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Chapter 2

The Concept of Punishment Under Sharia

Islamic Law: Sharia is the code of conduct followed by Muslims and has its basis in two main sources: the Quran and the Sunnah of the Prophet. It seeks to foster success and welfare of humanity in both this life and in the afterlife. The Sharia prescribes a complete code of laws to guide mankind towards establishing good (Maruf) and removing evil (Munkar) from society. The Quran is the main source of the Sharia and lays out the main principles. The Sunnah provides guidance for the application of the principles that are laid down in the Quran. There are other sources of the Sharia-Ijma and Qiyas. Ijma (consensus) can be applied when there is no clear conclusion that can be derived from the Quran or the Sunnah. Qiyas (analogical reasoning) is arrived at through a process of deduction by comparing it with a similar situation in the past. Sharia is the outcome of a continuous process of development during the 14 centuries of the existence of Islam. According to classical theory, the Sharia consists of express injunctions of the Quran, the legislation introduced through the practice of the Prophet, and the opinions of jurists.

The Sharia is not a systematic code, but rather, a living and growing organism. There is a large degree of agreement among its different schools, inasmuch as the starting point and the basic principles are identical. The differences in approach have been occasioned due to economic, political, historical, and cultural factors. The Sharia is so intimately connected to religion that it cannot easily be severed from it (Gobind Dayal v. Inayatullah 1885:7 All. 775, 781). Sharia refers to the canon law of Islam, and comprises the totality of Allah's commandments. Each of these are referred to as hukm (pl. ahkam). This sacred law and its inner meaning is not easy to understand; it encompasses all human actions. As such, it is not law, in the modern sense, but rather, an infallible ethical guide. It consists of a fundamental doctrine of duties (Hurgronje 2010) and a code of obligations. Legal considerations and individual rights are secondary; instead it gives supreme importance to a religious evaluation of all the affairs of daily life.

The Islamic conception of the law is an expression of the Divine will. Upon the death of the Prophet Muhammad, PBUH¹ the transmissions of the Divine will ceased, and as such the terms of the Divine revelation were considered to be fixed and immutable. After the process of interpretation and expansion, the source materials were held to be complete. The crystallization of the doctrine in the medieval legal manuals resulted in Sharia law becoming a rigid and static system. As opposed to secular legal systems, which grew out of society and changed with the changing circumstances of society, Sharia law was imposed upon society from above. Under Muslim law, it is not society that molds and fashions the law, but rather the law that precedes and controls society. Because the law is considered divine it is accepted as it is.

Schools of Islamic Law: Theories of Islamic law developed during the second century after the Hijra (i.e., around 800 CE). There were different schools of thought and each school was based on the writings of scholars dealing with different aspects of Islamic criminal law. These schools were based on the different interpretations of the Quran and Hadith, views of good and evil, and the varied socioeconomic and political circumstances.

The followers of Islam are divided into two main divisions: Sunni and Shia. Each of these is further subdivided into a number of schools, having their own authoritative texts. There are four schools of Sunnite law, which follow the four great jurists (Imam Abu Hanifa, Malik Ibn Anas, Ahmad Ibn Hanbal, and Muhammad Ibn Idris al-Shafeii). The followers of any of the Sunnite Schools may adopt any one of the four jurists as their guide. However, the teachings of the jurist must be followed consistently (Tyabji 1968). There are two authoritative texts of this school: these are the *Fatawa Alamgiri*, and the *Hedaya*. Both these texts were translated into English in the early nineteenth century.

As far as the Shia schools are concerned, these arose due to dynastic troubles and disputes regarding the person entitled to succeed as the rightful Imam. General Shia law had already been settled before these disputes and troubles. The main Shia School of jurisprudence is the Jafari School, which is named after the sixth Shia imam, Jafar al-Sadiq (699–765 CE). There are no differences in the basic beliefs of Islam, especially between Shias and Sunnis. Both believe in the five pillars of Islam. Over centuries a whole body of different rituals, and also forms of prayer have evolved. Much of this is only marginally different from the Sunni practice; one of the major differences is the Shia concept of Imamate versus the Sunni concept of Caliphate. The Shia tradition believes that the Imam must be a descendant of the Prophet. This concept of descent of the Prophet thus sets up a hereditary class hierarchy in the Imamate tradition of the Shias. As opposed to this tradition the Sunni tradition of Caliphate considers hereditary class succession alien to the spirit of Islam. For the Sunnis, matters and decisions among the Muslims should be governed by consensus. According to the Sunnis the Shia tradition of Imamate runs contrary to the principles of equality and consensus and thus has been rejected since the seventh century CE (Bassiouni 1982). However, with respect to the theory of punishment all schools agree with the main concepts. Differences stem from the interpretation and application of theory.

