore, essential to warn people in advance, making them accountable for their deeds and avoids any chance of excuse on the grounds of ignorance of the law, which may make application of the principle a difficult task. The enactment of *taᶜzīr* laws is also necessary to protect the society from the possibility of misuse of power by the judge. Furthermore, it will standardise judgements among the many judges and discourage questions of unfairness from arising and even make the judge's work easier and less complicated.

The facts note that ᶜUmar ibn ᶜAbd al- ᶜAzīz had made an effort to codify the law specifically on *taᶜzīr* i.e. by taking the formal legal opinions of the Medinese (*fatāwa ahl*

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[118] *Ibid.*, p.110.

al-Madīna) of the Companions and the *tābiᶜīn* (their successors) as the law which should be followed by all the judges of his time. However, he died before he completed this effort. Similarly, Abū Jaᶜfar al-Manṣūr, the second caliph of the Abbāsid period, had made an attempt to take the formal legal opinions of the Companions and the *tābiᶜīn* as the law for the Muslims. He asked Imām Mālik to compile the *Sunan* (the *fatāwa* of Companions and *tābiᶜīn* of Medina's period) in one book to make them as laws. Though Mālik had completed the compilation, he forbade the ruler and the rulers after Abū Jaᶜfar as well from taking it as the law of the country since the other region of the Islamic territory has already compiled the *Sunan* of the Companions and *tābiᶜīn* which they followed.[119]

The silence of the *Sharīᶜa* texts in not mentioning the demand for the discretion of the judge alone in the determination of *taᶜzīr* punishments indicates that the prescriptions involving *taᶜzīr* crimes and punishments do not contradict the rules of the *Sharīᶜa*. What we find in the books of *fiqh* (*kitāb*), in which the jurists mention that *taᶜzīr* punishments should be left to the discretion of the leader (*imām*), or the ruler (*ḥākim*) or the judge (*qāḍī*), in fact denotes the same meaning, i.e. a person who holds both the legislative and judiciary powers. We do not think that it denotes a person who is directly involved in the judgement of a certain case. If that were the case, the jurists would have used the word *qāḍī* constantly when they discussed on *taᶜzīr* matters.

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[119] *Ibid.*, p.70.

It is worth mentioning here that any *taᶜzīr* law which is enacted with the recognition of the ruler is considered as *taᶜzīr*, as long as it conforms to the *Sharīᶜa* texts and does not slip away from the general principles of the *Sharīᶜa*. It is also to be noted that the ruler who has the authority in the legislation of *taᶜzīr* crimes and punishments is the same ruler who implements the Islamic law comprehensively besides fulfilling all the requirements and qualifications stipulated for a just ruler (*ḥākim ᶜādil*) of the Islamic state.[120]

When *taᶜzīr* is enacted in advance, it seems that there is no point in discussing the power that the judge has in the determination of *taᶜzīr* punishment. In fact, when this matter is studied thoroughly, it can be noticed that the judge still has the power of determining the exact penalty to be imposed on the offender since *taᶜzīr* laws are established as a guideline to simplify the judge's task and to safeguard the public interest. It is still the judge's task to determine the most suitable punishment to be imposed on an offender taking into account the mitigating and aggravating factors.

The establishment of *taᶜzīr* laws does not mean that the law is unchanged forever. *Taᶜzīr* punishments are not prescribed as *ḥudūd* and *qiṣāṣ*. Therefore, they are subject to change whenever necessary. It is well-known that ᶜUmar ibn al-Khaṭṭāb, in his early days as a caliph, fixed that the number of lashes allowed in whipping an offender who was guilty for drinking intoxicants at forty lashes but later on he fixed it at eighty lashes

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[120]*Ibid.*

since the people were not deterred by the former punishment and the crime of drinking intoxicants became widespread during his time. It is indeed important to revise the *taᶜzīr* laws from time to time as is, in fact, done in many countries nowadays. This revision would ensure that the *taᶜzīr* laws continue to be applicable and relevant for the time and place.

PART TWO

THE APPLICATION OF *TAʿZĪR* LAWS IN MALAYSIA

CHAPTER FOUR

The Application of *Taᶜzīr* Laws in the Sharīᶜah Courts of Malaysia

4.1 Introduction

After discussing and analysing the concept of *taᶜzīr* from the classical Islamic point of view, we turn our attention to see how this law is applied in Malaysia. This chapter is therefore, designed to look through the provisions of *taᶜzīr* crimes and punishments as are applied in the Sharīᶜah Courts of Malaysia and to examine the extent to which they conform with the principles of *taᶜzīr* in Islamic criminal law.

4.2 Islamic Law in Malaysia : Historical Background

It is worthwhile to commence this topic with a brief discussion on the historical background of Islamic law in Malaysia in order to understand the position of Islamic criminal law in the present day Malaysian situation.[1] It is common knowledge that by the time European colonialism, in its Portuguese expression, reached the Malay Peninsula, Islam had already gathered a foothold there and was well on its way to gaining the adherence of the totality of the indigenous Malay population.[2] Islamic law

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[1]Malaysia, before 1963 was known as Malaya or Malay Peninsula.

[2]Ahmad Ibrahim, *Towards a History of Law in Malaysia and Singapore*, p.10.

was also in the process of becoming the established law of the land with the conversion of the various local rulers to Islam. This process was interrupted by the intrusion of colonialism and particularly the British intervention in the Malay States.[3]

Islamic law is believed to have been implemented gradually in the Malay Peninsula since the first Malacca sultan (ruler) embraced Islam. During that period, Islamic law was based on the text *Fatḥ al-Qarīb* which was written by Ibn al-Qāsim al-Ghazzi.[4] Another text was *al-Majalla*, which was produced during the Ottoman empire and was in use for some time in Johore. The text was translated into Malay and enforced in several courts in Johore.[5] Islamic law was, in fact, implemented in the Malay peninsula in varying degrees and spheres which included matrimonial matters, succession and some civil and even criminal matters. There are a number of digests which are based on Islamic texts and the Malay customs that form the texts of Malay law and which had been applied within the domain of the various Malay States.[6] The most popular one is *Undang-Undang Melaka* (the laws of Malacca).[7] This law is based on

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[3]Victor Purcell, *The Memories of A Malayan Official*, p.200.

[4]Liaw Yock Fang, *Undang-Undang Melaka (The Laws of Malacca)*, The Hague: Maritimes Nijhoft, 1976, p.35.

[5]Ahmad Ibrahim, *Towards a History of Law in Malaysia And Singapore*, p.71.

[6]Hooker, M.B., *Readings in Malay Adat Laws*, p.51-56.

[7]*Undang-Undang Melaka* covers criminal, transaction, family, evidence and procedure, and the conditions of a ruler. It was written around the years 1523-1524. For further details on this law see: Liaw Yock Fang, *Undang-Undang Melaka*, R.O. Winstedt and Josselin de Jong, "The Maritimes Laws of Malacca", *JMBRAS*, xxix, pt.iii, 1956, pp.25-27.

Islamic law as well as customary law.[8] Concerning criminal law matters, the crimes and punishments which are provided in *Undang-Undang Melaka* are divided into *ḥudūd*, *qiṣāṣ*, *diya* and *taᶜzīr*. *Hudūd* crimes which are legislated for in *Undang-Undang Melaka* are *zinā* (section 40:2), *qadhf* (section 12:3), theft (section 7:2 & 11:1), robbery (section 43), apostasy (section 36:1), drinking intoxicants (section 42) and *baghy* (section 5 & 42). While the crimes of *qiṣāṣ* and *diya* are legislated for in sections 5:1,3, 8:2,3, 18:4 & 39, causing injury in section 8:2 and its various types in sections 16, 17 & 21. It is worth noting that the punishments provided for all these crimes conform with those of classical Islamic law. *Undang-Undang Melaka* also mentions certain crimes which are punishable with *taᶜzīr* punishments. Such crimes include theft when it lacks the conditions for the *ḥadd* penalty (section 11, 11:1), kissing between a man and a woman (section 43:5), gambling (section 42) and giving false testimony (section 36).

It is clear from the above that Islamic criminal law was implemented in Malacca before the era of European colonialism. Apart from *Undang-Undang Melaka*, the provisions concerning Islamic criminal law can also be found in other Malay digests such as the laws of Johore, the laws of Kedah, the ninety-nine laws of Perak and the laws of Pahang.[9] According to Wilkinson, Islamic law would have eventually become predominant throughout Malaya had the British not stepped in to check it.[10]

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[8]See: Roff, *The Origins of Malay Nationalism*, Kuala Lumpur: University of Malaya Press, 1967, p.6, Alfred P.Rubin, *The International Personality of Malay Peninsula: A Study of the International Law of Imperialism*, Kuala Lumpur: University of Malaya Press, 1974, p.7.

[9]R.O. Winstedt and John E. Kempe, "A Malay Legal Digest", *JMBRAS*, vol.xxi, part 1, 1948.

[10]Wilkinson, R.J. *Law, An Introductory Sketch* , pp.48-49.

When Malacca was occupied by the Portuguese in 1511, followed by the Dutch in 1641, Islamic law continued to be implemented as the law of the land as before. It seems that the Portuguese and the Dutch were not interested in introducing their laws in Malacca and other Malay states during their occupation.[11]

It was only during the British period which began with the occupation of Penang in 1786, followed by the cession of Malacca in 1824 that English law was introduced into the Straits Settlements, which included Penang and Malacca, by the Charters of Justice under the royal prerogative. English law was confirmed through the medium of the Charters of Justice of 1807, 1826 and 1855. The first Charter of Justice which was granted by King George III in 1807 is considered as a major event in Malayan legal history, as it marked the beginning of the statutory introduction of the law of England into this area. The Charters set up a system of courts and a judiciary, they provided that English law should be the law of the land and should apply to the native inhabitants, in so far as the various religions, manners and customs would permit. They also enabled the establishment of the Court of Judicature of the Prince of Wales Island to exercise jurisdiction over all civil, criminal and ecclesiastical matters.[12] Consequently, Islamic law, which was considered the law of the land before the introduction of these Charters, was effectively set aside and only applied in a very narrow sense.

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[11]Ahmad Ibrahim & Ahilemah Joned, *Sistem Undang-Undang di Malaysia (Malaysian Legal System)*, pp. 14 & 15.

[12]Ahmad Ibrahim & Ahilemah Joned, *Sistem Undang-Undang Di Malaysia*, p.66, Wu Min Aun, *Pengenalan Kepada Sistem Perundangan Malaysia (An Introduction to Malaysian Legal System*, p.7.

A similar step was taken in introducing English law to the Federated Malay States. Perak and Selangor accepted British authority in 1874, Pahang in 1888, and Negeri Sembilan between 1874 and 1887. This was achieved through a series of treaties with the Malay rulers, beginning with the Treaty of Pangkor in Perak in 1874, by which each ruler was obliged to accept a British Resident, whose advice was to be asked and acted upon in all matters of administration except those concerning Islamic religion and Malay custom.[13] The courts were established and most of the judges were English with some Malay aristocrats as their assistants.[14] There was no statutory introduction of English law in these states until 1937, at which time the Civil Law Enactment of 1937 gave statutory authority for its application. Thus, although English law was not formally received until 1937, it was clearly accepted informally before that, especially through the judgement of the courts, since the judges were English and were, of course, experts in English law.[15] This situation was confirmed by Salleh Abas, L.P., in delivering the judgement of the Supreme Court in *Che Omar Bin Che Soh v. P.P*, as follows:

> Before the British came to Malaya... the sultans in each of the respective states were the heads not only of the religion of Islam but also as the political leaders in their states, which were Islamic in the true sense of the word, because, not only were they themselves Muslims, their subjects were also Muslims, and the law applicable in the states was Muslim law... When the British came, however, through a series of treaties with the sultans, beginning with the treaty of Pangkor and through the so-called British advice, the religion of Islam became separated into two separate aspects, viz the public aspect and the private aspect... Although

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[13]Wu Min Aun,*Pengenalan Kepada Sistem Perundangan Malaysia*, p.14.

[14]Emily Sadka, *The Protected Malay States 1874 - 1895*, p.207.

[15]Mohd Suffian Hashim, *An Introduction to the Constitution of Malaysia*, p.2.

> theoretically the sovereignty of the ruler was absolute in the sense that he could do what he liked, and govern according to what he thought fit, the Anglo-Malay Treaties restricted this power. The effect of the restriction made it possible for the colonial regime under the guise of "advice" to rule the country as it saw fit and rendered the position of the ruler one of a continuous process of diminution... Thus, it can be seen that during British colonial period, through their system of indirect rule and establishment of secular institutions, Islamic Law was rendered isolated in a narrow confinement of the law of marriage, divorce, and inheritance only.[16]

The same trick was used by the British to extend their powers to Unfederated Malay States. The four northern States were under Siamese influence before the British took over. It was only after the Anglo-Siamese Treaty of 1909 that the British began to extend their hold over these states by assigning a British Advisor to each of the states. Kelantan and Terengganu accepted a British Advisor in 1901, Kedah in 1923 and Perlis in 1930. Johore, which had been under British influence for a long time, accepted a British Resident only in 1914. The Civil Law Enactment of 1937 was extended to these states in 1951, by the Civil Laws (Extension) Ordinance 1951 and later it was replaced by the Civil Law Ordinance 1956.[17]

It is clear from the above that the British had succeeded in setting aside Islamic law and narrowing its application to personal matters only while at the same time confirming English law through the statutory introduction of English law and the judgements made by English judges. Besides, the British also enacted a specific law for

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[16][1988] 2 M.L.J. 55, 56.

[17]Wu Min Aun, *Pengenalan Kepada Sistem Perundangan Malaysia*, pp.14 & 15.

the administration of Muslim law,[18] which narrowed down the jurisdiction of Muslim courts and so on in order to reduce the application of Islamic law.

Sarawak and Sabah on the island of Borneo, which became part of Malaysia in 1963, were also subject to the intrusion of expanding British powers. Sarawak was under the rule of the Brooke family while Sabah was administered by the British North Borneo Chartered Company. Since these two territories were British protectorates, they were in the same position as the Malay States with regard to the reception of English Law. In Sarawak, there was no statutory reception of English law until 1928, when the Laws of Sarawak Ordinance was enacted and in Sabah, not until the Civil Ordinance 1938. At the time of the formation of Malaysia, the laws in force were the Sarawak Application of Laws Ordinance 1949 and the Sabah Application of Laws Ordinance 1951. These two statutes provided that the Common Law of England and the doctrines of equity, together with the statutes of general application, as administered or in force in England at the commencement of the Ordinances, should be the laws in Sarawak and Sabah, with the proviso that they should be in force in so far as the circumstances of Sarawak and Sabah and their inhabitants permitted, and subject to such qualifications as local circumstances and native customs rendered necessary.[19]

The Federation of Malaya became an independent sovereign state on 31st August

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[18]Sheridan, *Malaya and Singapore, The Borneo Territories, The Development of Their Laws and Constitutions*, pp.19-23.

[19]Wu Min Aun, *Pengenalan Kepada Sistem Perundangan Malaysia*, pp.20-22.

1957. The previous `protected Malay States' and the former Colonial Settlements of Penang and Malacca became the component states of the independent federation. A new federal constitution was introduced which became the supreme law of the new state.[20]

Henceforth, both Federal and State legislatures, were instituted, with the Constitution setting out a distribution of legislative powers between them. The powers of the Federal Parliament are listed in List 1 of the ninth schedule. There is also a concurrent list, that is, a list of matters upon which either Parliament or a State Legislative Assembly may legislate; residuary power remains with the States. In the event of a conflict between State and Federal legislation, the Act of Parliament prevails.[21] As regards Islamic law, to be administered in the States not the Federation, it is reserved to each state to administer. However, English Common Law and the rules of equity form part of the laws of Malaysia. Before 1st April 1972, several statutes provided the authority for the reception of English law into the country. The position of English law was mentioned specifically in the Civil Law Act (revised 1972), which came into force on 1st April 1972. This revised act is substantially similar to the various Ordinances it superseded. In section 3(1), it is stated that the court shall: a) in West Malaysia or any part thereof apply the common law of England and the rule of equity as administered in England on the 7th April 1956.[22] Judicial power in the Federation is

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[20]Article 4 & 162.

[21]Article 75.

[22]Wu Min Aun, *Pengenalan Kepada Sistem Perundangan Malaysia*, p.35.

vested in the Supreme Court and the High Courts of Malaysia and such courts as may be provided by federal law.[23]

Today, Malaysia is a federation of thirteen states with a written law and Federal Constitution.[24] The Constitution is the supreme law of the country and any law passed after *Hari Merdeka* (Independence Day) is void to the extent of its inconsistency with the Constitution.[25] Concerning laws that were passed before *Hari Merdeka*, they continue to be binding until amended or repealed by the relevant authority.[26]

It can be concluded from the above that English law is considered as the main law or the law of the land in Malaysia. In contrast, Islamic law is limited in its application, i.e. it is applied only to Muslims and has been narrowed down to family and other personal matters. The Sharī^{c}ah Courts have also become inferior to the Civil Courts. Furthermore, when the judicial system for the Federation of Malaysia was established by the Court of Ordinance, 1948, the Sharī^{c}ah Courts which were part of the judicial structure of Malaysia were then listed out from the hierarchy of the Malaysian Courts. Consequently, the Sharī^{c}ah Courts which operate in Malaysia nowadays no longer function like the Federal Courts but rather courts which resemble the concept of

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[23]Article 121.

[24]The thirteen states in Malaysia are : Kedah, Perlis, Perak, Selangor, Penang, Malacca, Negeri Sembilan, Johore, Kelantan, Pahang, Terengganu, Sabah and Sarawak. Federal Territories are administered independently by the Federal Government and can be considered as the fourteenth state.

[25]Article 4(1).

[26]Article 162.

secularism which separate worldly matters from religious matters.

4.3 The Position of Islamic Criminal Law in the Sharīᶜah Courts of Malaysia

As discussed in previous chapters, unlike the crimes of *ḥudūd* and *qiṣāṣ*, the crimes of *taᶜzīr* and their punishments are unlimited since they involve any wrongful act done by a person which is punishable with a *taᶜzīr* penalty that conforms with Islamic law. In Malaysia, such matters of criminal law are divided into two parts which are administered by two separate bodies with different jurisdiction and power. These bodies are the Sharīᶜah Courts and the Civil Courts.

Concerning the Sharīᶜah Courts, the Federal Constitution of Malaysia provides that the constitution, organization and procedure of the Sharīᶜah Courts is a State matter over which the State has exclusive legislative and executive authority, except in the Federal Territories.[27] Each Sharīᶜah Court is presided over by a Muslim *qāḍī*, i.e. a judge learned in Islamic law, and has jurisdiction only over Muslims and mainly in personal matters and applies only "Sharīᶜah law". Generally, there are two types of Sharīᶜah Courts, namely, Chief *Qāḍī* Courts and *Qāḍī* Courts. There is also an appeal committee which functions as an appellate court to hear appeals from the Chief *Qāḍī* Courts and *Qāḍī* Courts. What distinguishes the Chief *Qāḍī* Courts from the *Qāḍī* Courts is their jurisdiction and locality. A *Qāḍī* Court has jurisdiction only in its district

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[27]The Federal Constitution of Malaysia, 9th Schedule, List II, State list, item 1.

while the jurisdiction of a Chief *Qāḍī* Court extends throughout the state. These Sharīᶜah Courts are separate from the ordinary (i.e. Civil) Courts and do not come under the supervision of the Lord President.

Sharīᶜah Courts were established under the state laws (i.e. enactments).[28] For example, the Administration of Muslim Law Enactment of Selangor, 1952, provided that the Sultan (ruler) in Council may constitute a Court of the Chief *Qāḍī* and Court of *Qāḍī* for the state. The state enactments also provide the jurisdiction, both civil and criminal, to the Sharīᶜah Court. There is a slight difference between the state enactments in the usage of language in specifying this jurisdiction but the essence is the same. State enactments are bound to specify criminal and civil jurisdiction as provided by the Federal Constitution in 9th Schedule, List II, State list.

For criminal jurisdiction, the enactments list a number of offences which can be tried in the Sharīᶜah Courts. Generally, the offences can be divided into six categories,[29] namely:

1. Matrimonial offences such as cruelty to wives and disobedience to husbands.
2. Offences relating to sex such as unlawful intercourse, close proximity (*khalwa*), incest and prostitution.

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[28]It is called "ordinance" in Sarawak.

[29]Ahmad Ibrahim, *Islamic Law In Malaya*, p.316, Ahmad Ibrahim & Ahilemah Joned, *Malaysian Legal System*, p.62.

3. Offences relating to the consumption of intoxicants including selling and buying them.

4. Offences concerning the spiritual aspect of Muslim communal life such as failure to attend Friday prayer, non payment of *zakāt*, and failure to fast during the month of Ramaḍān.

5. Offences relating to conversion of religion such as failure to report and register conversion.

6. Miscellaneous offences not provided under any of the above categories.

In criminal matters, the Sharī'ah Courts have no jurisdiction except in so far as conferred by the Federal Constitution.[30] Parliament also enacted the Muslim Courts (Criminal Jurisdiction) Act 1965 (amendment) 1984,[31] limiting the jurisdiction of the Sharī'ah Courts to offences punishable with jail for no more than three years, or with a fine not exceeding five thousand Malaysian Ringgit, or with whipping not exceeding six strokes, or any combination thereof.[32] It should be noted that the jurisdiction of the Sharī'ah Courts is applied only to persons professing the religion of Islam.

From the above explanation, the extent to which Islamic criminal law is applied in the Sharī'ah Court of Malaysia and its position can be clearly seen. Only a small part

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[30]9th Schedule, List II, State list.

[31]Act No.23 of 1965. Before its amendment in 1984, the Sharī'ah Courts have jurisdiction over offences punishable with imprisonment for no more than six months, or with a fine not exceeding one thousand ringgit, or any combination thereof.

[32]Muslim Courts (Criminal Jurisdiction) (Amendment) Act 1984.

of Islamic crimes and punishments i.e. *qiṣāṣ*, *ḥudūd* and *taᶜzir* are included under the jurisdiction of the Sharīᶜah Courts. Crimes involving *qiṣāṣ* and *diyāt*, such as murder and other crimes relating to murder such as suicide, infanticide, causing miscarriage and the aiding and abetting of these crimes, are definitely placed under the jurisdiction of the Civil Courts.[33] Causing injury to other people, including hurting, wounding, beating and so on, also comes under the jurisdiction of the Civil Courts.[34] Similarly, the crimes of theft, robbery and rebellion which are *ḥudūd* crimes cannot be tried by the Sharīᶜah Courts since these crimes are already provided for in the Penal Code and therefore should be tried in the Civil Courts.[35] That the Sharīᶜah Courts do not have any jurisdiction over these crimes is confirmed by the Federal Costitution which states that:

> ...The constitution, organisation and procedure of Sharīᶜah courts ... shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law.[36]

The Sharīᶜah Courts still do not have jurisdiction over the above-mentioned crimes even if they are reduced to *taᶜzīr* crimes such as in the case of attempted crimes or not fulfilling the element of the crime of *qiṣāṣ* and *ḥudūd* since the Federal

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[33]See : *Penal Code*, Sections 299 - 318.

[34]*Ibid.*, Sections 319 - 338.

[35]For details, see : *Penal Code*, Of theft, Sections 378 - 382A; Of robbery, Sections 390 - 402A; Of rebellion, Sections 121 - 130A.

[36]9th Schedule, List II, State List, Item 1.

Constitution has put them under the Federal list.[37]

Hudūd crimes which are not provided for in the Penal Code, i.e. *zinā, qadhf* and drinking intoxicants, are included under the jurisdiction of the Sharī'ah Courts. However, the *ḥadd* punishments which should be imposed for these crimes are made impossible due to the limitations resulting from the Muslim Courts (Criminal Jurisdiction) Act 1965 (Amendment)1984. As mentioned above, the Muslim Courts have jurisdiction to impose a punishment of imprisonment for a term not exceeding three years or a fine not exceeding five thousand ringgit or whipping not exceeding six strokes or any combination thereof, whereas according to the *ḥudūd* laws, the punishment for *zinā* is either flogging with one hundered lashes (if the criminal is *ghayr muḥṣan*) or stoning to death (if the criminal is *muḥṣan*) and that for *qadhf* is flogging with eighty lashes while drinking intoxicants is punishable with flogging with forty or eighty lashes.[38] The type of punishments which are provided for in the above Act are also considered very limited even if the above *ḥadd* crimes are reduced to *ta'zīr* crimes, since the punishment for a *ḥadd* crime which is waived from a *ḥadd* penalty due to certain reasons can reach up to the maximum *ta'zīr* punishment which is allowed in Islamic law. (See Chapter Two) It is worth mentioning that a *zinā* committed by force, i.e. rape is still included under the jurisdiction of Civil Courts.[39]

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[37]9th Schedule, List 1, Federal List, Item 4.

