Codifying a jurist's law: Islamic criminal legislation and Supreme Court case law in the Sudan under Numairi and Bashīr

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6 Ta´zīr

6.1. *Ta´zīr* in the *fiqh*[1546]

Ta´zīr-punishments are unknown to the Qur´an and hardly mentioned in the Sunna. They have found their way into the *fiqh* relatively late in order to fill the gaps resulting of the relative scarcity of penal regulations to be found in the Qur´an or Sunna.

Function of the ta´zīr

They enable the judge to punish those who have committed *ḥadd*- or *qiṣāṣ*-crimes but where the legal requirements for the respective punishment are not met or where legal uncertainties

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[1546] For more details, see El Baradie (1983), pp. 146-165, Peters (2005), pp. 65-68, Bahnasī, al-jarā´im, pp. 245-252, al-Jazīrī (2004), Vol.5, p. 306 et sqq. and ´Awad (2001), Vol.1, p. 685 et sqq.

preclude the application of a *ḥadd*- or *qiṣāṣ*-punishment.[1547] *Ta´zīr* also serves to punish sinful or undesirable behavior, even if it is not related to *ḥadd*- or *qiṣāṣ* –crimes.

A *ta´zīr*-punishment thus serves to better the sinner and to save him from recidivism. It further is applied in order to deter the community to commit crimes against the claims of God and to retaliate against the infringement on claims of man.[1548] As Peters has pointed out a *ta´zīr*-punishment thus can serve to either punish past conduct or to coerce a person to fulfil his ritual duties, such as prayer or fasting.[1549]

A *ta´zīr*-punishment can represent a claim of God, a claim of man or both. It will be considered a claim of God if it is the result of an act of disobedience before God such as neglecting ritual prayers. It will be considered a claim of man if the rights of men are concerned, e.g. in a case of libel. Both claims come into play when, e.g. small amounts of property are being stolen. Here the claim of man is the right to property and the claim of God is public security.[1550] In contrast to *ḥadd*-crimes the *qāḍī* can dispense with the *ta´zīr*-punishment as far as the claims of God are concerned. With regard to the claims of men the aggrieved party has to forego its rights before the *qāḍī* can dispense with a *ta´zīr*-punishment.

Punishment of ta´zīr-crimes

The notion *ta´zīr* subsumes infractions against the (security) interest of the community (claims of God), punitive measures in order to protect the religious values and coherence of the Muslim community as well as all punishments enforcing private claims. The range of punishments reflects the variety of offences and crimes to be punished. They encompass capital and corporal punishments (flogging), imprisonment and banishment and punishments against the property of the delinquent. No corporal punishments other than flogging are allowed.[1551] A *ta´zīr*-punishment can further consist of the deposition of an official, a reprimand, public rebuke or the public announcement of the deed in question. While *qāḍī*´s enjoy a relative latitude when imposing *ta´zīr*-punishments, there are, however, limitations, especially in comparison to *ḥadd*- and *qiṣāṣ*-punishments.

[1547] Peters (2005), p. 66.
[1548] El Baradie (1983), p. 147.
[1549] Peters (2005), p. 66.
[1550] El Baradie (1983), p. 147.
[1551] There is one exception to this rule, however, the Mālikites allow the amputation of the right hand of someone who has forged documents. Compare Peters (2005), p. 66.

The majority of schools holds that the total number of lashes may not exceed those fixed for *ḥadd*-crimes. As an exception of this rule, the Mālikites leave the maximum number of lashes to the discretion of the judge or the official imposing the punishment. In the three schools it is controversial what the exact maximum amount of lashes should be. The number of lashes recommended by the different *fuqahā'* varies between ten, based on a *ḥadīth*, and 79 lashes, one less than the maximum number of lashes as *ḥadd*-punishment for the drinking of alcohol of a free person. Some Shāfi´īte and Ḥanbalite scholars argue that the number of lashes applied should not exceed the respective *ḥadd*-penalty. Thus, if, e.g., *zinā* cannot be proven and the *qāḍī* decides a *ta´zīr*-punishment, the maximum number of lashes is 99 and thus one less than the respective fixed punishment.[1552] The minimum number of lashes as *ta´zīr*-punishment is not fixed.