Category	Injunction	Actions
FARD	Strictly enjoined	Five daily prayers
MANDUB	Advisory (positive)	Performing additional prayers on Eid
JAIZ	Indifferent – Permitted	Travel by land, sea or air
MAKRUH	Advisory (negative)	Eating some kinds of fish
HARAM	Strictly prohibited	Alcohol consumption

Fig. 2.1 Religious injunctions

Islamic System of Criminal Law: Sharia means right path, or guide (Kamali 1999); it indicates the path to righteousness. Sharia is mostly contained in divine revelation such as the Quran and the Hadith. It comprises the totality of guidance that God revealed to the Prophet Muhammad regarding the dogma of Islam, its moral values, and its practical legal rules. The Sharia differs from Western systems of law on the basis of its scope and its conception of the law. According to Schacht (1964), the sacred law of Islam is an all-embracing body of religious duties, the totality of Allah’s commands that regulate the life of every Muslim in all aspects. The scope of the Sharia is much wider, because it regulates an individual’s relationship not only with one’s neighbors and the state but also with God and one’s conscience. Ritual practices such as *Salat* (prayer), *Zakat* (charity), *Saum* (fasting), and *Hajj* (pilgrimage) are an integral part of Sharia law. The Sharia deals with ethical standards as much as it does with legal rules, indicating not only what humans are entitled or bound to do in law, but also what they ought, in conscience, to do or refrain from doing. According to Sharia, actions are divided into five categories (see Fig. 2.1); these are referred to as al-akham al khamsa by Faruki (1966). *Fard* is a category that consists of acts that are strictly enjoined upon believers; these are compulsory duties and omission of these duties is liable to be punished. *Haram* consists of those activities that are strictly forbidden, and a violator is liable to be punished according to the law. Between these two extremes there are two middle categories. *Mandub* refers to actions that one is advised to do; these actions are rewarded but omission of these actions is not subject to punishment. *Makruh* refers to acts one is advised to refrain from doing; these actions are disliked or disapproved by the Sharia but not punished. The last category is *Jaiz*, which refers to actions about which religion is indifferent and thus permitted. Because the Sharia encompasses all human activity, it is necessary to understand this fivefold classification. This classification makes a distinction between acts that are morally enjoined and those that are legally enforceable. Because moral obligations differ from legal obligations, this distinction must be observed or else it could lead to error and confusion. This point was duly enunciated by Justice Mehmood in *Gobind Dayal v. Inayatullah* (1885) 7 All. 775, 805.

The Sharia is not merely a system of law, but also a comprehensive code of conduct that encompasses the public and private domains of an individual’s activities. As opposed to the other systems of law the Sharia operates within the internal and external domains of an individual (inner conscience and external social relations). Through interplay of rituals, beliefs, actions, and community consciousness the individual is sought to be controlled.

Goals	Mechanisms	Techniques
Life	Islamic conscience; severe punishment	Qisas
Reputation	Islamic conscience; severe punishment	Hadd
Religion	Islamic conscience; severe punishment	Hajj; Tauhid; Saum; Salat, Zakat
Family	Islamic conscience; severe punishment	Hadd, Salat, Saum
Property	Islamic conscience; severe punishment; economic reform	Zakat

Fig. 2.2 Penal scheme of Sharia

The Islamic penal laws flow from the Quran and are supplemented by the Hadith. Although this law is based on divine sources, it is a living body of law that looks after the needs of Islamic society. Contrary to the common perception that is widely prevalent, Islamic laws are essentially preventive and are not based solely on harsh punishment as a first resort; rather the harsh punishments are implemented as a last resort. Because faithful Muslims internalize the values and mores of Islamic society, they are inclined to respect the rights of others and also perform their duties. As a consequence, the harsh punishments prescribed by the Sharia are rarely in need of being applied. The five famous goals of the Sharia are the protection of life, mind (reputation or feelings of the individual), religion, ownership, and family. Although it has not been mentioned thus in the Quran or the Hadith, Muslim jurists agree upon these goals. The agreement is derived through deduction from all the judgments of the relevant Islamic legal sources (Shatibi *n.d.*; Abuzahrah 1974; Al-Ghazzali 1894). The varied prohibitions and obligations in the Sharia were prescribed for attaining these ends. The ruler or other constituted authority of a state is required to act in the public interest to protect these five basic aspects of social life. The Sharia considers transgression against any one of these unlawful and therefore punishable. Figure 2.2 depicts the penal scheme employed by the Sharia. It delineates the goals, mechanisms, and techniques that are employed by the Sharia to safeguard society.