[38]For further details on this point, see: 'Awda, *al-Tashrī' al-Jinā'ī al-Islāmī*, vol.i, pp.635-651, Abū Zahra, *al-'Uqūba*, pp.87,95,146, Bahnasi, *al-'Uqūba fī al-Fiqh al-Islāmī*, pp.24, 124, Wahba al-Zuhaylī, *al-Fiqh al-Islāmī Wa Adillatuh*, vol.vi, pp.23-148.

[39]See: *Penal Code*, Sections 375,376.

When it comes to the crime of apostasy (*ridda*), it is even confusing, since when a person becomes an apostate, he or she is no longer under the jurisdiction of the Sharī^{c}ah Court because, as mentioned above, the Federal Constitution stipulates that the Sharī^{c}ah Courts shall have jurisdiction only over persons professing Islam.[40] However, if it happens that this crime is included under the jurisdiction of the Sharī^{c}ah Courts, the death penalty which is provided for this crime in Islamic law still cannot be imposed due to its contradicting with the Muslim Courts (Criminal Jurisdiction) Act 1965 (Amendment) 1984, as above.

Thus, there is no gainsaying the fact that in Malaysia, Islamic criminal law is limited in its application in comparison with the Civil law. It is agreed that there are some provisions concerning *qiṣāṣ* and *ḥudūd* crimes in the Sharī^{c}ah Court laws; however, the intention behind these provisions is not to apply valid *qiṣāṣ* and *ḥudūd* laws but it is, in fact, to apply *ta^{c}zīr* punishments only. Therefore, it is no wonder that some of the Sharī^{c}ah Court laws clearly mention this intention. For example, in mentioning the punishment for the crime of *zinā*, the Sharī^{c}ah Criminal Code Enactment of Kelantan provides that:

> Any person who commits zina which is not liable to the punishment of hadd, in accordance with Hukum Syarak (Islamic law), shall be guilty of an offence and shall be liable, on conviction, to imprisonment for a term not exceeding three years or to a fine not exceeding five thousand ringgit or to both and to six strokes

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[40] 9th Schedule, List II, State List, Item 1.

of whipping.[41]

4.4 The Provision of *Taᶜzīr* Laws in the Sharīᶜah Courts of Malaysia

Under the Administration of Muslim Law Enactments which are applied in the Sharīᶜah Courts of Malaysia, almost all crimes provided for are of *taᶜzīr* type. This type of crime and its punishment is also provided in the Sharīᶜah Criminal Codes and the Muslim Family Law Enactments. It is worth noting that these enactments (hereinafter referred to as the Sharīᶜah Court laws) may show slight differences of wording between different states and the degree of punishment provided but, as mentioned above, the essence is the same. Therefore, these laws will be discussed on a general basis and examples will be given from the enactment which are relevant to the discussion. The discussion on the provision of *taᶜzīr* crimes and their punishment in the Sharīᶜah Court laws will also be based on the previous chapters showing the classical Islamic point of view on *taᶜzīr*.

Based on the above explanation, *taᶜzīr* crimes which are provided for in the Sharīah Court laws in Malaysia can be classified into two types, *taᶜzīr* for religious disobedience (*maᶜṣiya*) and *taᶜzīr* for the public interest (*maṣlaḥaᶜ āmma*). We shall discuss each in turn.

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[41]Section 11.

4.4.1 *Taᶜzīr* For Religious Disobedience (*Maᶜṣiya*)

As defined in the first chapter, *maᶜṣiya* means the commission of prohibited acts and the omission of obligatory acts which are mentioned in the *Sharīᶜa* texts. (See above, p.14) Thus, any violation of a legal order or prohibition which is not punishable by either a *ḥadd* punishment or atonement is considered a *taᶜzīr* crime and should be punished only by a *taᶜzir* punishment.

In the Sharīᶜah Court laws of Malaysia, most of the *taᶜzīr* crimes provided for are of this type. It covers all aspects of religious life in the secular understanding of that phrase, including offences concerning the spiritual aspect of Muslim communal life such as those relating to religious beliefs (*ᶜaqīda*) and observances (*ᶜibāda*); offences concerning morals (*akhlāq*); matrimony (*munākaḥāt*) and so on.

Regarding the crimes relating to religious beliefs, the most noticeable provision is concerning the propagation of heretical doctrines which are false and divergent from the Islamic teachings. Almost all the Sharīᶜah Court laws have this provision. [42]

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[42]See : *The Administration of Muslim Law Enactment of Kedah, 1962*, Section 161, *of Perlis, 1964*, Section 126, *of Perak, 1965*, Section 169, *of Selangor, 1952*, Section 167, *of Penang, 1959*, Section 158, *of Malacca, 1959*, Section 157, *of Negeri Sembilan, 1960*, Section 160, *of Johore, 1979*, Section 167, *of Federal Territories, 1974*, Section 167, *of Kelantan, 1966*, Section 69, *of Pahang 1982*, Section 162, *of Terengganu, 1986*, Section 204, *The Sharīᶜah Criminal Code Ordinance of Sarawak 1991*, Section 31.

Similarly, the offence of humiliating or insulting the religion of Islam is provided for in all the above laws.[43] This involves any humiliation of religious beliefs and laws including the teachings made by any religious teacher who is approved by the Sharīᶜah Court laws.

Almost all the Sharīᶜah Court laws also have a provision concerning books and leaflets which contradict the true Islamic teachings.[44] It is to be noted that the faulty books meant here are not only limited to those concerning beliefs but also include any other matters so long as they contradict the true Islamic teachings, since they may affect the beliefs of Muslims.

Another provision concerning the offence relating to religious belief is misuse of Qurʾānic verses and making fun of it in public places such as in the cinema or play house. Like the above, this offence is stated in most of the Sharīᶜah Court laws.[45] Some of the later laws also include the misuse of the *ḥadīth* of the Prophet among the provision of *taᶜzīr* crime relating to religious belief. For example, the Sharīᶜah

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[43]Ibid.

[44]See : *The Administration of Muslim Law Enactment of Kedah*, Section 163, *of Perlis*, Section 128, *of Perak*, Section 168, *of Selangor*, Section 169, *of Penang*, Section 160, *of Malacca*, Section 159, *of Negeri Sembilan*, Section 162, *of Johore*, Section 169, *of Federal Territories, 1952*, Section 169, *of Kelantan*, Section 71, *of Pahang*, Section 164, *of Terengganu*, Section 217, *The Sharīᶜah Criminal Code Ordinance of Sarawak*, Section 35.

[45]See : *The Administration of Muslim Law Enactment of Kedah*, Section 164, *of Perlis*, Section 129, *of Penang*, Section 161, *of Malacca*, Section 160, *of Negeri Sembilan*, Section 163, *of Johore*, Section 170, *of Kelantan*, Section 72, *of Pahang*, Section 167, *of Terengganu*, Section 206, *Sharīᶜah Criminal Code Ordinance of Sarawak*, Section 36.

Criminal Code Ordinance of Sarawak 1991, provides that:

> Any person who makes fun of, or insults, or humiliates, by words or acts, any verse of the Qur'ān or any *Hadīth* of the Prophet or any word relating to Islamic Religion, shall be guilty of an offence and shall be liable, on conviction, to a fine not exceeding two thousand ringgit or to imprisonment for a term not exceeding one year or to both.[46]

The above ordinance also provides a *ta'zīr* punishment for an offence of revering something or a human being or anything which is false and divergent from Islamic religion's beliefs. It states that:

> Any person who reveres beaches, trees, tombs, forest, or human-being or anything which contradict with Islamic teachings shall be guilty of an offence and shall be, on conviction, liable to a fine not exceeding two thousand Ringgit or to imprisonment for a term not exceeding one year or to both; and the court shall give an order to destroy any materials or buildings used for such rituals.[47]

An offence of teaching or propagating the beliefs of any other religion to Muslims is provided for in the Administration of Muslim Law Enactment of Pahang, 1982 and of Perak, 1965. In the former, it provides that :

> Any person who propagates or teaches the teachings or beliefs of any other religion to people professing Islam shall be guilty of an offence and shall be, on conviction, liable to a fine not exceeding five hundred Ringgit or to

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[46]Section 36.

[47]Section 37.

imprisonment for a term not exceeding six months or to both.[48]

Whilst in the latter, its provision relates these offences with the jurisdiction of the Civil Court where the prosecution can be enforced to both Muslims and non-Muslims. It states that:

> Any person, either Muslim or non-Muslim, who propagates the teachings or beliefs of other religion to the Muslim, shall be guilty of an offence in the knowledge of Civil Court and shall be liable to imprisonment for a term not exceeding one year or to a fine not exceeding two thousand Ringgit.[49]

All the above-mentioned offences are very serious since they affect the beliefs and faith of the Muslims which may turn them out of Islam. According to the classical judgements in Islamic law, some of these offences, such as the propagation of heretical doctrines, may be punished with severe punishments, including the death penalty. (See above, p.63).

Regarding the crimes relating to religious observances, all the Sharī'ah Court laws except in Sabah and Sarawak have a provision concerning failure to attend Friday prayer at a district mosque without any permissible reason as stated in Islamic law.[50]

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[48]Section 166.

[49]Section 170.

[50]See: *The Administration of Muslim Law Enactment of Kedah*, Section 143, *of Perlis*, Section 111, *of Perak*, Section 148, *of Selangor*, Section 150, *of Penang*, Section 143, *of Malacca*, Section 141, *of Negeri Sembilan*, Section 142, *of Johore*, Section 143, *of Federal Territories*, Section 150, *of Kelantan*, Section 60, *of Pahang*, Section 135, *of Terengganu*, Section 188.

Terengganu, for example, provides that:

> Any mukallaf who does not perform the Friday prayer at a mosque where it should be performed, without any permissible reason according to Islamic law, shall be guilty of an offence and shall be liable to a fine not exceeding one thousand Ringgit or to imprisonment for a term not exceeding six months or to both.[51]

Similarly, in the case of failure to fast in the month of Ramaḍān, almost all the Sharīᶜah Court laws except in Sarawak provide a punishment for a person who commits this offence.[52]

Refusal to pay *zakāt* is also provided for in the above laws.[53] The laws also consider paying *zakāt* to an unauthorised person, or taking *zakāt* without the authorization of the Islamic Council, to be an offence. Some states even consider an act of refusal to disclose a statement of income in order to avoid paying *zakāt*, to be an offence which is punishable with a *taᶜzīr* punishment.[54] Section 177 of the

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[51]Section 188.

[52]See : *The administration of Muslim Law Enactment of Kedah*, Section 145, *of Perlis*, Secton 133, *of Perak*, Section 149, *of Selangor*, Section 152, *of Penang*, Section 145, *of Malacca*, Section 143, *of Negeri Sembilan*, Section 144, *of Johore*, Section 145, *of Federal Territories*, 152, *of Kelantan*, Section 62, *of Pahang*, Section 137, *of Terengganu*, Section 190, *of Sabah*, Section 98.

[53]See : *The Administration of Muslim Law of Perak*, Section 174, *of Selangor*, Section 173, *of Penang*, Section 164, *of Malacca*, Section 163, *of Negeri Sembilan*, Section 166, *of Johore*, Section 175, *of Federal Territories*, Section 173, *of Kelantan*, Section 75, *of Pahang*, Section 171, *of Terengganu*, Section 213, *of Sabah*, Section 96.

[54]See : *The Administration of Muslim Law Enactment of Pahang*, Section 172, *of Johore*, Section 174, *of Perak*, Section 175.

Administration of Muslim Law Enactment of Perak and section 174 of the equivalent Enactment of Pahang add another provision concerning refusal of the ᶜāmil to submit *zakāt* that he collects to the authorised body. For example, Perak provides that :

> Any person who is appointed as ᶜāmil according to the rules of this law, after receiving zakat collection or fiṭrah, does not surrender the collection and its statement as required by this law or by any other rules similar to this law shall be liable, on conviction, to a fine not exceeding five hundred ringgit or to imprisonment for a term not exceeding six months or to both and to imprisonment for a further offence and the Court may order that the collection and its statement be surrendered directly to the director of the Islamic Council or his representatives.[55]

In classical Islamic law, financial punishment other than a fine was imposed based on the practice of Companions who seized half of the property of those who refuse to pay *zakāt*. (See above p.108) Regarding a dishonest ᶜāmil, he should be dismissed as suggested by Ibn Taymiyya who said that any officer who acts irresponsibly against the nature of his profession should be dismissed. (See above, p.117)

Another provision concerning the crime relating to religious observances is persuading other Muslims to neglect their religious duties such as performing the Friday prayer, paying *zakāt* and so on. The Administration of Muslim Law Enactment of Terengganu 1986, for example, provides that :

> Any person who dissuades any Muslim from attending the mosque or attending

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[55]Section 177.

> religious classes or paying zakat or fiṭrah or paying any fee of his duty required by this law or doing anything of his duty required by this law shall be guilty of an offence and shall be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding one year or to both.[56]

Apart from offences relating to religious observances, sexual offences which are not *ḥudūd* crimes are also provided for in the Sharī'ah Court laws. The most prevalent provision is "khalwat" which is provided for in all the Sharī'ah Court laws.[57] The meaning of khalwat can be understood from the following example which is derived from section 9 of the Sharī'ah Criminal Code Enactment of Kelantan, 1985, which says that :

> (1) Any male person who, in any place, found living with or cohabiting with or in retirement with or hiding with any female person who is not is mahram other than his spouse shall be guilty of an offence of khalwat and shall be liable, on conviction, to a fine not exceeding two thousand ringgit or to imprisonment for a term not exceeding one year or to both.
>
> (2) Any female person who, ... (as (1) above).
>
> (3) Any male person who is found together with more than one woman who is not his spouse or his mahram in a deserted place or in a room of any building or in a separate place in circumstances which may arouse suspicion that they would commit maksiat shall be guilty of an offence and shall be liable, on conviction, to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both.
>
> (4) Any female person who ... (as (3) above).

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[56]Section 211.

[57]See : *The Administration of Muslim Law Enactment of Perlis*, Section 115, *of Perak*, Section 154, *of Selangor*, Section 157, *of Penang*, Section 148, *of Malacca*, Section 148, *of Negeri Sembilan*, Section 149, *of Johore*, Section 152, *of Federal Territories*, Section 157, *The Sharī'ah Criminal Code Enactment of Kelantan*, Section 9, *of Kedah*, Section 9, *The Sharī'ah Criminal Code Ordinance of Sarawak*, Section 5.

> (5) The Court may order any woman found guilty of an offence under this section to be committed to a welfare home for a term not exceeding one year.

A sexual offence relating to incest which does not involve sexual intercourse is provided for in Kelantan, Kedah, Sarawak and Terengganu.[58] Kelantan for example, provides that :

> Any person who commits incest shall be guilty of an offence and shall be liable, on conviction, to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both and the Court may order them to live separately.[59]

An act preparatory to the commission of *zinā* is provided for in section 12 of both the Sharī^{c}ah Criminal Code Enactment of Kelantan, 1985, the Enactment of Kedah, 1988, and in section 11 of the Ordinance of Sarawak, 1991. Under provision of the above Enactments, this crime is punishable with a fine not exceeding three thousand ringgit or imprisonment for a term not exceeding two years or to both. Kelantan, however, adds another punishment, i.e. whipping not exceeding three strokes in addition to both punishments.

It is to be noted that all of the sexual offences mentioned above are *ta^{c}zīr* crimes which are subsumed under the *ḥadd*-type of *zinā*. The sentence for this offence in

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[58]See: *The Sharī^{c}ah Criminal Code Enactment of Kelantan*, Section 10, *of Kedah*, Section 10, *Ordinance of Sarawak*, Section 9, *The Administration of Muslim law Enactment of Terengganu*, Section 193.

[59]Section 10.

Islamic law is usually flogging up to the maximum number of lashes allowed for cases of *taᶜzīr*. (See above, p.77)

Kelantan and Kedah also have a provision concerning abetment of the commission of the offence of *zinā* which can be found in section 13 of the Sharīᶜah Criminal Code Enactment of both States both of which provide that:

> Any person who abets the commission of the offence of *zinā* shall be guilty of an offence and shall be liable, on conviction, to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.

Similar to the above offence, a person who abets prostitution or becomes a middle man for prostitution is guilty of an offence and this is provided for in some of the Sharīᶜah Court laws.[60] Sarawak, for example, provides that :

> Any person who acts as a pimp shall be guilty of an offence and shall be liable, on conviction, to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both.[61]

Concerning prostituting a wife or child, the Sharīᶜah Criminal Code Enactment of Kelantan, 1985, for example, provides that :

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[60]See : *The Administration of Muslim Law Enactment of Perak*, Section 180, *of Johore*, Section 179, *The Sharīᶜah Criminal Code Enactment of Kelantan*, Section 22, *of Kedah*, Section 22, *The Sharīᶜah Criminal Code Ordinance of Sarawak*, Section 22.

[61]Section 22.

> (1) Any husband who prostitutes his wife or allows her to become a prostitute shall be guilty of an offence and shall be liable, on conviction, to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.
>
> (2) Any parent or guardian who prostitutes his child or a child under his guardian or allows his child or a child under his care to prostitute shall be guilty of an offence and shall be liable, on conviction, to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.[62]

The offence of abetment of committing *zinā* and prostitution as mentioned above is, in fact, a very serious *taᶜzīr* offence. It is arguably as serious as committing *zinā* itself though an offender does not involve himself or herself directly in the commission of *zinā*. The punishment could, therefore, justifiably be up to the same degree with the punishment for *zinā*, i.e. flogging, one hundred lashes and banishment for one year. This would thus be similar to the judgement for abetting a murderer without directly committing murder. In this case, the majority of the jurists hold that the abettor should be punished severely with a *taᶜzīr* punishment which may reach the death penalty, while the Mālikīs hold that *qiṣāṣ* punishment should be inflicted on the abettor.[63]

Apart from sexual offences, an act of indecency is also provided for in the Sharīᶜah Court laws. Indecency can be an act such as kissing a woman or a man or hugging one another, it can also be a word such as uttering dirty words. An indecent act is different from khalwat in the sense that the former is committed in a public place

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[62]Section 18.

[63]See: Wahba al-Zuhaylī, *al-Fiqh al-Islāmī Wa Adillatuh*, vol.vi, p.237.

while the latter committed in a secret place. For example, the Sharī'ah Criminal Code Enactment of Kelantan, 1985 provides that:

> (1) Any person who wilfully commits in a public place any act or behaves in an indecent manner which is contrary to Hukum Syarak (Islamic law) shall be guilty of an offence and shall be liable, on conviction, to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both.[64]

But it is to be noted that an indecent act does not always involve both male and female, it can be an indecent man only or an indecent woman only, such as exposing most of the body in public. This can be found in section 183 of the Administration of Muslim Law enactment of Pahang, 1982 which provides that :

> Any Muslim female who exposes most of her body in public shall be guilty of an offence and shall be liable, on conviction, to a fine not exceeding three hundred ringgit.

Kelantan, Kedah and Sarawak have a provision concerning an offence of being an effeminate person. Kelantan, for example, provides that:

> Any male person who, in any public place, wears women's attire and poses as a woman shall be guilty of an offence and shall be liable, on conviction, to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding four months or to both.[65]

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[64]Section 5.

[65]Section 7.

As referred above in Chapter two, the punishment for an effeminate person in the classical judgement is banishment, based on the *Sunna* of the Prophet which states that he banished an effeminate person from Medina. (See above, p.90) The purpose of banishing an offender is to reform him, as well as preventing his offence from influencing other potential males who wish to behave in effeminate manner.

The Sharī'ah Court laws also have a provision concerning offences relating to matrimony. These offences are normally provided for in the Muslim Family Law Enactment of the states which have enacted such a law.[66] However, in some other states which do not have a Muslim Family Law Enactment, matrimonial offences are provided for under the ordinary Administration of Muslim Law Enactment of those states.

Among the provisions concerning matrimonial offences is forcing another person to engage in a marriage without his or her permission or preventing him or her from a marriage. This provision can be found only in section 97 of the Muslim Family Law of Kelantan 1983, which provides that:

> Unless he is allowed by Islamic law, any person who uses a force or threat:
>
> > (a) To force someone to engage in a marriage without his or her permission; or

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[66]See : The Muslim Family Law Enactment of Kelantan 1983, of Selangor 1984, of Kedah 1984, of Pahang (amendment) 1987, of N.Sembilan 1983, of Malacca 1983, of Perak 1984, of Penang 1985, of Johore 1990, of Terengganu 1985, The Muslim Family Law Act of Federal Territories 1984, The Muslim Family Law Ordinance of Sarawak 1991.

> (b) To prevent someone who has reached the age of marriage from getting married;
>
> shall be guilty of an offence and shall be liable, on conviction, to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both.

The above enactment also has a provision concerning an offence of giving a false declaration to enable a person to get married. It provides that:

> Any person who, with the intention of enabling a marriage to be carried out under this Enactment, deliberately makes a false declaration or signs a fake document or declaration of which is required by this Enactment, shall be guilty of an offence and shall be liable, on conviction, to a fine not exceeding five hundred ringgit or to imprisonment for a term not exceeding three months or to both.[67]

Giving a false declaration is similar to bearing false witness. The classical judgement for this offence is usually public disclosure in order to warn other people not to trust the offender. (See above, p.118)

Another matrimonial offence is refusal to live with a wife and consummate the marriage and this is provided for in most of the Sharīᶜah Court laws.[68] Selangor, for example, provides that:

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[67]Section 98.

[68]See : *The Muslim Family Law Enactment of Kelantan*, Section 104, *of Terengganu*, Section 123, *of Johore*, Section 126, *of Sarawak*, Section 128, *of Kedah*, Section 112, *of Selangor*, Section 126, *of Federal Territories*, Section 126, *The Administration of Muslim Law Enactment of Perak*, Section 152, *of Pahang*, Section 140, *of N.Sembilan*, Section 147, *of Penang*, Section 148, *of Malacca*, Section 146.

> Any person who has got an order by the Court to live together with his wife again, and deliberately neglects that order, shall be guilty of an offence and shall be liable to a fine not exceeding five hundred ringgit or to imprisonment for a term not exceeding six months or to both.[69]

Similarly, most of the Sharī'ah Court laws have a provision concerning the offence of battering a wife.[70] Section 129 of the Muslim Family Law of Sarawak 1991, however, mentions that an act of battering need not come from a husband only but also a wife. It provides that:

> Any husband or wife who batters his wife or her husband or cheats the property of his wife or her husband shall be guilty of an offence and shall be liable, on conviction, to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both.

Concerning an offence of cheating the property of one's spouse as mentioned in the above provision, it is also provided for in section 109 of the Muslim Family Law of Kelantan 1983, but it is applied only to a husband who uses his wife's property without her permission. The punishment for this offence is also similar to the above provision.

A wife who refuses to obey her husband is committing an offence which is

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[69]Section 126.

[70]See : *The Muslim Family Law Enactment of Kelantan*, Section 108, *of Selangor*, Section 127, *Act of F.Territories*, Section 127, *of Sarawak*, Section 129, *of Terengganu*, Section 124, *of Kedah*, Section 113, *The Administration Muslim Law Enactment of Perak*, Section 152, *of Penang*, Section 148, *of Malacca*, Section 146, *of Johore*, Section 148, *of N.Sembilan*, Section 147, *of Pahang*, Section 140.

provided for in the Sharīᶜah Court laws.[71] Selangor, for example, provides that:

> Any woman who deliberately refuses to obey any order of her husband which is valid according to Islamic law shall be guilty of an offence and shall be liable to a fine not exceeding one hundred ringgit or, for a second offence and so forth, to a fine not exceeding five hundred ringgit.[72]

This contrasts with the classical judgement for this offence which is derived from the Qurʾānic injunction. (See above, pp.72,93,113) It is mentioned in the text that there are three stages of penalty to be imposed in dealing with a disobedient wife. The first offence is punishable with admonition, the second one is punishable with boycott (refusing to have sexual relations with her) and the third one is punishable with beating (with certain conditions). The imposition of a fine for the above offence does not seem appropriate to reform a wife and to regain her obedience to her husband since her maintenance is her husband's duty anyway.