While the capital punishment is undisputed for various *ḥadd-crimes* and as a *qiṣāṣ*-punishment it remains controversial among the *fuqahā'* whether execution is admissible in the *ta´zīr*-system. The proponents of the death penalty as a *ta´zīr*-punishment belong to all schools but are especially present in the Ḥanafite school. According to this school, the ruler can impose the death penalty when it is in the public interest, e.g. for the person who repeatedly committed crimes similar to *ḥadd*- or *qiṣāṣ*-crimes (but not fulfilling all of their legal characteristics). Examples are *liwāṭ* of a *muḥṣan* or intentional homicide with instruments which (normally) do not hurt. This opinion holds that crimes similar to *ḥadd*- or *qiṣāṣ*-crimes, such as the two examples given above, are to be clearly distinguished from these. They fall under *ta´zīr*-crimes. The death penalty, however, is not compulsory and will only be applied to the recidivist. In contrast, those jurists – especially in the Shāfi´īte and the Ḥanbalite schools – who reject the application of the death penalty as a *ta´zīr*-punishment consider cases such as the above as true *ḥadd*- or *qiṣāṣ*-crimes and imposes the death penalty already for the first time offender.

The minimum amount of time of imprisonment (*ḥabs*) as *ta´zīr* is undefined. As to the maximum time a culprit has to stay in prison opinions are controversial. According to the Shāfi´ītes the maximum prison term must stay below the maximum term in banishment, i.e. one year. According to the other schools the maximum prison term is not fixed. The Ḥanafite

[1552] Peters (2005), p. 67.

Ibn ´Ābidīn holds that in cases of felonies such as semi-intentional homicide the culprit should stay in prison until he shows signs of repentance.[1553]

Being mentioned in the Qur´an and in the Sunna banishment (*nafy*, *taghrīb*) as a deterrent *ta´zīr*-punishment is not controversial in the *fiqh*. However, its mode of application and its maximum length are. Shāfi´ītes and Ḥanbalites hold that the convicted should be placed in a different social context so that the separation from his original tribe and the ensuing feelings of loneliness serves as punishment. The majority holds that the place of banishment should not be outside the *dār al-Islām* since the betterment and reintegration of the culprit are important goals of the punishment. If the banished person constitutes a danger for the people around him he can also be imprisoned. Some Mālikites, however, are of the opinion that banishment means to chase the culprit out of Muslim territory. Ḥanafites even hold that banishment is imprisonment.

According to the Ḥanafites and the Mālikites the maximum time of imprisonment or banishment is not fixed. The Shāfi´ites and the Ḥanbalites hold that banishment should be less than one year.[1554]

Punishments with regard to property are also highly controversial in the *fiqh*. Those against such punishments argue that the protection of one's property as guaranteed by Islam should not be touched. Admitting this punishment would lead to tyranny and arbitrariness. In contrast, the proponents hold that the convicted should be deprived of part of his property until he repents his deed and betters himself. If the official imposing the punishment gives up hope for the repentance of the culprit his property becomes property of the state. Further, property can be destroyed because it is forbidden (wine) or confiscated because it has been used to commit a forbidden act, e.g. milk diluted with water.[1555]

Proof of ta´zīr[1556]

Ta´zīr crimes can be proven by a confession of the offender. A single confession, which can not be withdrawn, is sufficient since the conviction will not be averted by legal uncertainties. *Shubha* as taken into account in the context of *ḥadd*- and *qiṣāṣ*–crimes does not play a role in the area of *ta´zīr*-crimes. Secondly, *ta´zīr*-crimes can be proven by the testimony of either two

[1553] El Baradie (1983), p. 152-153.
[1554] El Baradie (1983), p. 154.
[1555] El Baradie (1983), p. 156.

men or one man and two women. Indirect testimony (*shahāda ʿalā al-shahāda*) such as an admission by the defendant out of court or by two qualified witnesses out of court are admitted. Equally admissible is the written testimony a *qāḍī* receives from another *qāḍī* (*kitāb al-qāḍī lilqāḍī*) and the *qāḍīʿs* own knowledge (*ʿilm al-qāḍī*). While the above opinions represents the majority of *fuqahāʿ*, Abū Ḥanīfa does not accept the testimony of women alongside men.

6.2. *Taʿzīr* in the Islamized Penal Codes 1983 and 1991

Functions of taʿzīr *in the Islamized Penal Codes*

As shown above *taʿzīr*-punishments have various functions in the *fiqh* either in the context of criminal law or related to the fulfillment of ritual duties. As to the latter, both Islamized Penal Codes are silent, they do not use *taʿzīr* as a means to punish the neglect of ritual duties. Thus neither eating in public during Ramaḍān nor neglecting one's ritual prayers are the object of *tazīr*-punishments as stipulated in the two Islamized Penal Codes.