In order to achieve the above goals the Sharia adopts a policy that covers three different areas. According to Hathout (1997) the Sharia protects society from crime through three mechanisms: Islamic conscience, economic reform, and severe punishment.

- (a) The establishment of the *Islamic Conscience* acts as a social force to reduce crime. It rests on the basis that Allah is omnipresent. The individual's family rearing, educational system, the media, and the general moral environment of the community influence this conscience. This mechanism helps to inculcate and internalize the values of Muslim society and acts as a built-in restraint on crime.
- (b) Economic Reform: The Sharia seeks to address the material causes that lead to crime. It attempts comprehensive economic reform to address the needs of all members of society, so as to distribute wealth more equitably. This can be regarded as one of the ultimate responses to crime prevention. The institution of charity (*Zakat*) seeks to usher in economic reform.
- (c) Severe Punishment. No punishment will deter others unless it is severe enough. Punishment serves the purposes of justice and assures the safety of the community. Society is assured that no one can commit a crime and get away with it.

An examination of the Islamic penal complex reveals that it has many highly interconnected institutions that need further analysis. Islam being a complete system for regulating all aspects of human life, the Sharia complements this system through maintenance of the essential institutions of *Hajj*, *Saum*, *Zakat*, *Tauhid*, and *Salat*. The rules, obligations, injunctions, and prohibitions stemming from the Quran and Hadith produce a complete picture of the ideal Muslim community (Ummah). According to some scholars of Islamic law (Souryal et al. 1994), Islamic justice is based on the philosophical principles that are regarded as alien, if not unconscionable, to the Western observer. The most prominent among these is the penalty of hand amputation for the offense of theft. In order to understand these practices, they should be examined within the socioreligious context of Islam and in the spirit of true theoretical inquiry. The imposition of this penalty in certain cases and under the stringent rules of evidence may be justifiable, and even necessary, within the Islamic context of sustaining a spiritual and peaceful society. Although this penalty is designed primarily as an instrument of social deterrence, its continuing and undisguised application acts as a potent reminder to the believers' spiritual obligation towards God and society. The use of this penalty does not seem to be inconsistent with the principles of natural law or the Judeo-Christian doctrine in their original versions. It has parallels to the other theological views of crime and punishment that were prevalent in the early Christian and Jewish traditions. According to the Old Testament, murder, willful assault on parents, or cursing parents, was punished with death by stoning. However, there were checks to the harsh provisions of the *lex talionis*. Believers were expected to exercise mercy on the errant members of their fold (Hoekema 1986). In this same vein the Sharia also has provisions for mercy, penance, and forgiveness.

According to some scholars (Garland 1991), the sociological approach to punishment offers a unique framework for the analysis of penal issues. Instead of treating punishment as a means to an end or a routine problem for moral philosophy, historians and sociologists regard punishment as a social institution. Through this

perspective, punishment is regarded as a historical and cultural artifact that is not concerned merely with the control of crime but is also shaped by an array of social forces that have many further ramifications. This tradition examines the social bases of punishment. It delineates the social implications of specific penal modes, and seeks to uncover the structures of social action and the mesh of cultural meaning that gives modern punishment its distinctive forms, functions, and effects (Ignatieff 1978; Garland and Young 1983; Jacobs 1983; Cohen 1985; Hirst 1986). Here we examine penalty under the Sharia from such a sociological perspective and focus on its many interconnected structures, processes, and distinctive functions. Through its interaction with sociocultural forces it has developed its own unique system of criminal justice.

Theory of Punishment Under Sharia: This theory of punishment derives from Divine law, which is contained in the Quran and the Hadith. It contains the basics of the rules and commands expressed generally. According to Muslims, the Quran is considered to be the word of God; it contains about 30 equal parts (*Paras*), divided into 114 chapters (*Suras*) and about 6,241 verses (*Ayats*). On the whole the Quran has very little legislative material, with only about 10% of its verses containing rules. About 200 verses of the Quran deal with legal issues.² According to Pearl (1987), the Sharia consists of Quranic legislation that was later interpreted by subsequent generations and incorporated much of the customary law of the Arabs. Strictly speaking the Quran provides the laws that were given by the divine authority: Allah. Islamic law is a divinely ordained system of commands. Denying these laws would amount to a renunciation of the Muslim religion (Lippman et al. 1988). In order to settle issues Muslims have developed a detailed legal system whereby complex issues can be examined, compared with known Islamic teachings, and then evaluated. This is referred to as the science of Fiqh (understanding the legal positions). Thus Sharia is the path of living Islam and Fiqh is the process employed to apply it. Because all Muslims do not agree on everything, there are different traditions of Fiqh, each with its own methods of research and interpretation.