The Sharīᶜah Court laws also have a provision for the offence of not treating a wife or wives fairly. What is meant by "treating fairly" in most of the Sharīᶜah Court laws refers to a single wife and not to two, three or four wives,[73] while Pahang and

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[71]See : *The Muslim Family Law Enactment of Kelantan*, Section 103, *of Terengganu*, Section 126, *of Kedah*, Section 115, *of Sarawak*, Section 131, *of Selangor*, Section 129, *Act of F.Territories*, Section 129, *The Administration of Muslim Law Enactment of Johore*, Section 149, *of N.Sembilan*, Section 148, *of Pahang*, Section 141, *of Malacca*, Section 147, *of Perak*, Section 153.

[72]Section 129.

[73]See : *The Muslim Family Enactment of Kelantan*, Section 103, *of Kedah*, Section 115, *of Terengganu*, Section 125, *of Sarawak*, Section 130, *of Selangor*, Section 128, *Act of F.Territories*, Section 128.

Johore hold that the meaning of "treating fairly" here refers to more than one wife in the case of polygamy.[74] Pahang for example, provides that:

> Any person who is married to more than one wife, who is found not treating his wives fairly concerning maintenance, clothing, accommodation and taking turns with his wives as required according to Islamic law shall be guilty of an offence and shall be liable, on conviction, to a fine not exceeding two hundred ringgit or to imprisonment for a term not exceeding one month.[75]

An offence of not giving the maintenance to those who should be paid for is also provided for in most of the Sharī'ah Court laws.[76] This includes an offence of refusal to obey an order of the Court to pay maintenance. According to the classical judgement of Islamic law, a person who refuses to fulfil his obligation to the one to whom he owes it such as in the above offence may be imprisoned as suggested by the Mālikī Qarāfī. (see above, p.102)

There is another provision concerning making up a trick with the intention of leaving his or her spouse. In most of the Sharī'ah Court laws, the trick can either come from the husband or the wife.[77] For example, Selangor provides that:

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[74]See : *The Administration of Muslim Law Enactment of Pahang*, Section 143, *of Johore*, Section 151.

[75]Section 143.

[76]See : *The Muslim Family Law Enactment of Kelantan*, Section 102, *of Kedah*, Section 116, *of Terengganu*, Section 130, *of Sarawak*, Section 133, *of Selangor*, Section 132, *Act of F.Territories*, Section 132.

[77]See : *The Muslim Family Law Enactment of Kedah*, Section 117, *of Terengganu*, Section 127, *of Selangor*, Section 130, *Act of F.Territories*, Section 130.

> Any person who abhors her husband or his wife and makes up a trick by pronouncing herself or himself as an apostate for the purpose of dissolution of marriage shall be guilty of an offence and shall be liable to imprisonment for a term not exceeding six months.[78]

In the Johore and Pahang Enactments, however, it is stated that the trick can only come from the wife.[79] For example, Pahang provides that:

> Any Muslim woman who, due to her abhorrence of her husband, makes up a trick by pronouncing herself as an apostate in order to dissolve her marriage with her husband, shall be guilty of an offence and shall be liable, on conviction, to a fine not exceeding five hundred ringgit or to imprisonment for a term not exceeding three months or to both.[80]

It is worth noting that most of these laws mention specifically that pronouncing oneself as an apostate is a trick made up in order to get a dissolution of marriage. Only Johore does not make a specific reference to apostasy as a trick to dissolve a marriage but rather generalises it to any other means which serve that purpose. This can be seen in section 150 of the Administration of Muslim Law Enactment of Johore 1978, which provides that:

> Any wife, due to her abhorrence of her husband, makes up a trick in order to dissolve her marriage with him, shall be guilty of an offence and shall be liable, on conviction, to a fine not exceeding five hundred ringgit or to imprisonment

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[78]Section 127.

[79]See : *The Administration of Muslim Law Enactment of Johore*, Section 150, *of Pahang*, Section 142.

[80]Section 142.

for a term not exceeding six months or to both.

The above offence should not be considered unimportant since it is related to religious belief. Making up a trick by pronouncing oneself as an apostate is a great sin and there is doubt about the faith of a Muslim who dares to do this. It may even lead him or her to apostasy which is punishable with the *ḥadd* penalty if he or she intentionally does this. The offender should therefore be asked to repent first before any punishment is inflicted. The punishment should also be severe, such as flogging or even death (for a recidivist), in order to deter others from committing the same offence.

Terengganu and Negeri Sembilan have a provision concerning coming back to live together as a husband and wife after getting divorced without expressing the word *rujūᶜ* (withdrawal of a divorce) during her waiting period (*idda*).[81] According to the Shāfiᶜī school, a husband cannot come to live together with his divorced wife unless he expresses the word *rujūᶜ* during her waiting period.[82] Thus, both States consider this act as an offence and it is punishable with a fine or imprisonment. Terengganu as well as Kelantan, in addition, consider an act of coming back to a divorced wife (*rujūᶜ*) without her permission as an offence.[83] Kelantan, for example, provides that:

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[81]See : *The Administration of Muslim Family Law Enactment of Terengganu*, Section 128, *The Administration of Muslim Law Enactment of N.Sembilan*, Section 152.

[82]Al-Shīrāzī, *al-Muhadhdhab*, vol.ii, p.103.

[83]See : *The Muslim Family Law Enactment of Kelantan*, Section 112, *of Terengganu*, Section 129.

> Any husband who expresses the word *rujū'* without first getting permission from his wife to do so, shall be guilty of an offence and shall be liable, on conviction, to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both.[84]

Besides those offences relating to matrimony, the Sharī'ah Court laws also have a provision concerning the offence of neglecting one's own children or giving them up to a non-Muslim.[85] Johore, for example, provides that:

> Any person who is found selling or giving up his or her child to a non-Muslim shall be guilty of an offence and shall be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both.[86]

Other religious disobediences which are provided for in the Sharī'ah Court laws are those offences which are disturbances of the peace. The provisions for such offences, however, only relate to personal law. Such offences are persuading a wife or a husband to a divorce or persuading either to neglect his or her duties toward each other;[87] taking away someone's wife or causing her to run away from her husband;[88]

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[84]Section 112.

[85]See : *The Muslim Family Law Enactment of Kelantan*, Section 106 & 110, *of Sarawak*, Section 21, *The Administration of Muslim Law Enactment of Pahang*, Section 181, *of Johore*, Section 182.

[86]Section 182.

[87]See : *The Sharī'ah Criminal Code Enactment of Kedah*, Section 8, *of Kelantan*, Section 8, *Ordinance of Sarawak*, Section 7, *The Administration of Muslim Law Enactment of Pahang*, Section 144.

[88]See : *The Administration of Muslim Law Enactment of Perak*, Section 184, *of Pahang*, Section 182, *of Johore*, Section 183, *The Sharī'ah Criminal Code Enactment of Kelantan*, Section 17, *of Kedah*,

obstructing a husband and his wife from living together as a husband and wife;[89] taking away any woman from her guardian or persuading her to run away from her guardian;[90] deliberately running away from a guardian (in the case of a virgin);[91] and disturbing another person with the intention of ruining his or her reputation.[92]

Religious disobediences relating to breach of trust are also provided for in the Sharī^{c}ah Court laws. One of these provisions is the offence of breaking the confidence of the Sharī^{c}ah Courts and this is provided for in most of the Sharī ah Court laws.[93] Terengganu, for example, provides that:

> Any person, violating the provisions of this enactment or any rules, provisions or orders made under this enactment, who discloses any matter which is of his duty to keep it as secret to any person who should not be informed of that secret by law shall be guilty of an offence and shall be liable to a fine not exceeding one thousand ringgit or to imprisonment not exceeding for a term not exceeding six months or to both.[94]

Section 17, *Ordinance of Sarawak*, Section 16.

[89]See : *The Sharī^{c}ah Criminal Code Enactment of Kedah*, Section 17(2).

[90]See : *The Administration of Muslim Law Enactment of Perak*, Section 181, *of Pahang*, Section 179, *of Johore*, Section 180, *The Sharī^{c}ah Criminal Code Enactment of Kelantan*, Section 20, *of Kedah*, Section 20, *Ordinance of Sarawak*, Section 17.

[91]See : *The Administration of Muslim Law Enactment of Perak*, Section 182, *of Pahang*, Section 180, *of Johore*, Section 181, *The Sharī^{c}ah Criminal Code Ordinance of Sarawak*, Section 20.

[92]See : *The Sharī^{c}ah Criminal Code Ordinance of Sarawak*, Section 24.

[93]See : *The Administration of Muslim Law Enactment of Kedah*, Section 158, *of Perak*, Section 165, *of Selangor*, Section 164, *of Penang*, Section 155, *of Malacca*, Section 197, *of N.Sembilan*, Section 157, *of Johore*, Section 164, *of Kelantan*, Section 66, *of Pahang*, Section 59, *Act of F.Territories*, Section 164.

[94]Section 197.

Giving a false statement concerning the administration of Muslim law is also an offence which is provided for in Johore, Kedah and Sarawak.[95]

Utilising money dishonestly is an offence provided for in some of the Sharī'ah Court laws.[96] It normally involves an officer of the Islamic Council who dishonestly utilises the money of the Islamic Council. Perak and Johore, however, generalise it to any person who dishonestly uses money which should be used for religious purposes. Johore, for example, provides that:

> Any person who is entrusted to collect, keep, protect or administer any money or property of waqf, Baitul-mal, zakat and fitrah, donation from the public or any property for the religion of Islam, and does not allocate such money or property to the one who has the right to it or fails to make a payment to a particular person or fails to disclose the statement of such money or property to the Council shall be guilty of an offence and shall be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months. The Court shall make an order that the money or property be paid directly to those who have the right of such money or property or be returned to anybody who is specified by the Court.[97]

Another offence concerning breach of trust is the refusal of a *waṣī* (testator) to surrender any of the deceased's property which has become the right of the Baitul-Mal.

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[95]See : *The Administration of Muslim Law Enactment of Johore*, Section 159, *The Sharī'ah Criminal Code Enactment of Kedah*, Section 36, *Ordinance of Sarawak*, Section 42.

[96]See : *The Administration of Muslim Law Enactment of Perlis*, Section 122, *of Perak*, Section 162, *of Selangor*, Section 162, *of Johore*, Section 161, *of Kelantan*, Section 164, *Act of F.Territories*, Section 162.

[97]Section 161.

This is provided for in section 212 of the Administration of Muslim Law Enactment of Terengganu 1986. This law also has a provision concerning the offence of intrusion of the *waqf* land which can be found in section 214 of the above enactment which provides that:

> Any *waṣī* or administrator who refuses to obey any provision of section 139 shall be guilty of an offence and shall be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceding six months or to both and an additional fine not exceeding one hundred ringgit per month if the offence continues.

Section 139 mentioned above, concerns the duty of the *waṣī* to surrender any of the deceased's property which has become the right of the Baitul-mal.

Sarawak has a quite similar provision to the above enactment, i.e concerning the offence of intrusion or trespass onto the land of the Islamic Council, including its air-space. Even taking something from land owned by the Islamic Council is considered an offence by this enactment.[98] It provides that:

> Any person, without a valid permit, who - (a)occupies, or builds, any building on land owned by the Islamic Council; or (b) cleans, ploughs, digs, builds a gate or plants anything on that land or some part of it; or (c) cuts or takes out any timber or product from that land, shall be guilty of an offence and shall be liable, on conviction, to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both.[99]

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[98]*The Sharīᶜah Criminal Code Ordinance of Sarawak*, Sections 39,40 & 41.

[99]Section 39.

Breach of trust or *khiyānat al-amāna* as mentioned above, is a *maᶜṣiya* which is expressly mentioned both in the Qurʾān and *ḥadīth* of the Prophet but whose punishment is not stated. (See above, p.39) There was a relevant case where ᶜUmar flogged Maᶜn ibn Zāʾida for forging the property of the *bayt al-māl* (see above, p.74) and in another case ᶜUmar banished Dubaiᶜ for fraud (see above, p.90). According to Ibn Taymiyya, if this type of offence involves an officer of the government, he should be dismissed. (see above, p.117)

Apart from the above offences, most of the Sharīᶜah Court laws have provisions concerning the offence of refusal to obey an order of the Court, including the judge or the ruler or any officer of the Islamic Council.[100] Contempt of Court or dishonour of the ruler is also an offence provided for in some of the Sharīᶜah Court laws.[101]

4.4.2 *Taᶜzīr* for the Public Interest (*Maṣlaḥa ᶜĀmma*)

What is meant by the above phrase is that a *taᶜzīr* punishment is imposed for an act which is initially legal but then considered illegal because it conflicts with the public interest. The jurists agree that such exceptional cases are legal because of the *Sunna* of

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[100]See : *The Administration of Muslim Law Enactment of Johore*, Section 172, *The Sharīᶜah Criminal Code Enactment of Kelantan*, Sections 31 & 32, *of Kedah*, Sections 31 & 32, *Ordinance of Sarawak*, Section 28.

[101]See : *The Administration of Muslim Law Enactment of Terengganu*, Section 207, *The Sharīᶜah Criminal Code Enactment of Kelantan*, Section 28, *of Kedah*, Section 28, *Ordinance of Sarawak*, Section 27.

the Prophet mentioned earlier in Chapter One. (See above, p.42)

In the Sharī'ah Court laws, there are some provisions concerning this type of offence. It is noteworthy that the Sharī'ah Court laws of Malaysia have set out the procedures for marriage, divorce and conversion, their registration and the issue of certificates of marriage, divorce and conversion. This procedure is set out with the intention of safeguarding the public interest so as to ensure that the marriage or divorce is done validly according to Islamic law or to guarantee that nobody will escape from his or her responsibility following the marriage, divorce or conversion. Therefore, any person who fails to comply with this procedure is guilty of an offence which is punishable with a fine or imprisonment. Examples of offences of this type are many, such as: solemnising a marriage without the authorization and permission of the Islamic Council;[102] issuing a document of marriage without the authorization of the Islamic Council;[103] failure to report a marriage which has been solemnised outside Malaysia;[104] marrying a second wife without the permission of the Islamic Council;[105] divorcing a

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[102]See : *The Administration of Muslim Law Enactment of Perlis*, Section 119, *of Perak*, Section 158, *of Penang*, Section 151, *of Malacca*, Section 150, *of N.Sembilan*, Section 153, *of Johore*, Section 156, *of Pahang*, Section 151, *The Muslim Family Law Enactment of Kedah*, Section 31, *of Selangor*, Sections 39 & 40, *of Kelantan*, Sections 99 & 100, *of Terengganu*, Sections 37 & 38, *Act of F.Territories*, Sections 39 & 40, *Ordinance of Sarawak*, Sections 37 & 38.

[103]See : *The Administration of Muslim Law Enactment of Perlis*, Section 120, *of Perak*, Section 159, *of Penang*, Section 152, *of N.Sembilan*, Section 154, *of Johore*, Section 157, *of Pahang*, Section 125, *of Sabah*, Section 95.

[104]See : *The Muslim Family Law Enactment of Kedah*, Section 26, *of Selangor*, Section 35, *of Kelantan*, Section 95, *of Terengganu*, Section 33, *Act of F.Territories*, Section 35, *Ordinance of Sarawak*, Section 33.

[105]See : *The Muslim Family Law Enactment of Kedah*, Section 109, *of Selangor*, Section 123, *of Terengganu*, Section 120, *Act of F.Territories*, Section 123, *Ordinance of Sarawak*, Section 125.

wife without getting permission from the Islamic Council in advance;[106] failure to report a divorce;[107] failure to report conversion of a non-Muslim to Muslim or vice versa.[108]

Beside the above offences, all the Sharī'ah Court laws have a provision concerning the offence of building a mosque or *muṣalla* without the permission of the Islamic Council.[109] Another provision concerns giving a speech in the mosque without the permission of the Islamic Council, including being an *imām* or *khāṭib* or *mu'adhdhin* for the Friday prayer without the permission of the Islamic Council.[110] Similarly, teaching religion without the authorization of the Islamic Council is considered as an offence and this is provided for in all the Sharī'ah Court laws.[111] For example, the Administration of Muslim Enactment of Pahang, 1982 provides that:

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[106]See : *The Administration of Muslim Law Enactment of Perlis*, Section 120, *of Perak*, Section 160, *The Muslim Family Law Enactment of Kedah*, Section 110, *of Selangor*, Section 124, *of Kelantan*, Section 105, *of Terengganu*, Section 121, *Act of F.Territories*, Section 124, *Ordinance of Sarawak*, Section 126.

[107]See : *The Administration of Muslim Law Enactment of Penang*, Section 152, *of Malacca*, Section 151,*of N.Sembilan*, Section 154, *of Johore*, Section 158, *of Pahang*, Section 154, *of Sabah*, Section 95.

[108]See : *The Administration of Muslim Law Enactment of Kedah*, Section 159, *of Perak*, Section 161, *of Selangor*, Section 161, *of Penang*, Section 153, *of Malacca*, Section 152, *of N.Sembilan*, Section 155, *of Johore*, Section 160, *of Pahang*, Section 156, *Act of F.Territories*, Section 161.

[109]See : *The Administration of Muslim Law Enactment of Kedah*, Section 159, *of Perlis*, Section 124, *of Perak*, Section 166, *of Selangor*, Section 165, *of Penang*, Section 156, *of Malacca*, Section 155, *of N.Sembilan*, Section 158, *of Johore*, Section 165, *of Pahang*, Section 166, *of Terengganu*, Section 198, *of Sabah*, Section 94, *The Muslim Family Law Enactment of Kelantan*, Section 67, *The Sharī'ah Criminal Code Ordinance of Sarawak*, Section 33.

[110]*The Administration of Muslim Law Enactment of Terengganu*, Sections 200 & 202.

[111]See : *The Administration of Muslim Law Enactment of Kedah*, Section 160, *of Perlis*, Section 125, *of Perak*, Section 167, *of Selangor*, Section 166, *of Penang*, Section 157, *of Malacca*, Section 156, *of N.Sembilan*, Section 159, *of Johore*, Section 166, *of Pahang*, Section 161, *of Terengganu*, Section 199, *Act of F.Territories*, Section 166, *The Muslim Family Law Enactment of Kelantan*, Section 67.

> Any person, except at his own dwelling and in front of his family members only, who teaches any teaching of the religion of Islam without the authorization of His Royal Highness the Sultan shall be guilty of an offence and shall be liable, on conviction, to a fine not exceeding five hundred ringgit or to imprisonment for a term not exceeding three months.[112]

Most of the Sharī'ah Court laws also have a provision concerning the offence of collecting money for a religious purpose without the permission of the Islamic Council.[113] For example, the Administration of Muslim Law Enactment of Johore, 1978 provides that:

> Any person who, without the permission of the Islamic Council, collects money for the purpose of promoting the religion of Islam or for the benefit of the Muslims shall be guilty of an offence and shall be liable to a fine not exceeding five hundred ringgit or to imprisonment for a term not exceeding three months, and any collection that he made shall be seized by the Court.[114]

From the above, it may seem inappropriate to impose punishments on those people who act for religious purposes yet without the permission of the Islamic Council. However, this is justified, particularly in the Malaysian context, because there are still a number of people, especially in rural areas, who are not well-educated and who are easily influenced by others. Therefore, in order to protect the society from any disturbances concerning religious matters, certain measures have been taken by the

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[112]Section 161.

[113]See : *The Administration of Muslim Law Enactment of Perlis*, Section 121, *of Perak*, Section 163, *of Penang*, Section 166, *of Malacca*, Section 156, *of N.Sembilan*, Section 168, *of Johore*, Section 162, *of Pahang*, Section 157, *of Terengganu*, Section 195.

[114]Section 162.

Islamic Council, such as the enforcement of the above provisions. Furthermore, it is difficult nowadays to identify a trustworhty person and thus, in order to safeguard the Muslim community from any person or groups who might abuse them, the above measures are taken by the Islamic Council as a precaution for the public interest, which is approved by Islamic law.

4.5 The Provision of *Taᶜzīr* Punishments in the Sharīᶜah Court Laws

Based on the above discussion, it can be clearly seen that there are no punishments other than imprisonment and fining provided for *taᶜzīr* offences in the Sharīᶜah Court laws. However, there is a case where materials or buildings used for the purpose of committing an offence may be demolished in addition to imprisonment or a fine. Demolition, according to classical Islamic law, is one of the financial punishments imposed for *taᶜzīr* crimes. (See above, p.109) Such a case can be found in section 37 of the Sharīᶜah Criminal Code Ordinance of Sarawak, 1991 concerning the punishment imposed for revering something or someone which is false and divergent from Islamic teachings. (See above, p.196) As for whipping, only one case can be traced, i.e. in the Sharīᶜah Criminal Code Enactment of Kelantan, 1985 which provides the infliction of three strokes of whipping for an act preparatory to the commission of *zinā* in addition to a fine or imprisonment, while the rest of the punishment of whipping, as mentioned earlier, is only provided for the case of *ḥudūd* offences, i.e. *zinā* and drinking intoxicants. However, the number of lashes provided for in the Sharīᶜah Court laws does not conform with that of Islamic criminal law since it cannot exceed six lashes

whereas the number of lashes imposed in the case of *zinā ghayr muḥṣan* is one hundred and in the case of drinking intoxicants forty or eighty according to different views. The six lashes which are provided for in the Sharī^{c}ah Court laws are very limited when compared to the maximum number of lashes allowed for *ta^{c}zīr* according to the views of the jurists on this matter. (See above, p.77)

It seems that *ta^{c}zīr* punishments which are provided for in the Sharī^{c}ah Court laws are very limited and consequently, the discretion of the judge is also confined to choosing imprisonment or a fine or whipping (as provided for in Kelantan) as the only punishments which may be inflicted on a *ta^{c}zīr* offender. This contrasts with the concept of *ta^{c}zīr* punishments in classical Islamic law which gives the ruler or the judge considerable discretion in the infliction of *ta^{c}zīr* punishments, which range in gravity from a warning to death. According to ^{c}Awda, in cases of *ta^{c}zīr*, the *Sharī^{c}a* provides a variety of punishments starting with the death penalty, flogging, imprisonment, fine, banishment, threat, public disclosure, reprimand, admonition or any other type of punishment which suits for the situation of the offender and the offence.[115]

The maximum penalty provided for in cases of *ta^{c}zīr* in the Sharī^{c}ah Court laws is imprisonment for a term of three years and a fine of five thousand ringgit. In fact, this is the maximum limit that can be enforced by the Sharī^{c}ah Court laws according to the jurisdiction given by the Muslim Courts (Criminal Jurisdiction) Act 1965 (Amendment)

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[115]^{c}Awda, *Al-Tashrī^{c} al-Jinā'ī al-Islāmī*, vol.ii, pp. 687-708.

1984. For this reason, this maximum penalty can only be found in the laws which are enacted after 1984.

Falsifying a *fatwā* (formal legal opinion of religious authority) is among the maximum penalties provided for in the Sharī'ah Criminal Code Enactment of Kelantan, 1985[116] and of Kedah, 1988.[117] The Sharī ah Criminal Code Ordinance of Sarawak, 1991 also provides the maximum penalty for other offences such as propagating heretical doctrines,[118] prostituting a wife or child,[119] being a middleman for prostitution,[120] occupying land of the Islamic Council and altering its property without permission,[121] while the Administration of Muslim Law Enactment of Terengganu, 1986 provides the maximum penalty for offences such as propagating heretical doctrines,[122] dishonestly using welfare money or dishonestly collecting it,[123] building a mosque or holding the Friday prayer without permission,[124] and giving a *fatwā* which

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[116]Section 24 (2).

[117]Section 24 (2).

[118]Section 31.

[119]Section 18.

[120]Section 22.

[121]Section 39 & 41.