The PC83 has a strong connection with its predecessor, the PC74. A large majority of its provisions are direct translations of its 1974 model. With regard to its function as a punishment for crimes other than *ḥadd*- or *qiṣāṣ*-crimes the 1983 Penal Code does not clearly separate *ḥadd*-crimes and their respective punishment and *taʿzīr*-crimes and their punishments respectively. The PC83 combines *taʿzīr*- crimes, in some instances taken over verbatim from the PC74, with newly introduced *ḥadd*-punishments and thus, in contradiction with the *fiqh*, unduly enlarges the number of crimes where the harsh *ḥadd*-punishments are applicable. At the same time the legislator had replaced the specific punishments for clearly defined crimes, as stipulated in the PC74, in many instances with *tazīr*-punishments such as flogging, fine or prison in various combinations. In most cases the number of lashes, the amount of the fine and the maximum prison term remained unspecified. It can be safely assumed that the team of three jurists, charged by former president Numairi to overhaul the 1974 Penal Code and Islamize it, had wanted to introduce the kind of latitude traditional *qāḍīs* had enjoyed as to the imposing of punishments. This approach stood in contradiction to pre-1983 legislative principles and had especially led to the destruction of the well-defined relation between the gravity and nature of crimes and their corresponding punishment which was a distinctive

[1556] For the following compare Bahnasī, al-jarāʿim, p. 252 and Peters (2005), pp. 12-13.

characteristic of the PC74. Instead very similar *ta´zīr*-punishments were stipulated wholesale for very different crimes. Whether or not a *qāḍī* would take into account differences with regard to the gravity of the crime was to a large extent left to him. This clearly being a major flaw of the Penal Code 1983 the latitude given to judges was reduced, but not entirely removed, in the Criminal Act 1991. The formula „flogging, fine and/or prison" in various combinations was to some degree replaced by punishments that normally more closely related to the gravity and nature of the crime, thus following more closely the model of the pre-1983 Penal Codes. However, the leeway given to judges in the PC83 continues to exist to a lesser extent in the CA91. Typically, the punishment for *ta´zīr*-crimes is a prison term in proportion to the deed. This prison term can be either combined with a fine or be replaced by it.[1557]

Both laws punish – next to *ḥadd*- and *qiṣāṣ*-crimes a large variety of crimes that either represent claims of God/the community or claims of man that do not amount to *ḥadd*- or *qiṣāṣ*-crimes or cannot be punished as such because the legal requirements are not met or their punishment is precluded due to legal uncertainties. This includes, especially with regard to the Penal Code 1983, a sizeable variety of political crimes, whose punishments are often harsh e.g. the death penalty for the organization of illegal strikes or the publication of critical articles.[1558]

Punishments

While in 1983 *ta´zīr*-punishments had not been mentioned explicitly, the Criminal Act 1991 for the first time makes reference to *ta´zīr*. A *ta´zīr*-penalty is explicitly defined as „any penalty other than *ḥudūd* and retribution (*qisas*)".[1559] This definition shows clearly that the legislator had intended to adopt the classical trichotomy of *ḥudūd*, *qiṣāṣ* and *ta´zīr*. This trichotomy is also confirmed by the right to pardon which differs for the three categories. While the execution of *ḥudūd* can not be stopped by a pardon (by either the public authority or the aggrieved party) the execution of *qiṣāṣ* can indeed be remitted by the pardon of the victim or his heir. In cases of *ta´zīr* a pardon can be granted by the public authority, the rights of the aggrieved party to compensation, however, have to be satisfied.[1560]

[1557] En passant, flogging – ubiquitous in the PC1983 – was abolished in many instances.
[1558] For an analysis see e.g. Köndgen (1992), pp. 124-126.
[1559] See article 3, CA91, "Interpretations and explanations".
[1560] Art. 38, "Pardon of the offence", CA91.

Further a whole chapter defines guidelines for judges on how to apply *ta´zīr*-punishments.[1561] Judges are advised to take into consideration all aggravating and mitigating circumstances, the degree of responsibility (of the defendant), the motive, previous convictions of the offender etc. What looks like a matter of course can not be taken for granted. In 1983 and after defendants were at the mercy of judges who had been given substantial leeway and little guidance on how to use it. From 1991 onwards judges were bound again by well-defined maximum prison terms for specific crimes and the principles described above.

Both codes with regard to *ta´zīr*-punishments have been largely inspired by either their secular predecessor or by the necessities of criminal legislation in the modern nation state. The *fiqh* plays for the 1983/1991 *ta´zīr*-legislation only an insignificant role.