Classification of Crimes: Under the Sharia, punishment can be classified under three main categories: *Al-Hudud* (fixed punishments), *Al-Qisas* (restitutory), and *Al-Taazir* (discretionary). Islamic law has many similar defenses to crime as in the common law nations, including the use of puberty as the age of accountability. The penal philosophies under the Islamic system are similar to the Western views in theory, but they are applied in very different ways. Many punishments under the Sharia are public and are carried out as a deterrent to others. Sharia judges have much more freedom in sentencing options than Western judges. They have mandatory sentences for only a few of the most serious *Hadd* crimes. Some critics in the popular media point to the harshness of Islamic law and conclude that it must be wrong. However, scholars aver that Islamic law is not wrong but merely different (Wiechman et al. 1995). Figure 2.3 details the forms and purpose of the Sharia. It deals with the goals of the Sharia and delineates the forms and purpose for each kind of punishment and the sentencing options available to the judge.

Forms	Purpose	Options
Hadd	Deterrence; retribution; expiation	None; mandatory
Qisas	Restitution	Some; limited
Taazir	Reform; deterrence	Full discretion of judge/authority

Fig. 2.3 Goals of punishment under Sharia

Al-Hudud (Fixed Punishments)

The word *Hadd* (pl. *Hudud*) implies punishment that has been prescribed by God in the Quran or the Hadith. Crimes for which the Quran names certain fixed punishments are called *Hudud*. These are few, and like the rituals, are constant and unchanging. The application of this punishment is the right of God (*Haqq Allah*). Religious obligations such as prayer, fasting, and hajj are classified as *Haqq Allah*, the pure right of God, and are normally not justiciable. *Haqq adami* or the right of human beings such as debt repayment and spousal support are rights that can be made the subject of a judicial order. Under Islamic law duties and obligations may be categorized as the right of humans (*Haqq adami*) and the right of God (*Haqq Allah*). *Haqq Allah* is the punishment prescribed by God and revealed in the Quran/Hadith and its application is the right of God (*Haqq Allah*).

Hadd punishments have three main purposes: retribution against the wrongdoer for contravening the laws of society, expiation for the culprit after the punishment has been inflicted, and as a general and specific deterrent. According to Mawardi (1380 A.H.) deterrence is recognized as the main justification for *Hadd* punishments. Mawardi defined *Hudud* as being deterrent punishments that were established by God in order to prevent human beings from committing what He forbade and from neglecting what He commanded.

The main features of this type of punishment are that:

1. This punishment is prescribed in the public interest.
2. The punishment cannot be adjusted in any manner, that is, either lightened or made heavier.
3. After being reported to the judge (Qazi) it cannot be pardoned by anyone: judge, victim, or political authority.

This conceptualization of punishment is somewhat similar to the conscience collective mentioned by Durkheim (1947). After the law has been broken, punishment should be meted out without fear or favor or it would lead to a crumbling of the social fabric. The permanence of Hadd punishments is mirrored in the following verse of the Quran: II: 229, *Sura Al-Baqarah*:

These are the limits imposed by Allah. Transgress them not. For whoso transgresseth Allah's limits: such are wrongdoers (Pickthall 1992; Khan 1979; Ali 1983).

Under Islamic criminal law six major offenses are recognized as *Hudud*. Penalties for each of these offenses have been prescribed in the Quran (and the Hadith).

Classification: *Hadd* offenses may be classified into six categories: (a) *Al-Sariqa* (theft), (b) *Al-Hiraba* (armed robbery), (c) *Al-Zina* (illicit sexual relations), (d) *Al-Qadhf* (slandorous accusation of unchastity), (e) *Shurb al-Khamr* (drinking alcohol), and (f) *Al-Ridda* (apostasy). For an offense to be categorized as *Hadd*, it should be established that the punishment for it is determined in fixed terms in the Quran and the Hadith. According to El-Awa (1984) only four of the six offenses may be classified as offenses of *Hudud*. The other two (alcohol drinking and apostasy), cannot be so categorized because neither of these calls for punishment that is strictly defined by the Quran and the Hadith. However, according to Doi (1997), a seventh category also needs to be added, *Al-Firar Min Al-Zahf* (running away from the battlefield during Jihad) and is also liable to *Hadd* punishment. Many other scholars disagree with this categorization.