[122]Section 204.

[123]Section 194 & 195.

[124]Section 198.

contradicts that of the Islamic Council.[125]

The minimum punishment provided for *ta^{c}zīr* offences in the Sharī^{c}ah Court laws is normally for offences relating to matrimonial cases. Section 112 of the Muslim Family Law Enactment of Kedah, 1984 provides that refusal of a husband to consummate his marriage is punishable with a fine of one hundred ringgit or imprisonment for a term of one month. Similarly, section 126 of the Administration of Muslim Family Law Enactment of Terengganu, 1985 provides that the refusal of a wife to obey her husband is punishable with a fine of one hundred ringgit.

Apart from the above points, it can be seen from the previous discussion that the provision of a punishment for certain offences is not standardised between the states since each state has full power to determine the offences and their punishments without being interfered with other state. In certain cases the gap between two states on a matter of punishment is quite obvious, particularly between the laws enacted before 1984 and the laws enacted after that. For example, in the case of failure to fast in the month of Ramaḍān, the Administration of Muslim Law Enactment of Pahang, 1982 provides the punishment of a fine not exceeding fifty ringgit or imprisonment for a term not exceeding seven days, and for a second or subsequent offence, a fine not exceeding one hundred ringgit or imprisonment for a term not exceeding fifteen days.[126] The Sharī^{c}ah

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[125]Section 205.

[126]Section 137.

Criminal Code Enactment of Kelantan, 1985, however, provides a punishment of a fine not exceeding five hundred ringgit or imprisonment for a term not exceeding three months, and for a second or subsequent offence, a fine not exceeding one thousand ringgit or imprisonment for a term not exceeding six months or to both.[127] Though these differences may be regarded as insignificant, they allow possible accusations of injustice as they also allow potential offenders to take advantage of the situation by travelling to another state whose provision of punishment for certain crimes is more lenient, with the intention of committing such crimes whose punishments are affordable or tolerable for him or her.

The Sharī'ah Court laws also recognise factors affecting the degree of punishments. These factors are quite similar to classical Islamic law and they can be found in the Sharī'ah Criminal Procedure Code Enactment of each state. Kelantan, for example, provides that:

> When any person not being a youthful offender has been convicted of any offence punishable with imprisonment before any Court if it appears to such Court that regard being had to the character, antecedents, age, health or mental condition of the offender or to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed it is expedient that the offender be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on entering into a bond with or without sureties and during such period as the Court may direct to appear and receive judgement if and when called upon and in the meantime be of good behaviour.[128]

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[127]Section 26.

[128]*The Sharī'ah Criminal Procedure Code Enactment of Kelantan, 1983*, Section 132.

Being a youthful offender is also considered a mitigating factor since the Sharī^{c}ah Courts may only admonish him or execute a bond with or without sureties on his guardian instead of imposing a fine or imprisonment.[129] Though it seems that aggravating factors are not mentioned in the enactments, practically they are considered by the judge in passing judgement. The seriousness of the offence and repetition of the offence are considered as aggravating factors in the Sharī^{c}ah Court laws.[130]

From the above, it can be concluded that the application of *ta^{c}zīr* laws in the Sharī^{c}ah Courts of Malaysia does not conform with the principles of *ta^{c}zīr* in classical Islamic law since the scope of *ta^{c}zīr* crimes which are provided for in the Sharī ah Court laws are limited to family and personal law matters only whereas in classical Islamic law, *ta^{c}zīr* crimes are infinite, i.e. any wrong-deed excluding *ḥadd* and atonement. It is agreed that none of the offences provided for in the Sharī^{c}ah Court laws contradicts the *Sharī^{c}a* as such, but if we look at the punishment, again it is inconsistent with the *Sharī^{c}a* since it is insufficient and limited to imprisonment and fining only whereas the punishments of *ta^{c}zīr* in classical Islamic law may vary from a warning to death. Thus, it can be concluded that the Sharī^{c}ah Courts of Malaysia cannot be considered as a part of a complete Islamic judicial system but rather courts which implicitly embody the secularist concept of separating worldly from religious matters.

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[129]See: *The Sharī^{c}ah Criminal Procedure Enactment of Kelantan, 1983*, Section 131, *of Selangor, 1991*, Section 125.

[130]See for example: *Shamila Ismail and Mohd Ripa Hamat v. Sharī^{c}ah Prosecutor*, Qaḍī Court of Kelantan, (24.12.1995).

CHAPTER FIVE

Problems in Extending the Application of *Ta^{c}zīr* Laws in the Sharī^{c}ah Courts of Malaysia

5.1 Introduction

As discussed in Chapter Four, it emerges that the application of *ta^{c}zīr* laws in the Sharī^{c}ah Courts of Malaysia is very limited. This limited application of *ta^{c}zīr* is caused by many factors. This chapter aims to identify the factors which contribute towards hindering the full implementation of *ta^{c}zīr* laws in the Sharī^{c}ah Courts of Malaysia and to suggest remedies. The types of punishment as applied in Civil Courts will also be discussed in this chapter since some *ta^{c}zīr* crimes and punishments fall under the jurisdiction of Civil Courts.

5.2 Factors which Narrow Down the Application of *Ta^{c}zīr* Laws in the Sharī^{c}ah Court of Malaysia

5.2.1 Historical Factor

It is true, as mentioned earlier in Chapter Four, that *ta^{c}zīr* laws are being applied in the Sharī^{c}ah Courts of Malaysia but their application has been narrowed down to offences relating to family and personal law matters only. This phenomenon is not surprising,

since historical fact notes that Islamic law in Malaysia has gone through a process of diminishing significance as a result of the European colonisation until it is now only applied in family and personal law. The fact that Islamic law was becoming the law of the land in the Malay states before the British occupation is undeniable. This is supported by the case of *Ramah v. Laton*[1] in which the Court of Appeal in Selangor declared that Islamic law was the law of the land and the court should recognise and apply this law. In fact, there is evidence to say that Islamic law was followed in all matters, including family law, criminal law, land law, civil law, and procedure and evidence law. There are a number of Malay digests which are based on Islamic text books such as the Malacca law, the Pahang law and a Malay translation of *Majallat al Aḥkām* which was enforced in Johore, and these are sufficient evidence to confirm that Islamic law was implemented in Malaysia in varying degrees and spheres.

However, the situation changed when the occupation of British began in 1786 which interrupted the process of establishing Islamic law as the law of the land in the former Malay states. Through a series of treaties, the Malay ruler accepted the advice of the British Residents in all matters except those concerning Islamic religion and Malay custom. In achieving their intention to extend their hold over these states Islamic religion was given a very narrow definition by the British similar to the Christian definition, i.e. that the religion concerns the relation between a man and his God only. As a result, the British managed to administer all aspects of law in Malaysia since,

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[1][1927] 6 FMSLR 128; 2JH 213.

according to the above definition, these matters had no relation with religion. English law was confirmed and applied by two means, firstly, by statutory introduction, and, secondly, by the judgements of the court. At last, the British succeeded in setting aside Islamic law and narrowing its application to personal matters only while at the same time confirming that English law was the law of the land in Malaysia. (See above, pp.178-187)

European colonialism, particularly British, is not the only reason to be blamed for all that has happened in the limitation of the application of Islamic law as in the present day Malaysian situation. In fact, there are many other factors which are involved in aggravating the situation. Accordingly, in the following paragraphs, we will discuss certain other factors which contribute as barriers to extending the application of *taᶜzīr* laws specifically or Islamic law comprehensively in the Sharīᶜah Courts of Malaysia.

5.2.2 Federal Constitution

In order to examine to what extent the Federal Constitution of Malaysia contributes as a barrier towards extending the application of Islamic law in the Sharīᶜah Courts, it is essential to look through a provision of the Constitution concerning the position of Islam, its jurisdiction and administration, as follows:

> (1) Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.

> (2) In every State other than States not having a Ruler the position of the Ruler as the Head of the religion of Islam in his State in the manner and to the extent acknowledged and declared by the Constitution of that State, and, subject to that Constitution, all rights, privileges, prerogatives and powers enjoyed by him as Head of that religion, are unaffected and unimpaired; but in any acts, observances or ceremonies with respect to which the Conference of Rulers has agreed that they should extend to the Federation as a whole each of the other Rulers shall in his capacity of Head of the religion of Islam authorise the Yang di-Pertuan Agong[2] to represent him.[3]

The above provisions show that Islam as the religion of the Federation of Malaysia has a distinguished position compared to other religions. However, this does not mean that Malaysia is a true Islamic State which implements the Islamic judicial system wholly since the Constitution is not based on the Qur)ān and *Sunna* as its supreme law. The Constitution provides that:

> (1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.[4]

Thus, it is clear that the above provision contradicts Islamic law. In fact, the purpose of making Islam the religion of the Federation is to give it priority over other religions and for it to be exercised in official ceremonies, for example, prayer (*duᶜā)*) can be recited at the beginning of special state occasion such as Merdeka Day or the Sultan's

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[2]Yang di-Pertuan Agong is the head of the Federation of Malaysia. He is one of the Malay ruler who is chosen by the Ruler Council and he may have this post for up to five years.

[3]Federal Constitution, Article 3.

[4]Federal Constitution, Article 4.

birthday.[5] This is confirmed by the first Prime Minister of Malaysia Tunku Abdul Rahman who stated that:

> I would like to clarify that this State is not an Islamic State as understood by the public, we just provide that Islam is only the official religion of the Federation.[6]

Furthermore, the word "religion" in the Constitution is defined as nothing more than a belief towards a power higher than human beings.[7] This narrow definition is accepted and applied by the Supreme Court. In the case of *Che Omar bin Che Soh v PP* the court held that the words "religion of Islam" in article 3(1) of the Federal Constitution are to be applied to official ceremonies and rituals only.[8]

Islamic law is placed under the legislature of the State which has power inferior to that of Parliament. It is worth noting that the Federal Constitution distributes legislative powers between two bodies: (i) Parliament, which may make laws for the whole or any part of the Federation and laws having effect outside as well as within the Federation; and (ii) the legislature of a State, which may make laws for the whole or any part of that State.[9] If any State law is inconsistent with a federal law, the federal law

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[5]Mohamed Suffian Hashim, "The Relationship Between Islam and the State in Malaya", *Intisari*, vol.i, no.i, p.8.

[6]*Official Report of Legislative Council Debate*, 1958.

[7]Mohd. Salleh Abbas, *Prinsip Perlembagaan dan Pemerintahan di Malaysia*, p.344.

[8][1988] 2 MLJ 55.

[9]Federal Constitution, Article 73.

shall prevail and the State law shall, to the extent of the inconsistency, be void.[10] Thus, it can be understood from these provisions that Islamic law is considered inferior to other laws passed by Parliament since, if it is inconsistent with any of the federal laws, it will be considered void.

The Federal Constitution also has a provision which limits the application of Islamic Law. It lists the matters which fall under the jurisdiction of the state, as follows:

> 1. Except with respect to the Federal Territories of Kuala Lumpur and Labuan, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, bethrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Bait-ul-Mal or similar Islamic religious revenue; mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organisation and procedure of Syariah courts which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law, the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine Malay custom.[11]

It is clear that according to the provision of the Federal Constitution, Islamic law

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[10]Federal Constitution, Article 75.

[11]Federal Constitution, The ninth schedule, list II.

has become limited and narrowly defined. Thus the Federal Constitution of Malaysia can be considered as the main barrier to the full implementation of Islamic law.

5.2.3 Judicial System

The Federal Constitution of Malaysia sets out two systems of courts, i.e. Civil Courts and Sharīᶜah Courts. The former are administered by the federal goverment while the latter are administered by the state government. Civil Courts comprise two types of courts, i.e High Courts which are established under the Federal Constitution[12] and Subordinate Courts which are established under the Subordinate Court Act 1948. The hierarchy of the Civil Courts is as follows:

a. High Courts:
   i. Supreme Court
   ii. High Court
b. Subordinate Courts:
   i. Session Court
   ii. Magistrate Court (first class)
   iii. Magistrate Court (second class)
   iv. Penghulu[13] Court

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[12]Article 121(1).

[13]Penghulu is a leader of a village.

The Sharī'ah Courts are established under the Administration of Muslim Law Enactment of each state and they comprise the Chief *Qāḍī* Courts, the *Qāḍī* Courts and the Sharī'ah Appeal Committee which hears appeals from the Chief *Qāḍī* Courts and the *Qāḍī* Courts.

Before we look further at the jurisdiction of these courts, it can be seen from the above that the Sharī'ah Courts are given an inferior position to the Civil Courts since the former are placed under the state legislature whilst the latter are placed under Parliament. Thus, as mentioned earlier, in the event of a conflict between state and Parliament, the act of Parliament prevails.[14]

Relating to the jurisdiction of the courts, all Civil Courts, except Magistrate Courts (second class) and Penghulu Courts, have more power than the Sharī'ah Courts. The criminal jurisdiction of Civil Courts, especially that of the Supreme and High Courts, is very wide and unlimited. This can be clearly seen in section 22 of the Courts of Judicature Act, 1960, which provides that a High Court can try:

a. Any offence committed:
   i. within its local jurisdiction;
   ii. on the high seas on board any ship or on any aircraft which is registered in Malaysia;
   iii. by any citizen or any permanent resident on the high seas on board any ship or any aircraft;
   iv. by any person on the high seas if the offence is of piracy under International law; and

[14]The Federal Constitution, Article 75.

b. Offences under Chapter VI of the Penal Code and under any other written law which are stated in the schedule of the Extra-Territorial Offences Act 1976, or offences under any other written law which are considered by the National Lawyer to affect the safety of the Federation, as in the following situations:

i. on the high seas on board any ship or on any aircraft which is registered in Malaysia;
ii. by any citizen or any permanent resident of Malaysia on board any ship or on any aircraft; or
iii. by any citizen or any permanent resident of Malaysia in any place without and beyond the limits of Malaysia.

The High Courts can also impose any punishment allowed by the law including the death penalty on any offender whether or not he or she professes the religion of Islam.

The criminal jurisdiction of the Sharī'ah Courts, on the other hand, is very limited, i.e. as fixed by the Muslim Courts (Criminal Jurisdiction) Act 1965 (Amendment 1984). According to this act, the Shari'ah Courts have jurisdiction over offences punishable with jail for no more than three years, or with a fine not exceeding five thousand ringgit, or with whipping not exceeding six strokes, or any combination thereof. The power of the Sharī'ah Courts to try and impose a punishment is also limited to persons professing Islam and concerning family and personal laws only.

So, these are among the problems in the judiciary system which discourage the extension of the application of Islamic criminal law in the Sharī'ah Courts of Malaysia.

5.2.4 Laws of Malaysia

The full implementation of Islamic law in Malaysia cannot be achieved since some of this law, especially that relating to criminal matters, is inconsistent with other laws which are considered superior to Islamic criminal law. In the following paragraghs, some of the laws which contradict Islamic law and hinder its implementation will be mentioned.

5.2.4.1 Civil Law Act 1956 (Revised 1972)

Section 3(1) of the above Act provides that - with the usual reservations relating to written law, local circumstances and necessary qualifications - the courts in Malaysia shall:

a. in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th April, 1956;

b. in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 1st December, 1951;

c. in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 12th December, 1949, subject however to subsection 3(2).[15]

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[15]Law of Malaysia, Act 67, Civil Law Act, 1956 (revised 1972), section 3 (1)(a),(b) and (c).

With the enforcement of this law, most of the acts and ordinances of the law of contract enforced in Malaysia are based on English law which contradicts Islamic law. For example, section 17 of Pawnbrokers Act, 1972 allows any person who holds a pawnbroker license to charge a certain amount of interest on the borrower according to the rules of the Act.[16] This provision clearly contradicts the Islamic law of contract which prohibits any kind of *ribā* (interest) in transactions and for which a *ta'zīr* punishment should be imposed. (See above, p.39)

Thus, it can be concluded from the enforcement of the Civil Law Act 1956 that, unless there is another written law expressly stating otherwise, English law should be followed and considered as the law of the land in Malaysia. Furthermore, section 3(2) of the above Act also provides that if there is any conflict or gap in the matter of civil law,[17] the court should refer to the common law of England and the rules of equity as administered in England.[18] This means that Islamic law will never be resorted to as a basis of civil law in Malaysia so long as this Civil Law Act is in force.

5.2.4.2 Muslim Courts (Criminal Jurisdiction) Act 1965 (Amendment) 1984

It is common knowledge that the Federal Constitution of Malaysia allocates that Islamic

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[16]Pawnbrokers Act (Act 81) 1972, section 17.

[17]What is meant by civil law here is as opposed to criminal law.

[18]Civil Law Act, 1956 (revised 1972), section 3(2).

law is enforced through the Sharī'ah Courts of each state. The jurisdiction of these courts is provided for in the State List of the Federal Constitution, as follows:

> ...Sharī'ah Courts which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law.[19]

It is clear from the above provision that the Sharī'ah Courts can only impose certain punishments on certain offences in so far as conferred by federal law and as long as they are consistent with it.

Concerning the criminal jurisdiction of the Sharī'ah Courts, Parliament enacted the Muslim Courts (Criminal Jurisdiction) Act 1965 (Amendment) 1984. Section 2 of this act provides that the Sharī'ah Courts have jurisdiction over offences punishable with jail for no more than three years, or with a fine not exceeding five thousand Malaysian Ringgit, or with whipping not exceeding six strokes, or any combination thereof.

As a result of these limitations, most of the punishments imposed for the crimes which are included under the jurisdiction of the Sharī'ah Courts especially *ḥudūd* crimes, contradict those of Islamic law. For example, the punishment for *zinā*, as provided by the Sharī'ah Criminal Code Enactment of Kelantan, 1985, is imprisonment

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[19]Federal Constitution, 9th Schedule, List II, State list, item 1.

for no more than three years, or a fine not exceeding five thousand ringgit, and whipping not exceeding six strokes,[20] whereas its punishment as required by Islamic law is flogging with one hundred lashes (if unmarried) or stoning to death (if married). This is but one example; there are many other provisions which contradict Islamic law.

It can be concluded from the above, that the Muslim Courts (Criminal Jurisdiction) Act 1965 (Amendment) 1984 is one of the barriers to extending the application of Islamic law in the Sharī'ah Courts of Malaysia. The jurisdiction of the Sharī'ah Courts given by this Act is very limited compared to what it would be under Islamic law.

5.2.4.3 Penal Code (Amendment and Extension) 1976

Compared to the Muslim Courts (Criminal Jurisdiction) Act, 1965 (Amendment) 1984, the Penal Code has more power and jurisdiction since according to section 2 of this Code:

> Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within Malaysia.[21]

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[20]Section 11.

[21]Penal Code (F.M.S. Cap.45) (Amendment and Extension 1976), Section 2.

The above provision indicates that the application of the Penal Code is very wide and it can impose punishments on any offences which are provided for in this Code even if it contradicts Islamic law. *Hudūd* offences such as rape, theft, robbery and rebellion are provided for in this Code and should be tried in the Civil Courts. Similarly, *qiṣāṣ* crimes such as homicide and causing injury to other people are also included in the Penal Coce. The punishments specified for these crimes also do not conform with those of Islamic criminal law. As an example, the punishment for theft as provided for in the Penal Code is imprisonment for a term which may extend to seven years, or a fine, or both.[22] This punishment is, of course, in contrast with that of Islamic criminal law, i.e. the hand of the thief should be cut off.[23] The punishment for homicide, though, is quite similar to that of Islamic criminal law, i.e. the death penalty, since in Islam the death penalty can be imposed if the relatives of the victim demand it otherwise the murderer can be acquitted with or without blood money.[24]

There are some punishments provided for offences in other criminal law Acts such as the Dangerous Drugs Act (Amendment) 1975, the Firearms (Increased Penalties) Act 1974 and the Internal Security Act 1960 which also contradict Islamic criminal law. However, since these Acts are federal law which are consistent with the Federal Constitution, they remain valid and are assumed to be enforced throughout Malaysia

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[22]The Penal Code, section 379.

[23]See: ᶜAwda, *al-Tashrîᶜ al-Jināʾî al-Islāmî*, vol.i, p.651.

[24]*Ibid.*, pp.663-668.

howsoever they contradict Islamic law.

5.2.5 Political and Social Predicament

Since Malaysia applies a democratic system, it is difficult to identify the government's attitude towards the implementation of Islamic law in Malaysia. This is because goverment policy changes whenever the leader and the party change. It is apparent from the constitution and manifesto of the leading party whether or not it is interested in implementing Islamic law. At the moment, Malaysia is led by the National Front party, which is a combination of at least three parties, i.e. United Malayan Nation Organisation (UMNO), Malaysian Chinese Association (MCA) and Malaysian Indian Congress (MIC). Therefore, the power to legislate the law depends mostly on the leading member of this party which represents the will of the majority of Malaysian society.

The late fourth Prime Minister of Malaysia, Dato' Hussin Onn, once confirmed that the government under his political leadership was not ready to implement Islamic law comprehensively or to amend the Federal Constitution to conform with Islam since, according to him, Islamic law was incompatible with the multi-racial society of Malaysia and, if it were implemented, it would affect the harmony and safety of the country.[25]

The same attitude is also held by the current Prime Minister, Dr. Mahathir

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[25] Abu Bakar Abdullah, *Ke Arah Perlaksanaan Undang-undang Islam di Malaysia - Masalah dan Penyelesaiannya (Towards the Implementation of Islamic Law in Malaysia - Problems and Solutions)*, p.269.

Mohammad, who is not ready to implement Islamic law comprehensively but rather to implement those parts of it which are considered to be fair for the whole society. The reluctance of the leading party to implement Islamic law was even more clearly shown when it set aside the Sharī^{c}ah Criminal Code II of Kelantan, which had been approved by the Kelantan State Assembly on 25th November 1993[26] and was intended to uphold Islamic criminal law including *ḥudūd*, *qiṣāṣ* and *ta^{c}zīr* laws. The reason it gave was that the Code was incomplete and some sections of it contradicted Islamic law. This reason would seem to indicate the government's negative attitude toward the implementation of Islamic law. If it is true that this Criminal Code is incomplete and some sections of the Code contradict Islamic law, there should be other means to correct it instead of rejecting the whole Code. As a result of this rejection, Kelantan is unable to implement a comprehensive Islamic criminal law, especially *ḥudūd* laws, up to the present since as a State, its decision depends on the approval of the Federal government, as discussed above (see, p.185).

Regarding the question of a multi-racial society, non-Muslims in the society seem to have a prejudicial attitude towards Islamic criminal law because of their lack of knowledge of it. It is unfortunate that even some of the Muslims, including both leaders and intellectuals, are in doubt about the capability of Islamic law to be the law of the land of Malaysia.[27] However, this cannot be a reason not to implement Islamic

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[26]Kelantan is ruled by the opposition party, i.e. Islamic Party of Malaysia, which fights for Islamic law and urges the goverment to implement Islamic law comprehensively.

[27]Abu Bakar Abdullah, *Ke Arah Perlaksanaan Undang-undang Islam di Malaysia*, p.272.

law comprehensively since Islamic law is not strange to the Malaysian world and it was recognised as the law of the land before the occupation of the British, as discussed above (see pp.178-187). However, in order to be practical, there are certain exceptions that can be given to non-Muslims in the country regarding the implementation of Islamic law.

From the above, it emerges that there are several problems in extending the application of *taᶜzīr* laws specifically, or Islamic criminal law in general, in the Sharīʿah Courts of Malaysia. It is also possible to understand why there are these problems in the application of Islamic criminal law in the present day Malaysian situation. It will thus need a lot of effort and strength on the part of the Muslims to bring Islamic law back into practice.

5.3 Punishments in Civil Courts of Malaysia

In order to understand more about the situation of criminal laws in Malaysia, it is important to look through briefly the punishments which are imposed in the Civil Courts of Malaysia. These are of the following types:

1. Death sentence
2. Imprisonment
3. Fines
4. Whipping
5. Police supervision

6. Good behaviour bonds

5.3.1 Death Sentence

Death sentences may be passed under the following laws:

5.3.1.1 Penal Code

Under the Penal Code, death sentences are provided for several offences such as in the following sections:

121 - Waging or attempting to wage war or abetting the waging of war against the Head of State (Yang di-Pertuan Agong) or any of the Rulers.