With regard to punishments it is useful to take a step back and look at the development of punishments between 1974 and 1991. Under the secular 1974 Penal Code punishments were restricted to six: a) death, b) forfeiture of property, c) imprisonment, d) detention in a reformatory, e) fine and f) whipping. Due to the introduction of crimes and punishments inspired by Islamic Criminal Law the total number of punishments in the 1983 Penal Code subsequently doubled to twelve.[1562] The six punishments of the predecessor code had been taken over into the 1983 code and complemented with compensation (*ta´wīd*) as an additional *ta´zīr*-punishment.[1563] The five remaining new punishments are directly connected with the Islamization of the Penal Code: execution with or without crucifixion, stoning, amputation and cross-amputation, full or reduced *diya*,[1564] *qiṣāṣ*.[1565]

It is noteworthy that certain *ta´zīr*-punishments foreseen by the *fiqh*, such as reprimand, public rebuke or the public announcement of the deed in question have not been codified.

With regard to corporal punishments the *fuqahā´* did not allow any other punishment than flogging. As to flogging it must be pointed out that its application goes back to the times of the Anglo-Egyptian condominium[1566] and beyond. Thus, its application was simply continued and was - unlike other punishments derived from the *fiqh* - no novelty in Sudanese criminal

[1561] Chapter Two, articles 39-41, CA91.
[1562] The title Penal Code 1983 (qānūn al-´uqūbāt 1983) already indicates the general tendency of the 1983 code to focus on punishments.
[1563] Art. 64, PC83.
[1564] Interestingly *diya* is listed here under punishments. The nature of *diya*, whether punishment or mere compensation, is disputed in the *fiqh*.
[1565] Art. 64, PC83.
[1566] Article 64 (f) and (g) of the Penal Code 1925 made a difference between flogging and whipping while the same article in the 1974 Penal Code has dropped flogging but maintained whipping.

law. The maximum number of lashes, however, was twenty-five in 1925 and 1974.[1567] In addition, only men could be subjected to whipping. In 1983 twenty-five was not longer the maximum number of lashes but the minimum number. The maximum number of lashes quadrupled to a hundred, applicable to men and women alike.[1568] In 1991 the possible range of lashes has changed only slightly, and is set now between 20 and a maximum of hundred. *Ta´zīr*-offences punishable by whipping are mostly related to public morals and crimes that are related to *ḥadd*-crimes but were the requirements for a *ḥadd*-punishment are not met. Examples for the former are „Gross indecency"[1569] and „Indecent and immoral acts."[1570] Examples for the latter are „Practicing prostitution"/"Running a place for prostitution",[1571] „Insult and abuse"[1572] (not amounting to *qadhf*) and theft (not amounting to *ḥadd*-theft).[1573] It should be noted here that in the *fiqh* minors can be disciplined (*ta´dīb*) by way of a *ta´zīr*-punishment.[1574] The Criminal Act 1991 has adopted this opinion and stipulates, among other possible punishments, up to 20 lashes for children who were between seven and eighteen when they committed the crime.

We have shown above how especially the Penal Code 1983 has changed *ta´zīr*-crimes into *ḥadd*-crimes by stipulating *ḥadd*-punishments, i.e. corporal punishments not admissible under the above rule, for crimes that did not meet the requirements of the respective *ḥadd*-crime. In other words *ta´zīr*-crimes become punishable by corporal punishments other than flogging. This is hardly in harmony with the great majority of the *fuqahā´*.

We have also seen above that the application of the death penalty is controversial under the *ta´zīr*-system. Both Islamized codes have opted in favor of the death penalty as a *ta´zīr*-penalty (in addition to being an accepted *ḥadd*- and *qiṣāṣ*-punishment). However, the two laws use the death penalty in different ways.

The Penal Code 1983 does not explain the nature of „execution" (*i´dām*). In practice the death penalty is executed by hanging. The definition in 1991 becomes specific: „Death shall be by hanging, stoning, or in the same manner in which the offender caused death, and it may be by

[1567] See articles 76,77 PC24 and article 76, PC74.
[1568] Art. 64 (8), PC83.
[1569] Art. 151, CA91.
[1570] Art. 152, CA91.
[1571] Articles 154 and 155, CA91.
[1572] Art. 160, CA91.
[1573] Articles 173 and 174, CA91.
[1574] Peters (2005), p. 21.

way of hud, retribution (qisas) or Ta´zir; and it may be accompanied by crucifixion".[1575] *Ta´zīr* – crimes punished with the death penalty, i.e. hanging, are various in the Penal Code 1983. At times the death penalty was combined with *ḥadd*-punishments.[1576] In other instances the death penalty was widely used as a means to stifle opposition.[1577] Whether or not this was in harmony with ICL is debatable. The use of the death penalty as a *ta´zīr*-penalty could have been construed as following Ḥanafite scholars who deem „the death penalty inflicted with Ta´azīr as a necessary measure to ensure political order".[1578] From 1991 onwards the use of the death penalty as a *ta´zīr* penalty changes again. The political crimes of the PC83 have been removed completely. Only waging war against the state[1579] and espionage can still be punished with the death penalty.[1580] Further, the death penalty can be imposed for certain sexual crimes such as repeated acts of homosexuality (*liwāṭ*), rape and incest. However, the wording of the relevant articles is not unequivocal enough to determine whether the legislator meant them to be punished as *ta´zīr*-crimes or as a *ḥadd*-crime. Suffice to say that the application of the death penalty as a *ta´zīr*-punishment has been reduced in the CA91 to but a few crimes.