AL-QISAS

The punishment prescribed under Islamic law for murder and personal injury is known as *Qisas* or *Qawad* (retaliation). This means the infliction of injury on a culprit that is exactly equal to the injury that was inflicted on the victim. Islamic law gives preference to the wronged individual's wishes when administering *Qisas*. This feature distinguishes it from the procedure adopted for homicide under modern legal systems. Though homicide appears to be a tort (Anderson 1951) under Islamic law, this is not an accurate categorization. According to some scholars (Shaltut 1964; El-Awa 1984) the punishment for homicide under the Sharia has a dual nature. It is regarded as a crime for which punishment is imposed and as a tort, which compels the perpetrator to pay compensation, so that the victim may benefit. The ancient Arabs considered the concept of punishment inflicted by the state for homicide as an innovation of Islam. However, Islam did not completely abolish the pre-Islamic conception of punishment.

The law of *Qisas* can be understood after looking at the ancient customs of the Arabs prior to the advent of Islam. Hostility was a characteristic feature of the tribesmen of pre-Islamic Arabia. Friendly co-operation was a way of life only among the members of the same tribe. The main feature for this state of hostility was personal revenge for homicide. One of the most compelling reasons for the motive of revenge among Arab tribesmen was their belief that after the death of a murdered person a night-bird known as *Ham*, would stand on the grave and cry, "I am thirsty, give me a drink." This implied that revenge should be taken in order to quench its thirst. As a consequence, revenge was taken not only against the culprit, but also against the culprit's tribesmen. On many occasions tribal pride called for several victims as an equivalent for a fellow tribesman; this was the same with respect to the infliction of injury. *Diya* (blood money) was considered as a peaceful alternative to revenge. However, the amount of *Diya* varied according to the status of the murderer and his or her tribe. After Islam prevailed in Arabia the law of *Qisas* was introduced. As a consequence, just retaliation allowed only one life, that of the perpetrator of the crime only, to be taken for the life of the

victim, or a fixed sum of money was determined as blood money. This was not to vary from tribe to tribe or due to the status of the victim. At this stage the Quranic law radically changed the legal incidents of homicide (Coulson 1964). There was a transition from the pre-Islamic custom of *Thar* (revenge) to the Islamic law of *Qisas*.

The punishment for homicide and bodily injury in Islamic law can be either *Qisas* (retaliation) or *Diya* (blood money). *Qisas* can be divided into two categories: *Qisas* for homicide and *Qawad* for wounds or injuries. *Diya* signifies the blood money owed for killing and the term *Arash* is used for the blood money owed for injuries. *Diya* and *Kaffara* (penance) are the remedies for accidental homicide. The punishment prescribed in the Quran for deliberate homicide is the killing of the culprit or the payment of *Diya*. With respect to accidental homicide the jurists have determined that no *Qisas* is owed but the perpetrator is responsible for *Diya* and *Kaffara* (penance). Unlike retaliation for homicide the law regarding retaliation for injuries was not clearly prescribed in the Quran or the Hadith. Even the verses of the Quran on which the jurists based the law of retaliation for injuries are subject to interpretation. With regard to the Hadith, there is only one report where the Prophet ordered retaliation for injuries; Imam Bukhari and Muslim transmitted this through their compilations of the traditions.

The law of *Qisas* for injuries is not set out by the Quran and the Hadith but is based on *Ijma* (consensus). Jurists since the time of the Prophet are in agreement concerning this.

The following conditions have to exist before the law of *Qisas* for injuries applies: The injury must be deliberate (*Amd*) and not accidental (*Khata*), the part of the body where *Qisas* can be applied must be the same as the part injured by the culprit, and it must be practicable for the authority to inflict *Qisas*.

According to the Maliki and Shafeii jurists, if all these conditions exist then *Qisas* must be inflicted. However the jurists from the Hanafi school are of the view that *Qisas* for injuries can only be administered in two cases: when the injury reaches the skull bone (*al-muwaddaha*) and for an articular injury (*al-jinaya ala-mifsal*).

Diya is the only punishment for quasi-deliberate homicide. In cases of deliberate homicide it is due only when the nearest relatives of the victim do not insist on *Qisas* against the culprit.

Sharia scholars classify homicide into various categories and these differ from one school to another and also between jurists belonging to the same school. The Hanafi School gives five types of classifications: *Amd* (deliberate), *Shabah al-Amd* (quasi-deliberate), *Khata* (accidental), *Jari majra al-Khata* (equivalent to accidental), and *Bisabab* (indirect). Only the first category calls for the infliction of *Qisas*, whereas the remedy for all the others is *Diya*. These classifications came into vogue for the Hanafi School after al-Jassas (1928), the famous Hanafi jurist. The Shafeii, Hanbali, and Zaydi Schools have only three categories: deliberate, quasi-deliberate, and accidental. The Maliki and Zahiri schools have two categories: deliberate and accidental.