121A - Offences against the person of the Yang di-Pertuan Agong or any of the Rulers, their heirs and successors.

132 - Abetment of mutiny, if mutiny is committed in consequence thereof.

194 - Giving or fabricating false evidence with intent to procure conviction of a capital punishment.

302 - Murder.

305 - Abetment of suicide of child or insane person.

307 - Attempt to murder by a person who is undergoing sentence of imprisonment for life or for a term of twenty years, if harm is caused to any person by such an act.

396 - Gang robbery with murder.

The sentence of death is provided for as a mandatory sentence for offences of sections 121A and 302. Apart from both sections above, the death sentence is prescribed for as an alternative with imprisonment for life or for a term of twenty years.

5.3.1.2 Internal Security Act 1960 (Revised 1972)

Section 57(1) of the Internal Security Act 1960 (revised 1972), provides a sentence of death as a mandatory punishment. The section reads:

> Any person who without lawful excuse, the onus of proving which shall be on that person, in any security area carries or has in his possession or under his control -
>
> (a) any firearm without lawful authority therefor; or
>
> (b) any ammunition or explosive without lawful authority therefor; shall be guilty of an offence and shall on conviction be punished with death.

5.3.1.3 Firearms (Increased Penalties) Act 1971

Section 3 of the Act provides the death penalty as a mandatory sentence for discharging a firearm in the commission of a scheduled offence. It reads:

> Any person who at the time of his committing or attempting to commit or abetting the commission of a scheduled offence[28] discharges a firearm with

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[28]Scheduled offences are: 1. Extortion; 2. robbery; 3. the preventing or resisting, by any person, of his own arrest or the arrest of another by a police officer or any other person lawfully empowered to make the arrest; 4. escaping from lawful custody; 5. abduction or kidnapping under sections 363 - 367

> intent to cause death or hurt to any person, shall, notwithstanding that no hurt is caused thereby, be punished with death.

The accomplices for offences committed under section 3 of the above act shall also be punished with death as mandatory. This is provided for in section 3A which reads:

> Where, with intent to cause death or hurt to any person, a firearm is discharged by any person at the time of his committing or attempting to commit or abetting the commission of a scheduled offence, each of his accomplices in respect of the offence present at the scene of the commission or attempted commission or abetment thereof who may reasonably be presumed to have known that such person was carrying or had in his possession or under his custody or control the firearm shall, notwithstanding that no hurt is caused by discharge thereof, be punished with death, unless he proves that he had taken all reasonable steps to prevent the discharge.[29]

In addition, section 7(1) of the Act provides that any person trafficking in firearms shall be punished with death or imprisonment for life and with whipping with not less than six strokes.[30]

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of the Penal Code or section 3 of the Kidnapping Act 1961; and 6. housebreaking or house trespass under sections 454 to 460 of Penal Code. Refer Schedule Offence of section 2, Firearms (increased penalties) Act 1971.

[29]Section 3A is new section added, Firearms (Increased Penalties) (Amendment) Act, 1974.

[30]*Ibid.*

5.3.1.4 Dangerous Drugs Act (Amendment) 1975

Death as a mandatory sentence is provided for in section 39B of the above Act. It reads:

> (1) No person shall, on his own behalf or on behalf of any other person, whether or not such other person is in West Malaysia -
>
> (a) traffic in a dangerous drug,
> (b) offer to traffic in a dangerous drug; or
> (c) do or offer to do an act preparatory to or for the purpose of trafficking in a dangerous drug.
>
> (2) Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence against this Ordinance and shall be punished on conviction with death.

From the above, it can be seen that there are several offences which are punishable with death sentences as mandatory. In Islamic law, mandatory death sentences are applied in some *ḥudūd* offences only, i.e., *zinā muḥṣan* (adultery by a married culprit), robbery with murder and apostasy. Murder under Islamic law is not necessarily punished by death, since the relatives of the murdered person can agree to accept compensation and the murderer will then be punished with a *taᶜzīr* punishment as determined by the discretion of the judge. Certain offences of a *taᶜzīr* type may be punishable with death but this cannot be made mandatory. Therefore, the mandatory death sentences as prescribed for offences in the above Acts contradict Islamic law.

5.3.2 Imprisonment

In the case of a large majority of offences the Penal Code and other penal laws prescribe punishment of imprisonment of varying terms. Normally these laws prescribe the maximum term of imprisonment awardable in respect of any offence. Where the offence is punishable with imprisonment the policy is to give sufficient discretion to the court in awarding a suitable term of imprisonment. In exercising this discretion the court takes into account several factors such as the gravity of the offence, the motive of the offender, the harm caused to the victim, the circumstances in which the offence is committed, the age, character and antecedents of the offender and so on.

Imprisonment can be for a certain period or for life. Regarding imprisonment for a certain period, it is at the discretion of the court to determine a suitable term which can reach up to the maximum term of imprisonment prescribed by law for such an offence. Life imprisonment in Malaysian laws has two meanings, i.e. first it means imprisonment for the duration of the natural life of the person sentenced as provided in the Firearms (Increased Penalties) Act, 1971:

> `Imprisonment for life' means, notwithstanding Section 3 of the Criminal Justice Ordinance, 1953 and any other written law to the contrary, imprisonment for the duration of the natural life of the person sentenced.[31]

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[31]Section 2(1).

The second meaning of life imprisonment is a sentence of imprisonment for twenty years as provided in the Criminal Justice Ordinance, 1953 which reads:

> Where any person is treated as having been sentenced or is hereafter sentenced to imprisonment for life, such sentence shall be deemed for all purposes to be a sentence of imprisonment for twenty years.[32]

The same provision is also provided for in the Malaysian Penal Code which reads:

> In calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years.[33]

In the Penal Code, life imprisonment is preserved in seven sections, i.e.:

> (i) waging or attempting to wage war or abetting the wage of war against the Yang di-Pertuan Agong, a Ruler or Governor where life imprisonment is provided as an alternative to the death punishment and shall also be liable to a fine if death is not imposed;[34]
>
> (ii) offences against the authority of the Yang di-Pertuan Agong, a Ruler or Governor, shall be punished with imprisonment for life and shall also be liable to a fine;[35]

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[32]Section 3.

[33]Section 57.

[34]Section 121.

[35]Section 121 B.

(iii) collecting arms, etc. with the intention of waging war against the Yang di-Pertuan Agong, a Ruler or Governor, where imprisonment for life is an alternative to imprisonment for a term not exceeding twenty years, and shall also be liable to a fine;[36]

(iv) waging war against any power in alliance with the Yang di-Pertuan Agong where life imprisonment is an alternative to imprisonment which may extend to twenty years, together with a fine;[37]

(v) harbouring or attempting to harbour any person in Malaysia or person residing in a foreign state at war or in hostility against the Yang di-Pertuan Agong where life imprisonment is an alternative to imprisonment which may extend to twenty years, with or without a fine in either instance;[38]

(vi) public servants voluntarily allowing a prisoner of State or war in his custody to escape shall be punished with life imprisonment, or with imprisonment for a term which may extend to twenty years, and also shall be liable to a fine;[39]

(vii) aiding escape of, rescuing or harbouring such a prisoner shall be punished with imprisonment for life, or with imprisonment for a term which may extend to twenty years, and shall also be liable to a fine.[40]

The sentence of life imprisonment is also provided for in the Internal Security Act, 1960 (revised 1972)[41] and in the Firearms (Increased Penalties) (Amendment) Act, 1974.[42]

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[36]Section 122.

[37]Section 125.

[38]Section 125 A.

[39]Section 128.

[40]Section 130.

[41]For details, see: Sections 58(1), 59(1), 59(2) and 59(3).

[42]For details, see: Sections 4, 5 and 7(1).

5.3.3 Fines

Fining is a common sentence imposed on an offender. A fine is prescribed for almost all offences provided in the penal Code and other penal laws, normally as an additional punishment or as an alternative to the sentence of imprisonment or death sentence. The provisions regarding fines are stated in section 283 of the Criminal Procedure Code. In every case of an offence in which the offender is sentenced to pay a fine the Court passing the sentence may, in its discretion, do all or any of the following things:

(1) allow time for the payment of the fine;

(2) direct payment of the fine to be made by instalments;

(3) issue a warrant for the levy of the amount by distress and sale of any property belonging to the offender;

(4) direct that in default of payment of the fine the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may be sentenced or to which he may be liable under a commutation of sentence:

Provided that where time is not allowed for the payment of such fine an order for imprisonment in default of payment shall not be issued in the first instance unless it appears to the court that such person has no property or insufficient property to satisfy the fine payable or that the levy of distress will be more injurious to him or his family than imprisonment;

(5) direct that such person be searched and that any money found on him when so search or which, in the event of his being committed to prison, may be found on him when taken to prison, shall be applied towards the payment of such fine the surplus, if any, being returned to him:

Provided that such money shall not be so applied if the Court is satisfied that the money does not belong to the person on whom it was found or that the loss of

the money will be more injurious to him than his imprisonment.[43]

The period for which the Court directs the offender to be imprisoned in default of payment shall not exceed the following scale:

> (1) if the offence is punishable with imprisonment:
> Where the maximum term of imprisonment does not exceed six months, the period shall not exceed the maximum term of imprisonment. If it exceeds six months but does not exceed two years, the period shall not exceed six months. If it exceeds two years, the period shall not exceed one quarter of the maximum term of imprisonment.
>
> (2) If the offence is not punishable with imprisonment:
> Where the fine does not exceed twenty-five ringgit, the period shall not exceed two months. If it exceeds twenty-five ringgit but does not exceed fifty ringgit, the period shall not exceed four months. If it exceeds fifty ringgit, the period shall not exceed six months.[44]

From the above, it can be clearly seen that imprisonment and fines are the most popular types of punishment imposed in Malaysian criminal law. To a certain extent, imprisonment and fines incorporated in Malaysian law are generally in conformity with the concept of *ta'zīr* in Islamic law. However, it should be pointed out that neither of these punishments are preferred in Islamic law as the Qur'ānic *ḥudūd* punishments are corporal in nature. Furthermore, even the jurists dispute as to their legality. Concerning this matter, Dr. Tanzil al-Rahman in a paper entitled "Crime and Punishment in Islam" says:

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[43]Criminal Procedure Code, section 283(1)(b).

[44]Criminal Procedure Code, section 283(1)(c).

> Recent researches reveal that imprisonment is and has, in fact, proved itself to be source of producing criminals, besides bringing a burden on the public exchequer. Fines, as prescribed in various modern legislative enactments, have miserably failed to achieve the desired result. It neither brings any reformatory virtue to the criminal nor puts any deterring effect on him...Personally speaking I am in favour of imposing physical punishments instead of long and fruitless, rather harmful, imprisonment or fines.[45]

The imposition of imprisonment in default of payment of fines also seems to be unjust since it might open a wider gap between the poor and the rich. This contradicts the *Sharī'a* principle which always tries to ensure that any injustice raised in the society is eradicated and the gap between the rich and the poor is closed. This is among the reasons why the institution of *zakāt* has been established in Islam.

5.3.4 Whipping

The sentence of whipping is still enforced and included in the Malaysian Statutes up to the present day despite its abolition in England by the Criminal Justice Act 1948 and (in prison) by the Criminal Justice Act 1967.[46] Concerning this enforcement, R.H. Hickling commented in his book "Malaysian Law" that whipping illustrates one of the more severe features of the Malaysian system of justice.[47] It is worth mentioning that the whipping referred in Hickling's book is a barbarous type of whipping which is very

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[45]As quoted by Hashim Mehat, *Malaysian Law and Islamic Law on Sentencing*, p.288.

[46]P.J. Fitzgerald, *Criminal Law and Punishment*, p.228.

[47]R.H. Hickling, *Malaysian Law*, p.167.

different from the whipping executed in Islamic law.

In Malaysia, sentences of whipping are provided in at least five statutes, i.e. the Penal Code, the Arms Act 1960, the Firearms (Increased Penalties) Act 1971, the Dangerous Drugs Act 1975 and the Kidnapping Act 1961.

In the Penal Code, whipping is provided in thirty- four sections, mostly as an additional sentence to imprisonment and as an alternative to being fined. Those sections are:

324, 327, 329 - for offences relating to causing hurt;

354, 356 - for offences relating to assault or use of criminal force;

364 - for kidnapping or abducting in order to murder;

376, 377 - as a punishment for rape and unnatural offences;

379, 380, 382 - for offences relating to theft;

384, 385, 386, 387, 388, 389 - for offences relating to extortion;

392, 394, 395, 396, 397, 399, 400, 401, 402 - for offences relating to robbery;

430A - For mischief affecting railway engines, trains, etc;

453, 454, 455, 456, 457, 458, 459 - for offences relating to house breaking.

In the Arms Act 1960, whipping is prescribed for the manufacturing arms

without a licence and for breach of the conditions of licence.[48] Whipping is also prescribed for an offence of possessing of arms and ammunition for unlawful purpose.[49]

In the Firearms (Increased Penalties) Act 1971, whipping is provided in:

(i) section 5 - having firearms in the commission of a scheduled offence;

(ii) section 6 - exhibiting an imitation firearm in the commission of a scheduled offence;

(iii) section 7(1) - trafficking in firearms;

(iv) section 8 - unlawful possession of firearms;

(v) section 9 - consorting with a person carrying firearms.

Whipping is also provided in the Dangerous Drugs Act 1975[50] and Kidnapping Act 1961.[51]

Regarding the execution of the sentence of whipping, the Criminal Procedure Code provides that when the accused is sentenced to whipping only, the sentence can only be executed at such place and time as the Court may direct.[52] The number of

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[48]Section 14(1).

[49]Section 33.

[50]For details, see: Sections 6A, 9(2), 39A, 39B(2).

[51]For details, see: Sections 3, 5 and 6.

[52]Section 286.

strokes cannot exceed twenty-four in the case of an adult or ten in the case of a youthful offender. Whipping shall be inflicted on such part of the person as directed by the Minister in charge. The rattan (i.e. the whip) used for whipping shall not be more than half an inch in diameter. In the case of a youthful offender, whipping shall be inflicted in the way of school discipline with a light rattan.[53] There are certain persons not punishable with whipping, namely:

a. females;

b. males sentenced to death;

c. males whom the Court considers to be more than fifty years of age.[54]

From the above, it can be seen that whipping in Malaysian criminal law is imposed for the commission of violent crimes. It should be noted that the whipping as executed in Malaysian law is very harsh and painful since with just three strokes of a rattan will result in the unconsciousness of the offender. It also disgraces the offender since he will be carrying the scar caused by whipping for his entire life.[55] This situation contradicts the whipping in Islamic law since it is imposed for less serious offences and is far less harmful. Even one hundred lashes of whipping will not result in the death of the offender. Whipping is also imposed on the offender irrespective of sex and age. (For the execution of whipping in Islamic law, see above, pp.79-83)

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[53]Criminal Procedure Code, Section 288(1)(2)(3)(4).

[54]Criminal Procedure Code, Section 289.

[55]For further details on this point, see: Ahmad Ibrahim, *Hukuman Sebat Dalam Undang-undang Islam dan Undang-undang Awam di Malaysia (Whipping in Islamic Law and Malaysian Law)*, Kuala Lumpur: Istitut Dakwah dan Latihan Islam, Bahagian Ugama, Jabatan Perdana Menteri, p.47.

5.3.5 Police Supervision

The object and justification of sentence of police supervision is to ensure that in the interests of public security the police are in a position to exercise some measure of control over the movements and activities of persons of known bad character such as burglars, pick-pockets and common thieves who habitually and consistently lead a life of criminal dishonesty. This is pointed out by Justice Rigby in the case of *Bakar bin Ahmad.*[56]

The sentence of police supervision can only be imposed on a person if, having previously been convicted of an offence punishable with imprisonment for a term of two years or upwards, he is convicted again of any other offence also punishable with imprisonment for a term of two years or upwards. The High Court or Session Court may direct that he be subject to the supervision of the police for a period of not more than three years commencing immediately after the expiration of the sentence passed on him for the last such offence. A Court of a Magistrate can impose this punishment for a period of not more than one year.[57] The Courts have a discretion in the circumstances of each case to decide whether or not to impose a sentence of police supervision.[58]

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[56][1959] MLJ 256.

[57]Criminal Procedure Code, Section 295.

[58]As expressed by Gunn Chit Tuan J. in the case of *Roslan bin Haji Yahya v PP* [1985] 2 MLJ 218.

Every person subject to the supervision of the police who is at large within the Federation has the obligation to:

> (a) notify the place of his residence to the officer in charge of the police district in which his residence is situated;
>
> (b) whenever he changes such residence within the same police district to notify such change of residence to the officer in charge of the police district;
>
> (c) whenever he changes his residence from one police district to another to notify such change of residence to the officer in charge of the police district which he is leaving and to the officer in charge of the police district into which he goes to reside;
>
> (d) whenever he changes his residence to a place beyond the limits of the Federation to notify such change of residence and the place to which he is going to reside to the officer in charge of the police district which he is leaving;
>
> (e) if having changed his residence to a place beyond the limits of the Federation he subsequently returns to the Federation to notify such return and his place of residence in the Federation to the officer in charge of the police district in which such residence is situated.[59]

A male offender subject to the supervision of the police also has to report himself once a month to the Chief Police Officer or any other officer who represents him.[60]

5.3.6 Good Behaviour Bonds

When any person is required by any Court to execute a bond with or without sureties and

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[59]Criminal Procedure Code, Section 296 (1).

[60]Criminal Procedure Code, Section 296 (2).

in such a bond the person executing it binds himself to keep the peace or binds himself to be of good behaviour, the Court may require that there be included in such a bond one or more of the following conditions namely:

> (a) a condition that such a person shall remain under the supervision of some other person named in the bond during such period as may be therein specified;
>
> (b) such conditions for securing such supervision as the Court may think it desirable to impose;
>
> (c) such conditions with respect to residence employment associations abstention from intoxicating liquors or with respect to any other matter whatsoever as the Court may think it desirable to impose.[61]

From the above, it can be seen that the Civil Courts of Malaysia have unlimited criminal jurisdiction and can deal with all offences including those punishable with death. Some offences of *ḥudūd* and *qiṣāṣ* such as theft, robbery, rebellion, rape and murder were already incorporated in the federal law which is within the jurisdiction of the Civil Courts but the punishments imposed contradict those of Islamic law. The punishments for other offences are restricted to the options of either the imposition of a fine, or imprisonment, or whipping (as an additional punishment in violent crimes), or death in certain cases. The sentences of fining and imprisonment are the most popular punishments passed by the Civil Courts.

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[61]Criminal Procedure Code, section 294A.

5.4 The Relation Between the Punishments of *Taᶜzīr* and the Punishments in the Civil Courts

Some of the Muslims in Malaysia claim that the punishment passed by the Civil Courts nowadays is a form of *taᶜzīr* punishment. They believe that whenever *ḥudūd*, *qiṣāṣ* and other types of punishment in Islam are not applied, all the punishments passed in the Civil Courts are *taᶜzīr* punishments.[62] This misintepretation has arisen because it seems that there is a similarity in the definition of *taᶜzīr* punishments and the punishments in the Civil Courts i.e., a punishment which is not prescribed by the Qurʾān and *Sunna* but is left to the discretion of the judge. In fact, *taᶜzīr* is a form of Islamic punishment as are *ḥudūd*, *qiṣāṣ* and *kaffāra*. Although *taᶜzīr* is not mentioned in detail in Islamic texts, it is originally based on those texts and cannot contradict the general principles of the *Sharīᶜa*.

If we look closely at the differences between these two types of punishment, it is clear that the punishments which are passed by the Civil Courts of Malaysia cannot be categorized as *taᶜzīr*. Among the reasons are:

1. The punishments in the Civil Courts and the punishments of *taᶜzīr* are based on different sources of law. The former are based on the law and Constitution of the State which is not based on the *Sharīᶜa*. Even though Malaysia declares

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[62]Mahfodz Muhammad, "Hukum Taᶜzīr Dalam Islam: Perbandingan Dengan Hukuman-hukuman di Mahkamah Sekular", in *Islamika iv*, p.35.

Islam to be a State religion, it does not mean that Malaysia is an Islamic State since the objective of such provisions is only to give Islam priority over all other religions on certain official occasions. (See above, pp.228-229) The punishments of *ta^{c}zīr*, on the other hand, are based on the *Sharī^{c}a* and therefore, must not contradict the general principles of the *Sharī^{c}a*.

2. The punishments which are passed by the judges of the Civil Courts may contradict the *Sharī^{c}a* since their judgements should be consistent with the Federal Constitution. Any laws or rules passed which are inconsistent with the Constitution is void since the Constitution of the State is the supreme law and therefore no other law may surpass it. In Islam, *Sharī^{c}a* is the supreme law and *ta^{c}zīr* is part of the *Sharī^{c}a*.

3. The objective of *ta^{c}zīr* punishment is to protect the five basic necessities of the human society i.e. religion, life, sanity (*^{c}aql*), property and lineage. In Malaysian criminal law, some objectives and protections are different, since not all of these concerns are recognised. In other words, what is forbidden in Islam is not necessarily forbidden in Malaysian law and vice versa. One major difference between Islamic criminal law and Malaysian criminal law is that sexual offences are regarded as serious offences under Islamic law. Therefore *zinā* is prohibited and is considered a crime even if it is committed with the consent of both parties, whereas in Malaysian criminal law it is not a crime.

From the above, it is clear that the punishments passed by the judges in the Civil Courts of Malaysia today cannot be considered as *ta'zīr* punishments. It is true that both punishments are determined by the discretion of the judges but the punishments in the Civil Courts are man-made laws whereas *ta'zīr* punishments are a branch of God's law (*Sharī'a*). Accordingly, the punishments in the Civil Courts should be Islamised first before they can be accepted as Islamic punishments.

Islamising the existing Malaysian criminal law does not, as usually thought, mean the replacement of the already established laws. It means that some amendments should be made to the Federal Constitution and particularly the federal laws, to those provisions that contradict the principles of the *Sharī'a* as have been highlighted above, so as to bring such laws or provisions into conformity with the injunctions of Islam. Thus, steps should be taken to amend the law so as to enable Islamic law, and in particular Islamic criminal law, to be implemented in Malaysia.

CONCLUSION

Taᶜzīr punishment cannot be considered as a less important type of punishment compared to *ḥadd* and *qiṣāṣ*. In fact, *taᶜzīr* is a part of the *Sharīᶜa* which demonstrates the flexibility of Islamic criminal law. Without the law of *taᶜzīr*, Islamic criminal law would be insufficient to face the increasing number of crime problems in this world.

If *ḥadd*, *qiṣāṣ* and *kaffāra* offences are limited in numbers as counted by the jurists, the scope of *taᶜzīr* offences is the opposite. The offences of *taᶜzīr* are unlimited and include those considered as *maᶜṣiya* and non-*maᶜṣiya* which are punishable on the basis of public interest. Even delinquencies, i.e., omission of recommended acts or commission of reprehensible acts, are punishable with *taᶜzīr* punishments. In certain cases, *taᶜzīr* punishments can be combined with *ḥudūd* punishments or substituted for the latter but the conditions stipulated may be different from one jurist to another.

The objective of *taᶜzīr* is to punish wrong deeds which may do harm to the public or to the rights of an individual. In the first place, it is a deterrent punishment intended to prevent the commission of further offences, both by the offender and by other members of the society. At the same time, it is a reformatory punishment which is intended to rectify the offender and to reform him. This concept is based on the principle of *tawba* which is recognised by the Qurʾān.

A *taᶜzīr* punishment is always referred to as a milder form of punishment in

comparison with *ḥadd* punishments and *qiṣāṣ* since it is stipulated that a *taᶜzīr* punishment should not normally result in death or the amputation of limbs. The majority of the jurists, however, include the death penalty for certain *taᶜzīr* offences as an exception to this general rule. Though they dispute on what type of offences are punishable with death and on what grounds, it can be concluded that the death penalty, as a *taᶜzīr* punishment, may be imposed on offences which are harmful to the security of the Islamic state and to the Muslim community, religion and belief and to the individual as well. A recidivist of a serious crime may also be sentenced with death if other punishments have had no effect on him. This is drawn from analogy from a *ḥadīth* of the Prophet who warned that a person who drinks intoxicants for the fourth time should be put to death.