Having said that, it is important to take a closer look at the actual application of the death penalty in the Sudan under ICL. Our research has not found any cases of the application of stoning or retribution (*qiṣāṣ*) in the sense that the killer died in the same way as his victim. In actual practice the various forms of the death penalty seem to have been reduced to one, i.e. hanging. While the verdicts as confirmed by the Supreme Court do tell us whether the pronounced death penalty is by way of *ḥadd*, *qiṣāṣ* or *ta´zīr* its actual execution is uniform. Put in different terms, where the *fiqh* clearly distinguishes the three spheres of criminal law – *ḥadd*, *qiṣāṣ*, *ta´zīr* – by different ways of executing the death penalty, the Sudanese Criminal Act 1991 retains these differences only as a theoretical possibility. In actual practice, execution methods prescribed for certain ḥadd crimes (stoning for *zinā*) and *qiṣāṣ* by way of

[1575] Criminal Act 1991, article 27.(1). I quote from the official translation , ALQ, Vol.9, 1994. The wording is somewhat misleading, it does not clearly separate the different methods of execution. Executions by way of *ta´zīr* are carried out by hanging only.
[1576] See e.g. article 457 "Networks of organized crime".
[1577] Compare e.g. articles 96-98. For proof as stipulated in the PC83 and the CA91 and interpreted by the Supreme Court see chapters 5.2.7. and 5.3.8.
[1578] Benmelha (1982), p. 213.
[1579] Art. 51, CA91.
[1580] Art. 53, CA91.

retribution (Spiegelstrafe) are not applied. Since only hanging is left, clearly the death penalty has been brought into the sphere of *ta´zīr*.

Conclusion

Ta´zīr has, for the first time, found its proper place in the Criminal Act 1991. The wide applicability and functions of *ta´zīr* in the *fiqh* have allowed the Sudanese legislator to define any punishment, and therewith the corresponding crime, outside the *ḥudūḍ* and *qiṣāṣ* as a *ta´zīr*-punishment. While, from 1991 onwards, respecting the traditional trichotomy between *ḥadd*-, *qiṣāṣ* and *ta´zīr*-crimes on paper, in actual practice non-*ta´zīr* execution methods are not applied. As in other instances the flaws of the 1983 Penal Code have been corrected to a large extent with regard to *ta´zīr*. The excessive and unspecified use of flogging has been reduced and, where it is applicable, is specific as to the maximum number of lashes. Despite the removal of a number of political crimes, punishable under the PC83, the death penalty – as *ta´zīr* – is still applicable for certain crimes under the Criminal Act 1991 and other laws.[1581] Thus, espionage[1582], undermining the constitutional system[1583], waging war against the state[1584], some terrorism-related offences[1585] and drug trafficking.[1586]

[1581] While technically separate from the CA91 these laws can be considered to be part of criminal law. This concerns e.g. the Terrorism Combating Act of 2000 and the Sudan Narcotics Drugs and Psychotropic Substances Act of 1994.
[1582] CA91, art. 53.
[1583] CA91, art. 50.
[1584] CA91, art. 51.
[1585] Examples are the following articles of the Terrorist Combating Act of 2000. Art.5: Committing a terrorist act is punishable by death. Art. 6: Forming or attempting to form a criminal organization, or participating in such an organization of facilitating its activities, to stage attacks that may jeopardize life or property or tranquility, is punishable by death. Art.8: Terrorism involving aircraft hijacking that jeopardizes life or an attempt to seriously damage or destroy an aircraft is punishable by death.
[1586] Trafficking or producing drugs by recidivist, an oficial entrusted with combating drug trafficking, by use of a person uable to give legal consent, or as part of an international criminal organization makes capital punishment mandatory. Sudan Narcotics Drugs and Psychotropic Substances Act of 1994, art. 15 and art.17. The death penalty can be imposed for providing drugs or other assistance related to trafficking or when drugs are provided to students or distributed in places of schooling. Articles 16 and 17 of the same law. For more information on the death penalty in the Sudan in general see http://www.deathpenaltyworldwide.org.