The law of *Diya* for injuries is very complex. According to the Sharia nearly every part of the body has been considered with respect to the amount of *Diya* or

Arash, which is due upon injury. If there is no fixed amount that has been determined then the victim is entitled to compensation known as *hukumat adl*, which is an amount of money determined by the judge and paid to the victim. Most of the jurists are in agreement that blood money (*Diya* or *Arash*) can replace retaliation when it is not possible to inflict or when the matter has been amicably settled. The victim has the choice to pick from a variety of options. The Sharia is victim-centered because the victim has three options: pardon the offender, ask the offender for *Diya*, or ask the State to enforce the death sentence against the culprit.

Taazir

This form of punishment seeks to prevent crime, encourage respect for society, and reform the offender. In Islamic legal writings the word *Taazir* signifies a punishment that seeks to prevent the criminal from further committing crimes and secondly at reforming the criminal. It therefore has a dual purpose, to deter and to reform. Ibn Farhun (1301 A.H.) in his famous book *Tabsirat al-Hukkam* delineates the aims of *Taazir* to be a sort of disciplinary, reformatory, and deterrent type of punishment.

Taazir was defined as a form of discretionary punishment that was to be delivered for transgression against God, or against an individual for which neither fixed punishment nor penance was prescribed (Sarakhsi 1342 A.H.). This definition therefore excludes all crime for which *Qisas* is prescribed, because in all cases where *Hadd*, *Kaffara*, or *Qisas* are applied, *Taazir* cannot be applied to replace them.

The word *Taazir* was not used in the Quran or the Hadith in the sense that the Muslim jurists use it. However, the Quran and the Hadith referred to some categories of crimes for which no fixed punishments were prescribed. It was left to the judge or the ruler to decide what type or manner of punishment should be imposed. There are three instances where the Quran mentions this type of punishment: An-Nisa (women) verses 16, 34 and Al-Shura (consultation) verse 40. One of the relevant verses of the Quran refers to the punishment for homosexuality. It orders the authority "to punish them both," but the type of punishment is not given and it is left entirely up to the judge. Rulers and judges are facilitated in safeguarding the interests of society when these are threatened by actions or omissions that fall beyond the purview of *Hadd* and *Qisas*.

Though it was not used in the Quran or the Hadith, it is not correct to say that the Quran does not know about this kind of punishment. In fact the Quran lays down the general principles from which *Taazir* was deduced and further mentions some of its applications. The legal principles of *Taazir* are implied in the Quran. Examples and cases of *Taazir* are also found in the Hadith. These cases were used later in a manner to construct the juristic formulation of *Taazir* as part of the Sharia. The jurists owe their knowledge of *Taazir* to the Hadith of the Prophet. The decisions of the companions regarding *Taazir* are more clearly enunciated in the manuals of Islamic law; however, they were still based on the Hadith of the Prophet.

The punishments for *Taazir* are not determinate. The judge has wide discretion in such cases. The judge can choose the punishment that is most suitable to a particular crime, or the circumstances of the criminal, her prior conduct, and his psychological condition. However, the judge does not have unfettered or unbridled authority and is obliged not to order a punishment that is not permitted under the Sharia. For example, he cannot order that the offender be whipped naked.

These punishments are not the only ones that can be prescribed in cases of *Taazir*. Any punishment that serves the purpose of *Taazir*, that is, to prevent any further crime and reform the offender, can be used so long as it does not contradict the general principles of Islamic law. The punishments meted out under *Taazir* represent what was known and actually used in Islamic legal texts and practice; however, any other type of useful punishment may also be legally employed. Besides determining the punishment, the ruler or Qazi (judge) is also traditionally given the task of determining whether an act is criminal. This is the essence of *Taazir*, which has been defined as a punishment for any transgression. Because transgressions cannot be foreseen, this right has been granted to the ruler or Qazi to meet the needs of society and protect it against all kinds of transgressions.

Kinds of Taazir: There are ten different kinds of *Taazir* according to the Sharia and these vary in level of severity. They range from a mere admonition right up to the death penalty.