Apart from the death penalty, there are many other types of *taᶜzīr* punishments discussed by the jurists, i.e. flogging, crucifixion, imprisonment, banishment, fines and seizure of property, admonition, reprimand, threat etc. The jurists discuss these matters according to their own opinions. In some cases, they agree with each other, while in other cases, they dispute among themselves. The debate of the jurists arises concerning the number of lashes and the duration of banishment and imprisonment allowed for *taᶜzīr* cases. Some jurists, especially the Shāfiᶜīs, tend to limit punishment to a certain maximum, i.e. it should not exceed that of *ḥudūd*, while some others, particularly the Mālikīs, do not fix any limitation concerning this matter. The debate also arises as to the legality of financial punishment. The opinion of those who support the legality of this type of punishment (Mālik, Aḥmad, al-Shāfiᶜī and Abū Yūsuf) would seem

preferable, given the evidence of the practices of the Prophet and decisions of some of his Companions which confirm the legality of financial punishment and the weakness of counter argument.

The *Sharīᶜa* lays down rules governing the application of *taᶜzir* laws. In Islamic criminal law, punishment is not the only measure taken to fight crime. The *Sharīᶜa* firstly imposes internal and external controls to wipe out all the possibilities which may lead to the commission of a crime. If a person still turns to crime despite these safeguards, he merits a punishment which suits the crime that he has committed. As far as *taᶜzīr* punishment is concerned, certain factors which influence the degree of punishment are highlighted. The fact that the question of mitigating and aggravating factors does not arise in the case of *ḥadd* and *qiṣāṣ* (which may not be pardoned) since these punishments are prescribed and therefore unchangeable. Although the jurists do not systemise these factors in their manuals, and some jurists mention certain factors while some other jurists mention different factors which affect *taᶜzīr* punishments, it cannot be said that these factors are insignificant. In fact, the judge has to consider these matters each time before passing judgement concerning *taᶜzīr* offences. Certain factors, such as being a first offender or a young person, or a confession with good character, or a strong provocation, may all be considered as mitigating factors for *taᶜzīr* punishments whereas the commission of a serious offence or repetition of a similar offence may aggravate the degree of punishment.

The effect of *shubha*, *tawba* and *ᶜafw* on *taᶜzīr* punishments were also studied.

These matters are deduced from the discussions of the jurists while dealing with *ḥudūd* punishments. *Shubha* and *ᶜafw* may remit the punishment of *taᶜzīr* but *tawba* is only considered if it happens before the offender is arrested. Once the offender is arrested for the commission of a *taᶜzīr* offence, his appeal for remission of the punishment on the grounds of *tawba* can no longer be considered.

Since *taᶜzīr* punishment is subject to the discretion of the judge, the question arises as to whether this power is absolute or limited. The majority of the jurists hold that the discretionary power which the judge has is not fully absolute in the sense that if a judge chooses the punishment of flogging, it must not exceed the maximum number of lashes allowed for *taᶜzīr* cases. In addition to that, the Shāfiᶜīs hold that if a judge chooses to banish an offender, its duration should not exceed that of the *ḥadd* punishment for *zinā*. Even the Mālikīs, who hold that the discretion of the judge is absolute, hold that there is still a limit that a judge cannot go beyond. Previous judgements should also be referred to by the judge since this was practised by the Companions before making their judgements. However, previous judgements are not binding and may be adapted according to time and place.

Having discussed the concept of *taᶜzīr* in the classical Islamic point of view, our concern is with how this law is applied in Malaysia and to what extent the application of *taᶜzīr* laws conforms with the principles of the *Sharīᶜa*.

History fact notes that Islamic law was accepted by the Malay community

following the acceptance of Islam in the Malay peninsula, for example, during the Malacca sultanate. The law, including criminal law, was gradually developed and converted the local customs to Islamic law and this can be seen in the texts of the Malay digests. This process would have been completed successfully if it had not been interrupted by European colonialism. This means that since Islamic law was well accepted by the Malay community, the process of setting aside Islamic law which started during the era of colonialism was not by their will but was imposed by the colonisers and the local rulers who took over their traditions.

Our examinations of the Sharī^{c}ah Courts of Malaysia and their jurisdiction reveal that the Sharī^{c}ah Courts have very limited jurisdiction which does not conform with the principles of the *Sharī^{c}a* but, rather, must be considered as a type of secular court which suggests the idea of separating government from religion. Even after Malaysia became an independent state, this situation was continued and strengthened by the Federal Constitution of Malaysia and other written laws such as the Civil Law Act 1956, the Muslim Courts Act 1984, etc.

Our analysis of the provisions of *ta^{c}zīr* laws in the Sharī^{c}ah Courts through the related State enactments which are referred to as "the Sharī^{c}ah Court laws" shows that each offence provided for in the Sharī^{c}ah Court laws conforms with the *Sharī^{c}a* in the aspect of *ḥukm* (legal value). However, if we look at the scope of *ta^{c}zīr* as a whole, such provisions contradict the concept of *ta^{c}zīr* in Islamic law since they are limited and only involve offences related to family and personal law. Although from Islamic point

of view, *taᶜzīr* offences are not pre-determined in detail and left to the discretion of the judge, their scopes should cover all aspects of crime which are not included under *ḥadd*, *qiṣāṣ* and *kaffāra*.

Regarding the provision of *taᶜzīr* punishments in the Sharīᶜah Court laws, our research has found a similar situation as above. It seems that fines and imprisonment are the only punishments provided for all *taᶜzīr* offences in the Sharīᶜah Court laws with the exception of two cases, i.e. whipping for an act preparatory to the commission of *zinā* found in the Sharīᶜah Criminal Code Enactment of Kelantan, 1985 and demolition of a building used for the purpose of committing an offence found in the Sharīᶜah Criminal Code Ordinance of Sarawak, 1991. This contrasts with the concept of *taᶜzīr* punishments in Islamic law which gives the judge discretion in the infliction of *taᶜzīr* punishments, which range in gravity from a warning to death.

This phenomenon is not surprising as we have seen how Islamic law was set aside by European colonialism, particularly by the British, but the blame cannot be put solely on this historical reason. The Federal Constitution, which is regarded as the supreme law of Malaysia, is among the factors which have worsen the situation, since it is not based on the Qurʾān and *Sunna*. Concerning Islamic legal matters, list II of the ninth schedule of the Constitution provides that certain Islamic religious matters (as described by this list), which include Islamic law and the Sharīᶜah Courts, fall under the jurisdiction of the State legislation whose power is considered inferior to that of Parliament. Certain written laws also have provisions which contradict the *Sharīᶜa* and

thus hinder the application of Islamic law. Among these are the Civil Law Act 1956 which provides that in absence of any written law, the Civil Courts should follow the English common law and rules of equity; the Muslim Court (Criminal Jurisdiction) Act 1965 (Amendment) 1984 which gives the Sharī^{c}ah Courts limited jurisdiction over offences which are punishable with imprisonment not exceeding three years or fines not exceeding five thousand ringgit or whipping not exceeding six strokes; the Penal Code (Amendment and Extension) 1976 whose provisions cover the rest of the crimes and punishments which the Sharī^{c}ah Court laws do not cover. Political and social factors also assist in restricting the application of Islamic criminal law in the Sharī^{c}ah Courts of Malaysia.

From the above, it is clear that the Sharī^{c}ah Court laws do not conform with the principles of the *Sharī^{c}a* and therefore cannot be a convincing base for the implementation of a comprehensive Islamic penal system. However, the possibility of upgrading the Islamic element in the Civil Courts and Islamising the existing Penal Code and other related criminal laws seems to have a better chance and be more promising because this method is free from Constitutional restrictions. Above all, it is the political will that will be the most influential factor in making a full implementation of Islamic criminal law in Malaysia a reality.

BIBLIOGRAPHY

1. Arabic Printed Titles.

Abū Dāwūd, Sulaymān b. al-Ashᶜath al-Sijistānī al-Azdī, *Sunan Abī Dāwūd*, 4 vols., Cairo: Maṭbaᶜa al-Saᶜāda, 1369H/1950M.

_____, *Sunan Abī Dāwūd*, vol. iii & iv, Beirut: Dār Iḥyāʾ al-Sunna al-Nabawiyya, 1401H/1981M.

Abū Ghudda, Hasan, *Aḥkām al-Sijn wa Muᶜāmalat al-Sujanāʾ fī al-Islām*, 1st ed., Kuwait: Maktaba al-Manār, 1987.

Abū Shuhba, Muḥammad b. Muḥammad, *al-Ḥudūd fī al-Islām wa Muqāranatuha bi al-Qawānīn al-Waḍᶜiyya*, Cairo: 1974.

Abū Shujāᶜ, Aḥmad b. al-Husayn b. Aḥmad b. Shihāb al-Dīn Abū al-Tayyib, *Matn Abī Shujāʾ: Matn al-Ghāya wa al-Taqrīb*, Cairo: Maktaba Zahrān, (n.d.).

Abū Yaᶜlā, Muḥammad b. al-Husayn al-Farrā, *al-Aḥkām al-Sulṭāniyya*, 2nd ed., corrected and edited by Muḥammad Ḥāmid al-Faqī, Egypt: Maktaba wa Maṭbaᶜa Muṣṭafā al-Bābī al-Ḥalabī wa Awlāduh, 1386H/1966M.

Abū Yūsuf, Yaᶜqūb b. Ibrāhīm al-Anṣārī, *Kitāb al-Kharāj*, Cairo: Maṭbaᶜa al-Amīriyya bi Būlāq, 1302H/1884M.

Abū Zahra, Muḥammad, *al-Jarīma wa al-ᶜUqūba fī al-Fiqh al-Islāmī*, Cairo: Dār al-Fikr al-ᶜArabī, (n.d.).

_____, *Uṣūl al-Fiqh*, Cairo: Dār al-Fikr al-ᶜArabī, (n.d.).

Āmidī, Sayf al-Dīn al-Ḥasan, al, *al-Iḥkām fī Uṣūl al-Aḥkām*, Cairo: Dār al-Maᶜārif, 1332H/1914H.

ᶜĀmir, ᶜAbd al-ᶜAzīz, *al-Taᶜzīr fī al-Sharīᶜa al-Islāmiyya*, 4th ed., Cairo: Dār al-Fikr al-ᶜArabī, 1969.

Anṣārī, Zakariya b. Muḥammad, al, *Asnā al-Maṭālib Sharḥ Rawḍ al-Ṭālib*, Cairo: Maṭbaᶜa al-Maimana, 1313H.

_____, *Fatḥ al-ᶜAllām*, 1st ed., Beirut: Dār al-Kutub al-ᶜIlmiyya, 1990.

ᶜAsqalānī, Aḥmad b. ᶜAlī b. Hajar, al, *Fatḥ al-Bārī bi Sharḥ ṣaḥīḥ al-Bukhārī*, vol. xii, 1st ed., Cairo: Dār al-Rayyān li al-Turāth, 1987.

ᶜAwda, ᶜAbd al-Qādir, *al-Tashrīᶜ al-Jināʾī al-Islāmī*, vol. i & ii, Dār al-Turāth, (n.d.).

Azharī, Muḥammad b. Muḥammad Kamal al-Dīn, al, *Fasl al-Aqwāl fī al-Jawāb ᶜan al-Hadītha al-Suʾāl wa Nafy al-ᶜUqūba bi al-Māl*, Egypt: Muṣṭafa al-Bābī al-Halabī, 1340H.

Bābartī, Akmal al-Dīn Muḥammad b. Maḥmūd, al, *Sharh al-ᶜInāya ᶜala al-Hidāya*, printed with Sharḥ Fatḥ al-Qadīr, Cairo: Maṭbaᶜa Muṣṭafā al-Bābī al-Halabī wa Awlāduh, 1389H/1970M.

Bahnasī, Aḥmad Fatḥī, *al-Hudūd fī al-Islām*, Cairo: Maktaba ᶜAmmār Dār al-Naṣr li al-Tibāᶜa, (n.d.).

_____, *al-Jarāʾim fī al-Fiqh al-Islāmī*, 6th ed., Cairo: Dār al-Shurūq, 1408H/1988M.

_____, *al-Masʾūliyya al-Jināʾiyya fī al-Fiqh al-Islāmī*, 3rd ed., Cairo: Dār al-Shurūq, 1404H/1984M.

_____, *Naẓariyyāt fī al-Fiqh al-Islāmī*, 5th ed., Cairo: Dār al-Shurūq, 1408H/1988M.

_____, *Naẓariyyat al-Ithbāt fī al-Fiqh al-Jināʾī al-Islāmī*, 5th ed., Cairo: Dār al-Shurūq, 1409H/1989M.

_____, *al-Siyāsa al-Jināʾiyya fī al-Sharīᶜa al-Islāmiyya*, 2nd ed., Cairo: Dār al-Shurūq, 1408H/1988M.

_____, *al-ᶜUqūba fī al-Fiqh al-Islāmī*, 6th ed., Cairo: Dār al-Shurūq, 1409H/1989M.

Bahūtī, Manṣūr b. Yūnus b.Idrīs, al, *Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ*, vol. vi, Beirut: Dār al-Fikr, 1402H/1982M.

Bajirmī, Sulaymān b. ᶜUmar, al, *Tuḥfat al-Habīb ᶜala Sharḥ al-Khaṭīb*, known as *al-Iqnāᶜ* by al-Shirbīnī al-Khaṭīb, Egypt: Muṣṭafā al-Bābī al-Halabī, 1370H/1951M.

_____, *Hāshiya al-Bajirmī ᶜala Manhaj al-Tullāb*, 1st ed., Egypt: Muṣṭafā al-Bābī al-Halabī, (n.d.).

Bājūrī, Ibrāhīm, al, *Hāshiyat al-Bājūrī ᶜalā Sharḥ Ibn Qāsim al-Ghazzī*, Cairo: Maktaba Subaiḥ, 1957.

_____, *Taqrīr al-Awḥad*, in the margin of *al-Iqnāᶜ fī Ḥall Alfāẓ Abī Shujāᶜ*, Beirut: Dār al-Fikr, (n.d.).

Bayhaqī, Aḥmad b. al-Ḥusayn b. ᶜAlī, al, *al-Sunan al-Kubrā*, India: Hydarabad, 1354H.

_____, *Maᶜrifat al-Sunan wa al-Āthār*, vol. vi, 1st ed., Beirut: Dār al-Kutub al-ᶜIlmiyya, 1991.

Bukhārī, Abū ᶜAbd Allāh Muḥammad b. Ismāᶜīl b. Ibrāhīm b. al-Mughīra, al, *Saḥīḥ Abī ᶜAbd Allāh al-Bukhārī*, edited by Maḥmūd al-Nawāwī, Muḥammad Abū al-Faḍl Ibrāhīm, Muḥammad Khifājī, ᶜAbd al-Ghanī ᶜAbd al-Khāliq, ᶜAbd al-Shukūr ᶜAbd al-Fattāḥ Fidā, Sālih ᶜAbd al-Raḥmān al-Rāshid, 9 vols., Mecca: Maktaba al-Nahḍa al-Ḥadītha, 1404H/1984M.

Būṭī, Muḥammad Saᶜīd Ramaḍān, al, *Dawābiṭ al-Maṣlaḥa fī al-Sharīᶜa al-Islāmiyya*, 5th ed., Beirut: Muʾassasa al-Risāla, 1409H/1986M.

Dahlawī, al-Shaikh Aḥmad Shah Waliy Allāh b. ᶜAbd al-Raḥīm, *Hujjat Allāh al-Bāligha*, Cairo: Dār al-Turāth, 1355H.

Dardīr, Aḥmad b. Muḥammad al-ᶜAdawī, al, *al-Sharḥ al-Kabīr*, 4 vols., Beirut: Dār al-Fikr, (n.d.).

_____, *Aqrab al-Masālik li Madhhab Imām Mālik*, al-Maktaba al-Thaqāfiyya , (n.d.).

Dārimī, Abu Muḥammad ᶜAbd Allāh b. ᶜAbd al-Raḥmān, al, *Sunan al-Dārimī*, 2 vols., in 1, Cairo: Dār al-Fikr, 1398H/1978M.

Dasūqī, Shams al-Dīn al-Shaikh Muḥammad, al, *Hāshiyat al-Dasūqī ᶜAlā al-Sharḥ al-Kabīr li al-Dardīr*, vol. iv, Cairo: Dār Iḥyāʾ al-Kutub alᶜ Arabiyyaᶜ Īsā al-Bābī al-Halabī, (n.d.).

Dhahabī, Muḥammad Husain, al, *Athar Iqāmat al-Ḥudūd fī Istiqrār al-Mujtamaᶜ*, Matbaᶜa Wahba, 1965.

Durā, Muḥammad Fatḥī, al, *Buḥūth Muqārana fī al-Fiqh al-Islāmī wa Uṣūlih*, vol. ii, 1st ed., Beirut: Muʾassasa al-Risāla, 1994.

Fahmī, Muḥammad ᶜĀrif Muṣṭafā, *al-Ḥudūd Baina al-Sharīᶜa wa al-Qānūn*, Libya: Maktaba al-Nūr, 1972.

Ghazzālī, Abū Ḥāmid Muḥammad b. Muḥammad, al, *al-Mustasfā min ᶜIlm al-Uṣūl*, 2 vols., Cairo: Maṭbaᶜa al-Amīriyya, 1322H/1904M.

_____, *al-Wajīz fī Fiqh Madhhab al-Imām al-Shāfiᶜī*, 2 vols., Beirut: Dār al-Maᶜrifa, 1399H/1979M.

Ghazzī, Ibn Qāsim, al, *Hāshiyat al-Bayjūrī*, vol. ii, Egypt: Muṣṭafā al-Bābī al-Halabī, 1343H.

Hamīd, ᶜAbd Allāh b. Sālim, al, *al-Tashrīᶜ al-Jināʾī al-Islāmī*, a comparative study on Islamic criminal law with positive laws, 1st ed., Riyadh, 1399H/1979M.

Hajāwī, Abū al-Najā Sharaf al-Dīn, al, *al-Iqnāᶜ lī Tālib al-Intifāᶜ*, Cairo: al-Maktaba al-Miṣriyya, 1319H.

Haṣkafī, Muḥammad ᶜAlāʾ al-Dīn bᶜ Alī, al, *Sharḥ al-Durr al-Mukhtār*, Cairo: Maktaba wa Maṭbaᶜa Muḥammad ᶜAlī Sabīḥ wa Awlāduh, (n.d.).

Haṭṭāb, Abū ᶜAbd Allāh Muḥammad b. Muḥammad b. ᶜAbd al-Raḥmān al-Maghribī, al, *Mawāhib al-Jalīl fi Sharḥ Mukhtaṣar Khalīl*, Cairo: Maṭbaᶜa al-Saᶜāda, 1329H.

Husarī, Aḥmad, al, *al-Hudūd wa al-Ashriba fī al-Fiqh al-Islāmī*, Amman: Maktaba al-Aqṣā, 1392H/1972M.

Husayn, Muḥammad ᶜAlī, *Tahdhīb al-Furūq wa al-Qawāʾid al-Sinniyya fī al-Asrār al-Fiqhiyya*, in the margin of *al-Furūq*, Beirut: Dār al-Maᶜrifa, (n.d.).

Husaynī, Taqiy al-Dīn Abū Bakr b. Muḥammad, al, *Kifāyat al-Akhyār fī Hall Ghāyat al-Ikhtiṣār*, 2nd ed., Beirut: Dār al-Khayr, 1416H/1995M.

Husnī, Muḥammad b. ᶜAlwī al-Mālikī, al, *Anwār al-Masālik ilā Riwāyat Muwaṭṭaʾ Mālik*, Qaṭar: Matābiᶜ ᶜAli b. ᶜAlī, (n.d.).

Ibn ᶜĀbidīn, Muḥammad Amīn bᶜ Umar bᶜ Abd al- Azīz, *Hāshiyat Ibn Ābidīn, Hāshiya Radd al-Mukhtār ᶜalā al-Durr al-Mukhtār* by Haṣkafī, vol. iii & iv, Cairo: al-Astāna, 1294H, Bulāq, 1299H, 1323H and Maymaniya, 1327H.

_____, *Hāshiya Radd al-Mukhtār Muḥammad Amīn al-Shahīr bi Ibn ᶜĀbidin ᶜalā al-Durr al-Mukhtār, Sharḥ Tanwīr al-Abṣār*, vol.iv & v, 1st ed., Beirut: Dār al-Kutub al-ᶜIlmiyya, 1415H/1994M.

_____, *Nuzhat al-Nawāẓir ᶜalā al-Ashbah wa al-Naẓāʾir*, printed with *al-Ashbah wa al-Naẓāʾir*, Beirut: Dār al-Fikr, 1407H/1986M.

Ibn al-ᶜArabī, Abū Bakr Muḥammad b. ᶜAbd Allāh b. Muḥammad, *Aḥkām al-Qurʾān*, 4 vols., Dār al-Fikr, (n.d.).

Ibn Faraj, Abū ᶜAbd Allāh, *Aqḍiyat Rasūlillāh*, 2nd ed., Halab: Dār al-Waᶜy, 1982.

Ibn Farḥūn, Burhān al-Dīn Ibrāhīm b. ᶜAlī, *Tabṣirat al-Ḥukkām fī Uṣūl al-Aqḍiya wa Manāhij al-Aḥkām*, 2 vols., in 1, 1st ed., Beirut: Dār al-Kutub al-ᶜIlmiyya, 1416H/1995M.

Ibn Ḥajar, Shihāb al-Dīn Aḥmad b. Ḥajar al-Haytamī, *al-Fatāwā al-Fiqhiyya al-Kubrā*, Cairo: Maṭbaᶜa ᶜAbd al-Ḥamīd Aḥmad, 1358H.

_____, *Tuḥfat al-Muḥtāj bi Sharḥ al-Minhāj*, in the margin of *Ḥawāshī al-Sharwanī wa Ibn Qāsim al-ᶜIbādī*, Dār Ihyāʾ al-Turāth al-ᶜArabī, (n.d.).

Ibn Ḥanbal, Aḥmad b. Muḥammad, *al-Musnad*, 15 vols., Cairo: Dār al-Maᶜrifa, 1373H/1954M-1375H/1956M.

_____, *Musnad Aḥmad ibn Ḥanbal*, vol. vi, Istanbul: Cagri Yayinlari, 1402H/1982M.

Ibn Ḥazm, Abū Muḥammad ᶜAlī b. Aḥmad b. Saʿīd, *al-Muḥallā*, edited by Aḥmad Muḥammad Shākir, 11 vols., in 8, Beirut: al-Maktab al-Tijāri wa al-Nashr wa al-Tawzīᶜ, (n.d.).

_____, *al-Iḥkām fī Uṣūl al-Aḥkām*, vol. iii, Cairo: Maṭbaᶜa al-ᶜĀṣima, (n.d.).

Ibn al-Humām, Kamāl al-Dīn Muḥammad b. al-Wāhid al-Siwāsī, *Sharḥ Fatḥ al-Qadīr ᶜalā al-Hidāya Sharḥ Bidāyat al-Mubtadi*, vol. iv & v, 1st ed., Beirut: Dār al-Kutub al-ᶜIlmiyya, 1415H/1995M.

_____, *Sharḥ Fatḥ al-Qadīr*, vol. iv, 1st ed., Beirut: Dār Sādir, 1316H.

Ibn ᶜIrnūs, Maḥmūd b. Muḥammad, *Tārīkh al-Qaḍā fī al-Islām*, Cairo: Maṭbaᶜa al-Halabī, (n.d.).

Ibn Juzayy, Abū al-Qāsim Muḥammad b. Aḥmad b. Juzayy al-Kalabī al-Gharnāṭī, *al-Qawānīn al-Fiqhiyya*, Beirut: Maktaba Usāma b. Zayd, (n.d.).

Ibn Kathīr, Abū al-Fidāʾ Ismāᶜīl al-Qurashī al-Dimashqī, *Tafsīr al-Qurʾān al-ᶜAẓīm*, 4 vols., Beirut: Dār al-Kutub al-ᶜIlmiyya, 1406H/1986M.

Ibn Māja, Abū ᶜAbd Allāh Muḥammad b. Yazīd al-Qazwīnī, *Sunan Ibn Māja*, 2 vols., Cairo: ᶜĪsā al-Bābī al-Halabī, (n.d.).

Ibn Mandhūr, Abū al-Faḍlī Jamal al-Dīn Muḥammad b. Mukram, *Lisān al-ᶜArab*, vol. xx, Beirut: Dār Sādir, 1955.

Ibn Nujaym, Zayn al-ᶜĀbidīn b. Ibrāhim, *al-Ashbāh wa al-Naẓāʾir ᶜAlā Madhhab Abī Ḥanīfa*, Cairo: Muʾassasa al-Halabī, 1978.

Ibn Qāḍī Samāwana, Maḥmūd b. Ismāᶜīl, *Jāmiᶜ al-Fuṣūlayn*, 2 vols., Cairo: al-Maṭbaᶜa al-Azhariya, 1300H.

Ibn Qāsim, Aḥmad b. Qāsim al-ᶜIbādī, *Hawāshī al-Sharwānī wa Ibn Qāsim al-ᶜIbādī*, 10 vols., Dār Iḥyā) al-Turath al-ᶜArabī, (n.d.).

Ibn Qayyim al-Jawziyya, Shams al-Dīn Abū ᶜAbd Allāh b. Abī Bakr, *Ighāthat al-Lahfān*, edited by al-Shaikh Muḥammad Jamāl al-Dīn al-Qāsimī, Cairo: Maktaba al-Kulliyyat al-Azhariya, 1396H/1976M.

_____, *al-Iḥkām fī Uṣūl al-Aḥkām*, Egypt: Maṭbaᶜa al-Saᶜāda, (n.d.).

_____, *Iᶜlām al-Muwaqqiᶜīn ᶜAn Kalām Rabb al-ᶜĀlamīn*, vol. ii & iii, 2nd ed., Beirut: Dār al-Fikr, 1397H/1977M.

_____, *al-Turuq al-Hukmiyya fī al-Siyāsa al-Sharᶜiyya*, 1st ed., Beirut: Dār al-Fikr al-Lubnānī, 1991.

_____, *Zād al-Maᶜād fī Hudā Khayr al- Ibād*, vol. iii, 2nd ed., Cairo: Muṣṭafā al-Bābī al-Halabi, 1950.

Ibn Qudāma, Muwaffaq al-Dīn Abū Muḥammad ᶜAbd Allāh b. Aḥmad b. Muḥammad, *al-Mughnī wa al-Sharḥ al-Kabīr*, 10 vols., Beirut: Dār al-Kutub al-ᶜIlmiyya, (n.d.).

_____, *al-Mughnī li Ibn Qudāma*, 9 vols., Dār al-Manār, 1367H/1947M.

Ibn Qudāma al-Maqdisī, Shams al-Dīn Abī al-Faraj ᶜAbd al-Raḥmān b. Abī ᶜUmar, Muḥammad b. Aḥmad, *al-Sharḥ al-Kabīr*, printed with *al-Mughnī*, Beirut: Dār al-Kutub al-ᶜIlmiyya, (n.d.).

Ibn Rajab, Abū al-Faraj ᶜAbd al-Raḥmān, *al-Qawā id fī al-Fiqh al-Islāmī*, 2nd ed., Beirut: Dār al-Jayl, 1408H/1988M.

Ibn Rushd, Abū al-Walīd Muḥammad b. Aḥmad al-Qurṭubī, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid*, vol. i & ii, 2nd ed., ᶜĀbidīn: Dār al-Kutub al-Islāmiyya, 1403H/1983M.

Ibn Shahna, Abū al-Walīd Ibrahim b. Abī al-Yaman Muḥammad b. Abī al-Faḍl, *Lisān al-Hukkām fī Maᶜrifat al-Aḥkām*, printed with *Muᶜīn al-Hukkām fī mā Yataraddad bayn al-Khaṣmayn min al-Aḥkām*, Cairo: Dār al-Fikr, 1402H/1982M.

Ibn Taymiyya, Taqī al-Dīn Aḥmad b. ᶜAbd al-Halīm, *al-Fatāwā al-Kubrā*, vol. iv, Beirut: Dār al-Maᶜrifa, (n.d.).

_____, *al-Hisba fī al-Islām*, 1st ed., Beirut: Dār al-Kutub al-ᶜIlmiyya, 1992.

_____, *Majmūᶜ Fatāwā*, vol. xxviii, 1st ed., ᶜ Maṭābi al-Riyāḍ, 1373H/1953M.

_____, *al-Siyāsa al-Sharᶜiyya fī Iṣlāḥ al-Rāᶜī wa al-Raᶜiyya*, 1st ed., Beirut: Dār al-Fikr al-Lubnānī, 1992.

Ibn al-Ukhuwwa, Diyāʾ al-Dīn Muḥammad b. Muḥammad b. Aḥmad al-Qurashī, *Maᶜālim al-Qurba fī Aḥkām al-Ḥisba*, Cambridge:ᶜ Maṭba a Dār al-Funūn, 1357H/1938M.

ᶜIwaḍ, *Taqrīr al-Awḥad*, in the margin of *al-Iqnāᶜ fī Ḥall Alfāẓ Abī Shujāᶜ*, Beirut: Dār al-Fikr, (n.d.).

Janzūrī, Samīr, al, *al-Usus al-ᶜĀmma li Qānūn al-ᶜUqūbāt* (a comparative study of al-Sharīᶜa al-Islāmiyya), Egypt: Maṭbaᶜa al-Saᶜāda, 1392H/1972M.

Jaṣṣāṣ, Abū Bakr Aḥmad b. ᶜAlī, al, *Aḥkām al-Qurʾān*, vol. i, Maṭbaʾa al-Awqāf al-Islāmiyya, 1325H.

Jazāʾirī, Abū Bakr Jābir, al, *Minhāj al-Muslim*, 2nd ed., Cairo: Maktaba al-Daʾwa al-Islāmiyya Shabāb al-Azhar, (n.d.).

Jazīrī, ᶜAbd al-Raḥmān, al, *Kitāb al-Fiqh ᶜAla al-Madhāhib al-ᶜArbaᶜa*, vol. v, Dār al-Manār, (n.d.).

Kanawī, Abū al-Ḥasanāt ᶜAbd al-Ḥayy, al, *al-Nāfiᶜ al-Kabīr*, printed with *al-Jāmiᶜ al-Saghīr*, Beirut: Ālam al-Kutub, 1406H/1986M.

Kāsānī, ᶜAlāʾ al-Dīn Abī Bakr b. Masᶜūd, al, *Badāʾiᶜ al-Sanāʾiᶜ fī Tartīb al-Sharāʾiᶜ*, vol. vii, 1st ed., Cairo: Maṭbaᶜa al-Jamāliya, 1328H/1910M.

Khalīl, Isḥaq al-Māliki, *Mukhtaṣar al-ᶜAllāma Khalīl fī Fiqh al-Imām Mālik*, Dār al-Fikr, 1401H/1981M.

Khallāf, ᶜAbd al-Wahhāb, *ᶜIlm Uṣūl al-Fiqh*, Kuwait: Dār al-Qalam, 1398H/1978M.

Khaṭīb, Muḥammad al-Shirbīnī, al, *Mughnī al-Muḥtāj ila Maᶜrifat Maᶜānī Alfāẓ al-Minhāj*, vol. iv, Cairo: Dār al-Fikr, (n.d.).

_____, *al-Iqnāᶜ fī Ḥall Alfāẓ Abī Shujāᶜ*, Beirut: Dār al-Fikr, 1415H/1995H.

Khin, Muṣṭafā, al, and Sharbajī, ᶜAlī, al, Bughā, Muṣṭafā, al, *al-Fiqh al-Manhajī ᶜalā Madhhab al-Imām al-Shāfiᶜī*, 8 vols., in 3, Dimashq: Dārᶜ al- Ulūm al-Insāniyya, 1410H/1989M.

Khirshī, Abū ᶜAbd Allāh Muḥammad b. Abd Allāh, al, *Sharḥ al-Khirshī alā Mukhtaṣar Khalīl*, 8 vols., Cairo: al-Maṭbaᶜa al-Kubrā al-Amīriyya, 1317H/1899M.

Madkūr, Muḥammad Sallām, *al-Qaḍāʾ fī al-Islām*, Cairo: Dār al-Nahḍa, 1964.

_____, *al-Madkhal fī al-Fiqh al-Islāmi*, Cairo: Dār al-Nahḍa al-ᶜArabiyya, 1389H/1969M.

Mālik b. Anas, Abū ᶜAbd Allāh, *al-Mudawwana al-Kubrā*, Cairo: Maktaba al-Saᶜāda, 1323H.

_____, *Muwaṭṭaʾ al-Imām Mālik*, riwāya Muḥammad b. al-Hasan al-Shaybānī and edited by ᶜAbd al-Wahhāb ᶜAbd al-Laṭīf, Cairo: al-Majlis al-Aᶜlā li al-Shuʾūn al-Islāmiyya, Lujna Iḥyāʾ al-Turāth al-Islāmī, 1387H/1967M.

Marghīnānī, Burhān al-Dīn Abī al-Hasan ᶜAlī b. Abī Bakr b. Abd al-Jalīl al-Rushdānī, al, *al-Hidāya Sharh Bidāyat al-Mubtadī*, Maṭbaᶜa al-Khayriyya, (n.d.).

Mawāq, Abū ᶜAbd Allāh Muḥammad b. Yūsuf b. Abī al-Qāsim, al, *al-Tāj wa al-Iklīl li Mukhtaṣar Khalīl*, in the margin of *Mawāhib al-Jalīl li Sharḥ Mukhtaṣar Khalīl*, Dār al-Fikr, 1412H/1992M.

Māwardī, Abū al-Hasan ᶜAlī b. Muḥammad b. Habīb al-Baṣrī al-Baghdādī, al, *al-Aḥkām al-Sulṭāniyya wa al-Wilāyāt al-Dīniyya*, 3rd ed., Egypt: Maktaba wa Maṭbaᶜa Muṣṭafā al-Bābi al-Halabī wa Awlāduh, 1393H/1973M.

Muslim, Abū al-Husayn b. al-Hajjāj, *Saḥīḥ Muslim bi Sharḥ al-Nawāwī*, Beirut: Dār al-Kitāb al-ᶜArabī, 1407H/1987M.

Muwāfī, Aḥmad, *Min al-Fiqh al-Jināʾī Bayn al-Sharīᶜa wa al-Qānūn*, Emirate: al-Majlis al-Aᶜlā li al-Shuʾūn al-Islāmiyya al-Jumhūriyya al-ᶜArabiyya al-Muttaḥida, 1965.

Nabahān, Muḥammad Fārūq, al, *Niẓām al-Hukm fī al-Islām*, Morocco, (n.d.).

Nadwī, ᶜAlī Aḥmad, al, *al-Qawāʿid al-Fiqhiyya*, Dimashq: Dār al-Qalam, 1414H/1994M.

Nafrāwī, Aḥmad b. Ghanīm b. Sālim b. Muhannā, *al-Fawakih al-Dawānī*, vol.ii, Beirut: Dār al-Maᶜrifa, (n.d.).

Nasāʾī, Abū ᶜAbd al-Raḥmān b. Shuᶜayb, al, *Sunan al-Nasāʾī*, Sharḥ al-Hāfiẓ Jalāl al-Dīn al-Suyūṭī and Hashiya al-Imām al-Sindi, Egypt: Maṭbaᶜa al-Miṣriyya, (n.d.).

_____, *Sunan al-Nasāʾī*, Egypt: Maṭbaᶜa Muṣṭafā al-Bābī al-Halabī wa Awlāduh, 1st ed., 1383H/1964M.

Nawāwī, Abū Zakariya Maḥy al-Dīn b. Sharaf, al, *al-Majmū' Sharḥ al-Muhadhdhab*, vol. xx, Cairo: Dār al-Fikr, (n.d.).

_____, *Minhāj al-Tālibīn wa ᶜUmdat al-Muftīn fī al-Fiqh*, Jedda: al-Haramayn, (n.d.).

_____, *Rawḍat al-Tālibīn*, vol. vii, 1st ed., Beirut: Dār al-Kutub al-ᶜIlmiyya, 1412H/1992M.

Nawāwī, ᶜAbd al-Khāliq, al, *al-Tashrīᶜ al-Jinā'ī*, Beirut: al-Maktaba al-ᶜAṣriyya, (n.d.).

Qalyūbī, Shihāb al-Dīn Aḥmad b. Aḥmad b. Salāma, *Hāshiyatān Qalyūbī wa ᶜUmayra*, Eqypt: Dār Iḥyā' al-Kutub al-ᶜArabiyya, (n.d.).

Qaraḍāwī, Yūsuf, al, *al-Halāl wa al-Harām fī al-Islām*, Cairo: Dār al-Gharīb, 1396H/1976M.

_____, *al-ᶜIbāda fī al-Islām*, 15th ed., Cairo: Maktaba Wahba, 1405H/1985M.

Qarāfī, Shihāb al-Dīn Abī al-ᶜAbbās Aḥmad b. Idrīs b. ᶜAbd al-Raḥmān al-Sanhājī, al, *al-Furūq*, 4 vols., in 2, Beirut: ᶜĀlam al-Kutub, (n.d.).

Qurṭubī, Abū ᶜAbd Allāh Muḥammad b. Aḥmad al-Anṣārī, al, *al-Jāmi' li Aḥkām al-Qur'ān*, 20 vols., in 10, Beirut: Dār al-Kutub al-ᶜIlmiyya, 1413H/1993M.

Quṭb, Sayyid, *Fī Zilāl al-Qur'ān*, 6 vols., Beirut/Cairo: Dār al-Shurūq, 1400H/1980M.

Ramlī, Shams al-Dīn Muḥammad b. Abī al-ᶜAbbās b. Aḥmad, al, *Nihāyat al-Muḥtāj ilā Sharḥ al-Minhāj*, vol. vii & viii, Beirut: Dār al-Fikr, 1404H/1984M.

Rāzī, Muḥammad b. Abī Bakr, al, *Mukhtār al-Siḥāḥ*, 1st ed., Beirut: Dār al-Kitāb al-ᶜArabī, 1967.

Sābiq, al-Sayyid, *Fiqh al-Sunna*, vol. ii, 7th ed., Beirut: Dār al-Kitāb al-ᶜArabī, 1405H/1985M.

Sābūnī, Muḥammad ᶜAlī, al, *Rawā'iᶜ al-Bayān, Tafsīr Āyāt al-Aḥkām min al-Qur'ān*, 2 vols., 2nd ed., Dimashq: Maktaba al-Ghazzālī, 1397H/1977M.

Sadr, Sayyid Ismāᶜīl, al, *al-Tashrī al-Jinā ī al-Islāmī*, (in five schools of law, a comparative study with the positive laws). A commentary on the original book of ᶜAbd al-Qādir ᶜAwda, Beirut: Dār al-Taᶜāruf li al-Maṭbūᶜa, 1389H/1970M.

Sanᶜānī, Sharaf al-Dīn al-Ḥusayn b. Muḥammad, al, *Kitāb al-Rawḍ al-Naḍīr*, vol. iii,

Beirut: Dār al-Jayl, (n.d.).

Sanᶜānī, Muḥammad b. Ismāᶜīl b. Salāḥ al-Kaḥlānī, al, *Subul al-Salām Sharḥ Bulūgh al-Marām*, vol. iv, Beirut: Dār al-Jayl, (n.d.).

Sanhūrī, ᶜAbd al-Razzāq, *Maṣādir al-ḥaqq fī al-Fiqh al-Islāmī*, 1954.

Sarakhsī, Shams al-Dīn, al, *al-Mabsūṭ*, 30 vols., in 15, Beirut: Dār al-Maᶜrifa, 1406H/1986M.

Sāwī, Aḥmad, al, *Bulghat al-Sālik li Aqrab al-Masālik*, 2 vols., Dār al-Fikr, (n.d.).

Sayūṭī, Jalāl al-Dīn ᶜAbd al-Raḥmān, al, *al-Ashbāh wa al-Naẓā'ir fī Qawā'id wa Furū' Fiqh al-Shāfiᶜiyya*, 1st ed., Beirut: Dār al-Kutub al-ᶜIlmiyya, 1410H/1990M.

Shāfiᶜī, Muḥammad b. Idrīs, al, *al-Umm*, vol. vii, Beirut: Dār al-Fikr, 1410H/1990M.

_____, *Mawsū'at al-Imām al-Shāfiᶜī: al-Kitāb al-Umm*, edited by Aḥmad Badr al-Dīn Hassūn, vol. vii, 1st ed., Dār Qutayba, 1416H/1996M.

_____, *al-Risāla*, edited by Aḥmad Muḥammad Shākir, Beirut: Dār al-Kutub al-ᶜIlmiyya, (n.d.).

Shalabī, Shihāb al-Din Aḥmad, al, *Hāshiyat al-Shalabī ᶜalā Sharḥ al-Zaylaᶜī ᶜalā Kanz al-Daqā'iq*, 1st ed., 1313H, in the margin of *Tabyīn al-Ḥaqā'iq* by al-Zaylā ī, Būlāq, 1313H, 1314H, 1315H.

Shaltūt, Maḥmūd, *al-Islām ᶜAqīda wa Sharīᶜa*, 2nd ed., Cairo: Dār al-Qalam, (n.d.)

_____, *al-Masᵓūliyya al-Madaniyya wa al-Jināᵓiyya fī al-Shārī a al-Islāmiyya*, Maṭbaᶜa al-Azhar, (n.d.).

Shaᶜrani, ᶜAbd al-Wahhāb b. Aḥmad b. ᶜAlī al-Anṣārī, al, *al-Mīzān al-Kubrā*, 2 vols., in 1, Cairo: Maktaba wa Maṭbaᶜa Muṣṭafā al=Bābī al-Ḥalabī wa Awlāduh, 1359H/1940M.

_____, *Kashf al-Ghumma ᶜan Jamīᶜ al-Umma*, 2 vols., in 1, Beirut: Dār al-Fikr, 1408H/1988M.

Sharwānī, ᶜAbd al-Hamīd, al, *Hawāshī al-Sharwānī wa ibn Qāsim al-ᶜIbādī*, 10 vols., Dār Iḥyāᵓ al-Turāth, (n.d.).

Shāṭibī, Abū Isḥāq Ibrāhīm b. Mūsā al-Gharnāṭī, al, *al-Iᶜtiṣām*, 2 vols., in 1, Cairo: Dār al-Būrāq, 1408H/1988M.

_____, *al-Muwāfaqāt fī Uṣūl al-Sharīᶜa*, 4 vols., Egypt: Maktaba al-Tijāriyya al-Kubrā, (n.d.).

Shawkānī, Muḥammad b. ᶜAlī b. Muḥammad, al, *Nayl al-Awṭār Sharḥ Muntaqā al-Akhbār*, 8 vols., in 4, Beirut: Dār al-Jayl, 1393H/1973M.

Shaybānī, Abū ᶜAbd Allāh Muḥammad b. al-Ḥasan, al, *al-Jāmiᶜ al-Saghīr fī al-Fiqh li al-Imām al-Jalīl Muḥammad b. al-Ḥasan Sāḥib Abi Ḥanīfa*, in the margin of *Kitāb al-Kharāj li al-Imām Sāḥib Abī Ḥanifa al-Qāḍī Abū Yūsuf Yaᶜqūb b. Ibrāhīm*, Cairo: Maṭbaᶜat al-Amīriyya bi Būlāq, 1302H/1884M.

_____, *al-Jāmiᶜ al-Saghīr*, Beirut: ᶜĀlam al-Kutub, 1406H/1986M.

Shibrāmalsī, Abū al-Diyāʾ Nūr al-Dīn ᶜAlī b. ᶜAlī al-Qāhirī, al, *Hāshiya*, printed with *Nihāyat al-Muḥtāj ilā Sharḥ al-Minhāj fī al-Fiqh ᶜalā Madhhab al-Imām al-Shāfiʿī*, Beirut: Dār Iḥyāʾ al-Turāth al-ᶜArabī, 1413H/1992M.

Shīrāzī, Abū Isḥāq Ibrāhīm b. ᶜAlī b. Yūsuf al-Fīrūzābādī, al, *al-Muhadhdhab*, vol.ii, Cairo: Dār al-Fikr (n.d.).

_____, *Kitāb al-Tanbīh*, Cairo: Maṭbaᶜa al-Taqaddum âl- Ilmiyya, 1319H/1901M.

Sidqī, ᶜAbd al-Rahīm, *al-Jarīma wa alᶜ Uqūba fī al-Sharīᶜa al-Islāmiyya*, 1st ed., Cairo, 1978.

Tabarī, Abū Jaᶜfar Muḥammad b. Jarīr, al, *Jāmiᶜ al-Bayān ᶜAn Taʾwīl Āy al-Qurʾān*, 16 vols., 3rd ed., Egypt: Maṭbaᶜa Muṣṭafā al-Bābī al-Halabi wa Awlāduh, 1388H/1968M.

Tarābulsī, ᶜAlāʾ al-Dīn Abī al-Ḥasarf Alī b. Khalīl, al, *Mu īn al-Ḥukkām fī mā Yataraddad bayna al-Khaṣmayn min al-Aḥkām*, Cairo: Dār al-Fikr, 1402H/1982M.

Tibrīzī, Waliy al-Dīn Muḥammad b. ᶜAbd Allāh al-Khaṭīb al-ᶜUmarī, al, *Mishkāt al-Maṣābīḥ*, 3 vols., 1st ed., Dimashq: al-Maktab al-Islāmī, 1381H/1961M.

Tirmidhī, Abū ᶜĪsā Muḥammad b. Īsā b. Sawra, al, *al-Jāmi al-Saḥīḥ (Sunan al-Tirmidhī)*, 13 vols., 2nd ed., Cairo: Maṭbaᶜa Muṣṭafā al-Bābī al-Ḥalabī wa Awlāduh, 1395H/1975M.

ᶜUmayra, Shihāb al-Dīn Aḥmad, *Hāshiyatān Qalyūbī wa ᶜUmayra*, Egypt: Dār Iḥyāʾ al-Kutub al-ᶜArabiyya, (n.d.).

Zaydān, ᶜAbd al-Karīm, *Niẓām al-Qaḍāʾ fī al-Sharīᶜa al-Islāmiyya*, 1st ed., Baghdād: Matbaᶜa al-ᶜĀnī, 1404H/1984M.

_____, *Majmūʿa Buḥūth Fiqhiyya*, Baghdad: Maktabat al-Quds, 1406H/1986M.

_____, *al-Madkhal li Dirāsat al-Sharīʿa al-Islāmiyya*, 6th ed., Beirut: Muʾassasa al-Risāla, 1402H/1982M.

Zaylaʿī, ʿUthmān b. ʿAlī, al, *Tabyīn al-Haqāʾiq fī Sharḥ al-Daqāʾiq*, first ed., Egypt: Matbaʿa al-Amīriya, Būlāq 1313H.

Zuhaylī, Wahba, al, *al-Fiqh al-Islāmī wa Adillatuh*, 8 vols., 2nd ed., Dimashq: Dār al-Fikr, 1405H/1985M.

_____, *Uṣūl al-Fiqh al-Islāmī*, 2 vols., Dimashq: Dār al-Fikr, 1406H/1986M.

Zurqānī, Muḥammad al, *Sharḥ al-Zurqānī ʿalā Mukhtaṣar Khalīl*, Maṭbaʿa Muḥammad Affandi Muṣṭafā, (n.d.).

_____, *Sharḥ al-Zurqānī ʿAlā Muwaṭṭaʾ al-Imām Mālik*, 5 vols., Cairo: Maṭbaʿa Muṣṭāfā Muḥammad, 1355H/1936M.

2. English and Malay Printed Titles.

Abbas, Mohd. Salleh, *Mengenal Undang-Undang*, Kuala Lumpur: Dewan Bahasa Dan Pustaka, 1979.

_____, *Constitution, Law & Judiciary*, Kuala Lumpur: Malaysian Law Publishers, 1984.

_____, *Prinsip Perlembagaan Dan Pemerintahan di Malaysia*, Kuala Lumpur: Dewan Bahasa Dan Pustaka, 1968.

Abdullah, Abu Bakar, *Ke Arah Pelaksanaan Undang-Undang Islam di Malaysia: Masalah dan Penyelesaian*, 1st ed., Kuala Terengganu: Pustaka Damai, 1986.