1. Admonition (*Al Waz*). Under this category the person committing the transgression is reminded that he or she has done an unlawful thing. According to the Quran (IV:34 An-Nisa) it was provided as the first stage in dealing with disobedient wives. It is sought to be an admonition to remind the offender, that he or she has forgotten or is unaware of the fact that something wrong has been committed. This treatment is meant to be reserved for those who commit minor offenses for the first time, so long as the judge considers it sufficient to reform and restrain the culprit from any further transgression.
2. Reprimand (*Al-Tawbikh*): This kind of reprimand could be through any word or act which the judge feels is sufficient to serve the purpose of *Taazir*. The jurists refer to some specific words and acts as a means of reprimand. However, it is not necessary to dwell on these means because they vary according to the offense and the offender.
3. Threat (*Al-Tahdid*): This is a method through which the offender can be induced to improve her or his behavior out of fear of punishment. It may also comprise credible threats of punishment if the offense is repeated or by pronouncing a sentence against the culprit, the execution of this sentence is delayed until another offense has been committed within a stipulated time period. This method of dealing with offenders is comparable to the modern penal concept of suspended sentences, which exists under most modern penal systems. The period during which the sentence may be suspended is referred to as the *operational period* under the English Criminal Justice Act of 1967. This operational period cannot be less than 1 year or more than 3 years. Under the Islamic penal system this operational

period is left entirely up to the discretion of the judge. The second difference between the Islamic and the English system is that under English law the court has no power to suspend a sentence other than imprisonment. However, under Islamic law the judge has complete authority to suspend any kind of sentence.

4. **Boycott (*Al-Hajr*):** This form of *Taazir* punishment is prescribed in the Quran (IV: 34 An-Nisa). Besides being practiced by the Prophet it was imposed by Omar bin Khattab against a man who used to ask about and discuss difficult words in the Quran merely to confuse people and create mischief. Some scholars believe that this form of punishment is not practical in modern times.
5. **Public Disclosure (*Al-Tashhir*):** This type of punishment has been used since early Islamic times. Shurahy, a famous judge who served under the Caliphs Omar and Ali, believed that the person giving false witness must be publicly identified so as to warn people not to trust him. All four Islamic schools are in agreement on this point. The method of public disclosure usually comprised taking the offender by the judge's representatives to every part of the city and announcing that he had committed an offense for which he had received a *Taazir* punishment. The purpose of this punishment was to inform the public that the offender was not to be trusted. In the present times the mode of public disclosure differs. Due to the advances in media for the dissemination of information, this can now be done by publishing the court judgment in the newspapers, or by broadcasting it on radio and television, or by any other method that informs the public regarding the offense (Ibn Farhun).
6. **Fines and seizure (*Al-Gharamah wal-Musadarah*):** Though the Prophet imposed financial penalties as *Taazir* punishments, the jurists are split into three groups regarding its legality. One group believes that it is illegal to punish by fine or by seizure of property; a second group considers it to be legal; a third group regards it as legal only if the offender does not repent. According to Imam Malik, Ahmad bin Hanbal, and Abu Yusuf and some of the Shafeii jurists, financial punishments are allowed as a *Taazir*. The judge or ruler should not take the offender's money or property for the public treasury but should merely keep it away from her until the culprit has shown repentance. No one is allowed to take another's money without legal reason (*Bisabab Shari*). Later on if it appears that the offender will not repent, the ruler is entitled to order that the money be spent for public purposes. The reason advanced for this explanation is that allowing a judge or ruler to take the offender's money for the public treasury could subject this practice to abuse by unjust judges or rulers. Those who deny the legality of *Taazir* punishment aver that it was legalized in the beginning of Islam but was abrogated later. The Hanafi jurist Tahawi was the first to advance this view in his famous book, *Sharh Ma'ani al-Athar*. Ibn Taymiyya, and his student, Ibn al-Qayyim, strongly reject this claim of abrogation. The other Hanbali, Hanafi, and Maliki commentators also hold this view and defend it. As per Ibn al-Qayyim's evidence, both elements of financial punishment are permitted in Islamic law. The statement made by the famous Orientalist, Schacht (1964) that there are no fines in Islamic law is therefore patently incorrect.