Abdul Majid, Mahmood Zuhdi (ed), *Ke Arah Merialisasikan Undang-Undang Islam di Malaysia*, Kuala Lumpur: Thinker's Library, 1988.

Abdul Majid, Nik Abdul Rashid, "Kedudukan Undang-Undang Islam Dalam Perlembagaan Malaysia", in Mahmood Zuhdi Hj. Ab. Majid (ed), *Ke Arah Merialisasikan Undang-Undang Islam di Malaysia*, Kuala Lumpur: Thinker's Library, 1988.

Abdul Rahman, Mat Sa'ad, *Undang-Undang Jenayah Islam*, Kuala Lumpur: Penerbitan Hizbi, 1990.

Abdul Razak, Azizan, *The Administration of Islamic Law in Malaya*, M.Phil Thesis, University of Kent, 1978.

Abu Bakar, Abdullah, "Pentadbiran Mahkamah Syariah di Malaysia (The Administration of the Syariah Courts in Malaysia)", paper presented in *Seminar Perundangan Islam*, PMIUM, University of Malaya, 1990.

Ahmad Kamal, Nik, "Kedudukan Undang-Undang Islam Dalam Perlembagaan Malaysia (The Position of Islamic Law in the Federal Constitution of Malaysia)", paper presented in *Seminar Perundangan Islam*, PMIUM, University of Malaya, 1990.

Ahmad Khan, Mian Rashid, *Islamic Jurisprudence*, Lahore: Ashraf Printing Press, 1978.

Alfi, Ahmad Abd al-Aziz, al, "Punishment in Islamic Criminal Law", in M. Cherif Bassiouni, ed., *The Islamic Criminal Justice System*, New York: Oceana Publications, Inc, 1982.

ᶜAlī, ᶜAbd Allāh Yūsuf, *The Holy Qur ān: Text, Translation and Commentary*, Maryland: Amana Corp., 1983.

_____, *The Meaning of the Glorious Qurʾān*, London: Nadim & Co., 1404H/1983M.

ᶜAsqalānī, Aḥmad b. ᶜAlī b. Muḥammad b. Hajar, al, *Bulūgh al-Marām min Adillat al-Aḥkām*, English translation by Muhieddin al-Selek, Beirut: Dār al-Fikr, 1414H/1993M.

Attas, Syed Muhammad al-Naquib, al, *Islam and Secularism*, Kuala Lumpur: Muslim Youth Movement of Malaysia (ABIM), 1978.

Aun, Wu Min, *Pengenalan Kepada Sistem Perundangan Malaysia*, 2nd ed., Kuala Lumpur: Heinemann (Malaysia) Sdn. Bhd., 1985.

Awa, Mohamed S. El, *Punishment in Islamic Law: A Comparative Study*, Indianapolis: American Trust Publications, 1982.

Awang Othman, Mahmud Saedon, "Pentadbiran Undang-Undang Islam Di Malaysia", *al-Ahkam*, vol. iv, Kuala Lumpur: Dewan Bahasa Dan Pustaka, 1994.

_____, "Pentadbiran Undang-Undang Islam di Malaysia (The Admistration of Islamic Law in Malysia)", paper presented in *Seminar Perundangan Islam*, PMIUM, University of Malaya, 1990.

Bassiouni, M. Cherif, *The Islamic Criminal Justice System*, New York: Oceana Publications, Inc., 1982.

Buang, Salleh, Kedudukan Undang-Undang Islam di Bawah Perlembagaan", in Mahmood Zuhdi Hj. Ab. Majid (ed), *Ke Arah Merialisasikan Undang-Undang Islam di Malaysia*, Kuala Lumpur: Thinker's Library, 1988.

Bukhārī, Abū ᶜAbd Allāh Muḥammad b. Ismāᶜīl b. Ibrāhīm b. al-Mughīra, al, *al-Jāmiᶜ al-Saḥīḥ (Saḥīḥ al-Bukhārī)*, 9 vols., Cairo, 1314-1315H, Arabic with English translation by Muhammad Muhsin Khan, 9 vols., Turkey: Hilal Yayinlari, 1396H/1976M.

Coulsen, N.J., *A History of Islamic Law*, Edinburgh: Edinburgh University Press, 1978.

Depatemen Agama Republic Indonesia, *Al-Qurʾān dan Terjemahannya*, Jajasan Penjelenggara Penterdjemah/Pentafsir al-Qurʾān, (n.d.).

Din, Harun, *Hukum Hudud Dalam Perundangan Islam*, Kuala Lumpur: Pusat Islam Malaysia, (n.d.).

Doi, Abdul Rahman I., *Sharīᶜah The Islamic Law*, London: Ta Ha Publishers, 1984.

Emmins, Christoper J., *A Practical Approach to Sentencing*, London: Blackstone Press Limited, 1985.

Fang, Liaw Yock, *Undang-Undang Melaka (the Laws of Malacca)*, The Hague: Maritimes Nijhoft, 1976.

Fatimi, S.Q., *Islam Comes to Malaysia*, edited by Shirle Gordon, Singapore: Malayan Sociological Research Institute Ltd., 1963.

Fazlul Karim, Alhaj Maulana, *al-Hadis: An English Translation and Commentary of Mishkat-ul-Masabih with Arabic Text*, 4 vols., 1st ed., New Delhi: Islamic Book Service, 1988.

Fitzgerald, P.J., *Criminal Law and Punishment*, Oxford: Clarendon Press, 1962.

Gibb, H.A.R. and Kramers, J.H., *Shorter Encyclopaedia of Islam*, Karachi: South Asian Publishers, 1981.

Hamzah, Mohd. Azam and Mohd. Akhir Yaacob (ed.), *Falsafah dan Prinsip Perundangan Islam*, Bangi: Penerbit Universiti Kebangsaan Malaysia, 1986.

Harding, Andrew, "Islamic Law in Malaysia: Its Impact on Civil Law", paper presented in *9th Malaysian Law Conference*, Kuala Lumpur, 1991.

Hassan, Kamal Halili, "The Sharī'ah Court and Article 121(1A) of the Federal Constitution", in *Jurnal Perundangan*, vol.i, no.i, 1989.

Hashim, Mohamed Suffian, *An Introduction to the Constitution of Malaysia*, 2nd ed., Kuala Lumpur: Percetakan Kerajaan, 1976.

_____, *An Introduction to the Legal System of Malaysia*, Kuala Lumpur: Fajar Bakti, 1988.

_____, Lee, H.P. & Trindade, F.A. (ed), *The Constitution of Malaysia, Its Development: 1957-1977*, Kuala Lumpur: Oxford University Press, 1978.

_____, "The Relationship Between Islam and the State in Malaya", *Intisari*, vol. i, Singapore: 1962.

Hickling, R.H., *Malaysian Law*, Kuala Lumpur: Professional (Law) Book Publishers, 1987.

Hooker, M.B., *Readings in Malay Adat Laws*, Singapore: University Malaya Press, 1970.

_____, *Adat Laws in Modern Malaya*, Kuala Lumpur: Oxford University Press, 1976.

_____, *Islam in South-East Asia*, Leiden: E.J. Brill, 1983.

_____, *Islamic Law in South-East Asia*, Singapore: Oxford University Press, 1984.

Ibrahim, Ahmad, *Islamic Law in Malaya*, Singapore: MSRI, 1965.

_____, *Towards a History of Law in Malaysia and Singapore*, Singapore: Stamford College Press, 1970.

_____, "The Position of Islam in the Constitution of Malaysia", in *The Constitution of Malaysia, Its Development, 1957-1977*, edited by Mohamed Suffian, H.P. Lee, F.A. Trindade, Kuala Lumpur: Oxford University Press, 1978.

_____, *Hukuman Sebat Dalam Undang-Undang Islam dan Undang-Undang Awam di Malaysia*, Kuala Lumpur: Institut Dakwah dan Latihan Islam, Bahagian Ugama, Jabatan Perdana Menteri, (n.d.).

_____, "Perundangan Islam di Malaysia", in Persatuan Sejarah Malaysia, *Malaysia Masa Kini*, Kuala Lumpur, 1985.

_____, "Undang-Undang Islam di Malaysia", in Ismail Hashim and Others, *Tamadun Melayu*, Kuala Lumpur: Dewan Bahasa dan Pustaka, 1989.

_____ and Ahilemah Joned, *Sistem Undang-Undang di Malaysia*, 2nd ed., Kuala Lumpur: Dewan Bahasa dan Pustaka, 1986.

_____ and Mahmud Saedon Awang Othman, *Ke Arah Islamisasi Undang-Undang Islam di Malaysia*, Kuala Lumpur: Yayasan Dakwah Islamiah Malaysia, 1988.

_____ and others, *al-Ahkam*, vol. iv, Kuala Lumpur: Dewan Bahasa Dan Pustaka, 1994.

_____, "Sekatan-Sekatan Dalam Pelaksanaan Undang-Undang Islam di Malaysia", *al-Ahkam*, vol. iv, Kuala Lumpur: Dewan Bahasa Dan Pustaka, 1994.

_____, "Ke Arah Islamisasi Undang-Undang di Malaysia: Masalah dan Kemungkinan (Towards the Islamisation of Law in Malaysia: Problem and Possibility)", paper presented in *Seminar Perundangan Islam*, Jabatan Syariah, National University of Malaysia, 1981.

_____, "Ke Arah Penyelarasan Undang-Undang Islam di Malysia (Towards Systemising Islamic Law in Malaysia)", paper presented in *Konvensyen Penyelarasan Pentadbiran Islam*, Pusat Islam, 1986.

_____, "Kanun Jenayah Syariah dan Acaranya: Amalan dan Masalah (Syariah Criminal Code and Its Procedure: Practice and Problem)", paper presented in *Seminar Pentadbiran Undang-Undang Islam*, Terengganu, 1990.

_____, "Islamic Law in Malaysia: Its Impact on Civil Law", paper presented in *9th Malaysian Law Conference*, Kuala Lumpur, 1991.

Ismail, Paizah, *Undang-Undang Jenayah Islam*, Kuala Lumpur: Dewan Pustaka Islam, 1991.

James, Philip S., *Introduction to English Law*, London: Butterworths, 1976.

Jones, Howard, *Crime and Penal System*, 3rd ed., London, 1965.

Kamali, Mohammad Hashim, *Principles of Islamic Jurisprudence*, Cambridge: The Islamic Texts Society, 1991.

Koh Kheng Lian and Myint Soh, *The Penal Codes of Singapore and States of Malaya, (Cases, Materials and Comments)*, vol. i, Singapore: Law Book Company of Singapore & Malaysia, 1974.

_____ and Molly Cheang, *The Penal Codes of Singapore and States of Malaysia, (Cases, Materials and Comments)*, vol. ii, Singapore: Quins Pte. Ltd., 1976.

Lippman, Matthew et.al., *Islamic Criminal Law And Procedure*, New York: Greenwood Press inc., 1988.

Mackeen, A.M.M., *Contemporary Islamic Legal Organization in Malaya*, Yale University Press, 1969.

Majid, Mimi Kamariah, *Criminal Procedure In Malaysia*, Kuala Lumpur: Department of Publications, University of Malaya, 1987.

Malaysian Law Publishers, *Malaysian Internal Security Laws*, Kuala Lumpur: Malaysian Laws Publishers, 1983.

Mālik b. Anas, Abū ᶜAbd Allāh, *Muwaṭṭaʾ*, Translated with exhaustive notes by Prof. Muhammad Rahimuddin, Lahore: Sh. Muhammad Ashraf, 1980.

_____, *al-Muwaṭṭaʾ of Imām Mālik ibn Anas, the First Formulation of Islamic Law*, English translation by Aisha Abdurrahman Bewley, 1st ed., Spain: Madinah Press, 1992.

Marghīnānī, Burhān al-Dīn Abī al-Ḥasan ᶜAlī b. Abī Bakr bᶜ Abd al-Jalīl al-Rushdānī, al, *al-Hidāya Sharh Bidāyat al-Mubtadī (The Hedaya or Guide: A Commentary on the Mussulman Laws)*, translated by Charles Hamilton, New Delhi: Islamic Book Trust, 1982.

Māwardī, Abū al-Ḥasan ᶜAlī b. Muḥammad b. Ḥabīb, al, *al-Aḥkām al-Sulṭāniyya wa al-Wilāyat al-Dīniyya (The law of Islamic Governance)*, translated by Asadullah Yate, London: Ta Ha Publishers Ltd., 1996.

Mawdūdī, Abū al-Aᶜlā, al, *Human Rights in Islām*, Leicester: The Islamic Foundation, 1993.

_____, *Islamic Law and Constitution*, Lahore: Islamic Publications Ltd., 1980.

_____, *Tafhīm al-Qurʾān*, English translations and edition by Zafar Ishaq Ansari, *Towards Understanding the Qurʾān*, 5 vols., Leicester: The Islamic Foundation, 1408H/1988M-1414H/1993M.

_____, *The Meaning of the Qurʾān*, Lahore: Islamic Publications Ltd., 1973-1983.

Mehat, Hashim, *Malaysian Law & Islamic Law on Sentencing*, Kuala Lumpur:

International Law Book Services, 1991.

_____, *Islamic Criminal Law and Criminal Behaviour*, 1st ed., Kuala Lumpur: Muslim Youth Movement of Malaysia, 1993.

Mohamad, Mahfodz, *Jinayah Dalam Islam*, Kuala Lumpur, Norin Enterprise, 1985.

_____, "Hukum Ta^{c}zir Dalam Islam: Perbandingan Dengan Hukuman-Hukuman di Mahkamah Sekular", *Islamika*, vol. iv, Kuala Lumpur: Gateway Publishing House, 1991.

_____, "Pentadbiran Undang-Undang Jenayah Islam di Malaysia (The Administration of Islamic Criminal Law in Malaysia)", paper presented in *Seminar Perundangan Islam*, PMIUM, University of Malaya, 1990.

Muslehuddin, Muhammad, *Crime and the Islamic Doctrine of Preventive Measures*, Islamabad: Islamic Research Institute, 1985.

Muslim, Abū al-Ḥusayn b. al-Ḥajjāj al-Naysabūrī, *al-Jāmi^{c} al-Saḥīḥ*, English translation by Abdul Hamid Siddiqi, *Saḥīḥ Muslim*, 4 vols., New Delhi: Kitab Bhavan, 1412H/1991M.

New Bold, t.t., *British Settlements in the Straits of Malacca*, London, 1839.

Nik Mahmood, Nik Ahmad Kamal, "Kedudukan Undang-Undang Islam Dalam Perlembagaan Malaysia", *al-Ahkam*, vol. iv, Kuala Lumpur: Dewan Bahasa Dan Pustaka, 1994.

Purcell, Victor, *The Memories of A Malayan Official*, London: Cassell, 1965.

Qaraḍāwi, Yūsuf, al, *The Lawful and the Prohibited in Islām*, translated by Kamal El Helbawi, M. Moinuddin Siddiqui and Syed Shukry, Indianapolis: American Trust Publications, (n.d.).

Rahman, Afzalur, *Subject Index of Qur$^{\prime}$ān*, Lahore: Islamic Publications (PVT.) Ltd., 1412H/1991M.

Roff, William, R., *The Origins of Malay Nationalism*, Kuala Lumpur: University of Malaya Press, 1967.

Rubin, Alfred, P, *The International Personality of the Malay Peninsula: A Study of the International Law of Imperialism*, Kuala Lumpur: Penerbit University Malaya, 1974.

Sadka, Emily, *The Protected Malay State 1874-1895*, Kuala Lumpur: University of Malaya Press, 1968.

Sanad, Nagaty, *The Theory of Crime and Criminal Responsibility in Islamic Law*, Chicago: University of Illinois, 1991.

Sani, Hashim Yeop, *Our Constitution*, 1st ed., Kuala Lumpur: The Law Publishers (M) Sdn. Bhd., 1980.

_____, *Islam Dalam Perlembagaan*, Kuala Lumpur: Institut Dakwah dan Latihan Islam, Jabatan Perdana Menteri, (n.d.).

Schacht, Joseph, *An Introduction to Islamic Law*, Oxford: Clarendon Press, 1964.

Shad, Abdur Rehman, *The Rights of Allāh and Human Rights*, Lahore: Kazi Publications, 1981.

_____, *Do's and Do not's in Islām*, Delhi: Adam Publishers & Distributors, 1990.

Shāfiᶜī, Muḥammad b. Idrīs, al, *al-Risāla fī Uṣūl al-Fiqh (Treatise on the Foundations of Islamic Jurisprudence)*, translated into English with an intoduction, notes and appendices by Majid Khadduri, Cambridge: The Islamic Texts Society, 1987.

Sham, Abu Hasan, *Undang-Undang Melayu lama: Tumpuan Khas Kepada Hukuman Kanun Melaka dan Undang-Undang di Bawah Pengaruhnya*, M.A. Thesis, University of Malaya, 1972.

Sharif, Muhammad, *Crimes and Punishment in Islam*, Lahore: Institute of Islamic Culture, 1972.

Shaukat Mahmood, Sh., *Muslim Penal Laws*, Lahore: Legal Research Centre, 1983.

Sheridan, L.L. and Groves, H.E., *The Constitution of Malaysia*, New York, 1967.

Siddiqi, Muhammad Iqbal, *The Penal Law of Islam*, 2nd ed., Lahore: Kazi Publications, 1985.

Sidhu, J.S., *Administration in the Federated Malay States 1896-1920*, Kuala Lumpur: Oxford University Press, 1980.

Siraj, Mehrun, & Abdullah, Sulaiman, "Islamic Law and Civil Law in Malaysia: Constitutional Confusion and Curial Curiosities", paper presented in *9th Malaysian Law Conference*, Kuala Lumpur, 1991.

Tahir-ul-Qadri, Muḥammad, *Legal Character of Islamic Punishments*, 1st ed., Lahore: Idara Minhaj-ul-Quran, 1988.

Ul-Qadri, Muhammad Tahir, *Islam and Criminality*, Lahore: Idara Minhaj ul-Qur'ān, 1988.

Walter, J.N., *An Introduction to the Administration in the Colony of Straits Settlements*, Singapore, 1808.

_____, *Independence of the Judges in the Straits Settlements*, London: W.Dowson and Sons, 1869.

Wilkinson, R.J. *Papers on Malay Subjects*, London: Oxford University Press, 1972.

_____, "Law, an Introductory Sketch", in *Papers on Malay Subjects*, London: Oxford University Press, 1972.

Winstedt, R.O., *A History of Malaya*, Kuala Lumpur: Marican & Sons, 1982.

_____, "The Maritimes Laws of Malacca", *JMBRAS*, vol. xxix, part 3, 1956.

_____ and John E. Kempe, "A Malay Legal Digest", *JMBRAS*, vol. xxi, part 1, 1948.

Wright, A (ed), *Laws and Constitutions of the Straits Settlements and the Malay States*, London, 1908.

Yaacob, Abdul Monir, *An Introduction to Malaysian Law*, Bangi: Penerbit Universiti Kebangsaan Malaysia, 1989.

_____, "Peningkatan Mahkamah Syariah dan Pelaksanaan Hukum Syariah di Malaysia (Upgrading the Syariah Courts and the Implementation of Syariah Law in Malaysia)", paper presented in *Seminar Pentadbiran Undang-Undang Islam*, Terengganu, 1990.

3. Acts, Codes and Enactments.

Administration of Muslim Law Enactment of Federal Territories, 1974.

Administration of Muslim Law Enactment of Johore, 1978 (No. 4 of 1978).

Administration of Muslim Law Enactment of Kedah, 1962 (No. 9 of 1962).

Administration of Muslim Law Enactment of Malacca, 1959 (No. 1 of 1959).

Administration of Muslim Law Enactment of Negeri Sembilan, 1960 (No. 15 of 1960).

Administration of Muslim Law Enactment of Pahang, 1959 (No. 5 of 1959).

Administration of Muslim Law Enactment of Penang, 1959 (No. 3 of 1959).

Administration of Muslim Law Enactment of Perak, 1965 (No. 11 of 1965).

Administration of Muslim Law Enactment of Perlis, 1963 (No. 3 of 1964).

Administration of Muslim Law Enactment of Sabah, 1977 (No. 15 of 1977).

Administration of Muslim Law Enactment of Selangor, 1952 (No. 3 of 1952).

Administration of Muslim Law Enactment of Terengganu, 1955 (No. 4 of 1955).

Arms Act, 1960 (Revised 1978) (Act 206).

Arms Act, 1960 (Act 206) and Arms Licensing Regulations 1961, and Firearms (Increased Penalties) Act, 1971 (Act 37).

Arms (Amendment) Act, 1974 (Act A 266).

Civil Law Act, 1956 (Revised 1972) (Act 67).

Council of Religion and Malay Custom Enactment of Kelantan, 1966 (No. 2 of 1966).

Courts (Amendment) Act, 1972 (Act A125).

Courts of Judicature Act, 1964 (Revised 1972) (Act 91).

Criminal Procedure Code (F.M.S. Cap. 6).

Criminal Procedure Code (Amendment & Extension) Act, 1976 (Act A324).

Dangerous Drugs (Amendment) Act, 1972 (Act A 112).

Dangerous Drugs (Amendment) Act, 1973 (Act A 194).

Dangerous Drugs (Amendment) Act, 1975 (Act A 293).

Dangerous Drugs Ordinance, 1952.

Explosives Act, 1947 (Revised 1978) (Act 207).

Explosives (Amendment) Act, 1974 (Act A 267).

Firearms (Increased Penalties) Act, 1971 (Act 37).

Internal Security Act, 1960 (Revised 1972) (Act 82).

Internal Security (Amendment) Act, 1971 (Act A 61).

Juvenile Courts Act, 1947 (Revised 1972) (Act 90).

Kidnapping Act, 1961.

Malaysia, Federal Constitution.

Muslim Courts (Criminal Jurisdiction) Act, 1965 (No. 23 of 1965).

Muslim Courts (Criminal Jurisdiction) (Amendment) Act, 1984 (Act A 612).

Muslim Family Law Act of Federal Territories, 1984 (Act 303).

Muslim Family Law Enactment of Johore, 1990 (No. 5 of 1990).

Muslim Family Law Enactment of Kedah, 1984 (No. 1 of 1984).

Muslim Family Law Enactment of Kelantan, 1983.

Muslim Family Law Enactment of Malacca, 1983 (No. 8 of 1983).

Muslim Family Law Enactment of Negeri Sembilan, 1983 (No. 7 of 1983).

Muslim Family Law Enactment of Pahang, 1987 (No. 3 of 1987).

Muslim Family Law Enactment of Penang, 1985 (No.2 of 1985).

Muslim Family Law Enactment of Perak, 1984 (No. 13 of 1984).

Muslim Family Law Enactment of Perlis, 1991 (No. 4 of 1991).

Muslim Family Law Enactment of Sabah, 1992 (No. 15 of 1992).

Muslim Family Law Enactment of Selangor, 1984 (No. 4 of 1984).

Muslim Family Law Enactment of Terengganu, 1985 (No. 12 of 1985).

Muslim Family Law Ordinance of Sarawak, 1991 (No. 5 of 1991).

Pawn Broker Act, 1972 (Act 81).

Penal Code (F.M.S. Cap. 45).

Penal Code (Amendment and Extension) Act, 1976 (Act A 327).

Sharīᶜah Criminal Code Enactment of Kedah, 1988 (No. 9 of 1988).

Sharīᶜah Criminal Code Enactment of Kelantan, 1985 (No. 2 of 1985).

Sharīᶜah Criminal Code Ordinance of Sarawak, 1991 (No. 6 of 1991).

Sharīᶜah Criminal Procedure Code Enactment of Kedah, 1988 (No.3 of 1988).

Sharīᶜah Criminal Procedure Code Enactment of Kelantan, 1983 (No. 9 of 1983).

Sharīᶜah Criminal Procedure Code Enactment of Selangor, 1991 (No. 6 of 1991).

Subordinate Courts Act, 1948 (Act 92).

4. Journals/Reports

Federated Malay State Law Reports.

Jernal Hukum.

Jurnal Perundangan.

Law Reports.

Malayan Law Review.

Malayan Cases.

Malayan Law Journal.

Official Report of Legislative Council Debate, 1958.

Shariah Law Journal.