7. Imprisonment (*Al-Habs*): Under Islamic law there are two types of punishment; either for a definite term or for an indefinite term. Imprisonment for a definite term is imposed for minor offenses. The minimum duration of imprisonment is 1 day but the schools adopt different views regarding the maximum period of *Taazir* imprisonment. According to one group of schools (Hanafi, Maliki, and Hanbali), there is no maximum period specified for *Taazir* imprisonment. The period is indeterminate and varies by the offense and individual offender. As opposed to this view the Shafeii School sets a determinate period. The maximum period of imprisonment can be a month for investigation and 6 months as punishment. However, the total period of imprisonment cannot exceed 1 year. The majority view seems to favor an indeterminate period of imprisonment as punishment. This punishment can last until the criminal repents, or until his death if the person is a dangerous criminal (Ibn Farhun 1301 A.H.).
8. Banishment (*Al-Nafy*) is also a variant of this form of *Taazir* punishment. The Hanafi School applies this as an additional *Taazir* punishment for fornication. Along with the crime of fornication, banishment is regarded as a *Taazir* punishment and is administered to offenders who could encourage others to copy their deviant activities (Ibn Farhun 1301).
9. Flogging (*Al-Jald*): Flogging is a common form of punishment under the Sharia. It is referred to as the form of punishment for the crime of Qadhf (80 lashes) and for Zina committed by an unmarried person. The most liberal stance in this context is the one taken by the Maliki School, which avers that the *Taazir* punishment can exceed the Hadd punishment only as long as the judge or the ruler considers it necessary. The Zahiri and Zaydi Schools along with a section of the Hanbali School hold a contrary view that flogging, as a form of *Taazir* punishment cannot exceed 10 lashes. Another intermediate view is held by the Hanafi and Shafeii schools and by some Hanafi scholars. There is no unanimity about the maximum number of lashes. Furthermore, there is no consensus regarding the minimum number of lashes allowed as *Taazir*. Some jurists fix the minimum at three, but a majority does not agree with this view because it is at odds with the main feature of *Taazir*, which is its variation from one crime to another, according to the offender's character and other circumstances.
10. Death Penalty (*Al-Taazier bil Qatl*): *Taazir* punishments are meant to deal with the less serious offenses. The death penalty is normally imposed for the most serious crimes. According to the Sharia, it is the punishment stipulated for two *Hadd* offenses and as *Qisas*, for the crime of homicide. Normally, the jurists are against it being used as a *Taazir* punishment. However, in exceptional cases almost every school permits *Taazir* by death penalty. Examples of those who can be given the death penalty are mentioned in the Hanafi texts. The habitual homosexual, the murderer on whom *Qisas* cannot be imposed due to the means used in the crime, or the habitual thief who attacks a man's house and cannot be prevented from doing so by other punishments. With respect to the Maliki School, *Taazir* punishment is meant to fit the crime, the criminal and the victim and it is absolute in its application. The death penalty is permissible in certain cases where either the offense itself is very serious, such as spying for the

enemy, or propagating heretical doctrines, or practices which split the community, or if the criminal is an habitual offender whose wickedness can only be stopped by the death penalty. The Shafeii and the Hanbali Schools permit the death penalty to be imposed in the same cases for which it is permitted by the Malikis (Ibn-al Qayyim, in *Al-Turuq al-Hukmiyya*).

Notes

1. PBUH: all references to the Prophet Mohammed are followed by the words (pbuh) which means peace be upon him. When mentioning the name of the Prophet Muhammad, it is recommended that Muslims offer a prayer for him. The recitation – *salla Allahu alay hi wa sallam* (may God's peace and blessings be upon him) usually follows the Prophet's name when it appears in classical biographies. Since this book is intended for a much wider audience, which may include Muslims as well as non-Muslims, I shall omit mentioning it in the text, however, the devout Muslim reader can personally and inwardly recite this prayer when coming across the name of the Prophet.
2. The Quran makes references to legal matters in some verses. There are 114 chapters (Surahs) in the Quran. Each of the chapters is of variable length. In order to reference the relevant parts we will use the chapter and verse numbers within that chapter. For example, II: 286 will refer to verse 286 in the second chapter of the Quran, which is Al Baqarah (the cow). Some of the relevant verses of the Quran dealing with crime are as follows:
 Al-Sariqa (theft) II: 286; V: 38,39;
 Zina (fornication) XVII: 32; XXIV: 2–9;
 Shurb al-Khamr (intoxication) II: 219; V: 93;
 Al-Hiraba (highway robbery) V: 33,34; Killing (oath) II: 178,179; V: 33;
 Al-Qadhf (defamation) XXIV: 4,5,11,19,23,24;
 Witnesses II: 140,282,283; IV: 15,135; V: 8,108,111; XXIV: 13;
 Punishments II: 178,179; IV: 15,16,92,93; V: 36,37,41,42; XXIV:2–5;
 Taubah (repentance) IX: all verses particularly verse 29;
 Qisas (lawful retaliation) II: 178; V: 33–35,45; XLII: 39,40;
 War and peace II: 217; IV: 71,100; VIII: 41,61.
 Jihad VIII: 15–16

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