THE APPLICATION OF SHARĪᶜAH PRINCIPLES OF *TAᶜZĪR* IN MALAYSIAN COMMON LAW: A *MAQĀṢID*-BASED PROPOSAL

*Mohamed Azam Mohamed Adil**
*Ahmad Badri Abdullah***

Abstract: In the Malaysian context, debates pertaining to the role of judges in making new laws according to their own discretion are still on-going. In principle, Malaysia's judiciary system provides judges with a considerable amount of discretionary power when deciding on cases where no specific legislation has been enacted. Nonetheless, judicial discretion in Malaysia is restricted by mandatory sentences for a number of offences. In this context, many calls have been made by judges and scholars to scrutinize the judiciary system. They have raised the question of whether Malaysia needs to resort to English common law, despite having been independent for more than 50 years. Some have even proposed the development of a 'Malaysian Common Law' through the judges' discretionary authority. In this context, this article examines the Islamic legal principle known as *taᶜzīr*. One of Islam's pivotal criminal principles, *taᶜzīr* aims at several specific objectives (*al-maqāṣid al-khāṣs*), such as the prevention of perpetrators from repeating offences. This research highlights several underpinning principles (*ḍawābiṭ*) of *taᶜzīr* that, in light of the higher intents of the Shari'ah, could be used as guidelines for judges in the course of adjudicating cases. Drug trafficking offences are then selected as a specific example of how this could be done, thereby displaying the viability of this proposal in the realm of a hypothetical Malaysian common law system.
Keywords: *taᶜzīr*, sentencing principles, common law, *maqāṣid al-sharīᶜah*, drug trafficking.

1. Introduction

In Malaysia, English common law, modeled after the English court system, was first introduced by the British during the colonial period. During that time, several written laws were already available in the local context; since the fifteenth century, some of the region's entrepôts, like Melaka, had already possessed their own written laws (i.e. the '*Undang-undang Melaka*'), in which criminal and family laws could be identified.[1] There were also the non-codified Islamic laws,

initiated by scholars rather than legislators, and a wide array of customary laws (*adat*) practiced by different ethnic groups.[2]

In the wake of the new English legal system, however, judges operating in the colonial courts did not attempt to apply indigenous law, but rather paid homage to the English law.[3] In effect, whenever they were faced with private disputes and private wrongs, instead of applying indigenous laws, the courts more often referred to English common law. The British then introduced the Civil Law Act 1956, which established the legitimacy of applying English common law in both Malaya and Borneo. The same measure was continued post-independence (1957), since it seemed to provide stability to the fragile legal system of the newly established country.[4]

After more than 50 years of independence, there are now calls from Malaysian scholars, judges, and lawyers to indigenise Malaysia's common law and thereby give it fresh impetus. This is seen as essential for the country to progress and transform its legal system according to its own values and heritage. Lamentably, however, this pursuit has so far lacked any concerted and continuous effort to realise it. Nonetheless, there are several judges and academics who have proposed transforming the legal system by way of harmonising common law with local religious and customary values and practices. Furthermore, they have proposed that Islamic principles and ethical values should occupy a central role in such a reformation process and be given recognition as one of the sources of Malaysian common law.[5]

In the same vein, in this article we would like to propose that several underpinning principles (*ḍawābiṭ*) of Islam's unprescribed (*taʿzīr*) law could, and in light of the higher intents of Shari'ah, be included amongst the sentencing principles of common law judges when exercising their discretionary power in Malaysia. These principles are transcendental values, emphasising the proportionality of punishment and the reform of the offender, aimed at delivering justice across religious and racial boundaries.

2. A Brief Sketch of the Debates Surrounding the Common Law of Malaysia

Contingent upon its context, there are essentially two different definitions of 'common law'. Firstly, it could be defined as a common legal system (such as is practised in England) that stands in contradistinction to the civil legal system of continental European countries. Secondly, it could also refer to laws made by judges that are contrary to statutory laws.[6] All common law, however, is characterised by three essential features: its fluidity, its creation simultaneous to the application of the rules to a case, and its relevance only to those cases for

which existing laws are silent. These features indicate the flexibility of common law's methodology and the essential role judges play in its creation.[7]

Undeniably, maintaining the original English-derived structure of common law in Malaysia is advisable, in the sense that it may provide neutrality in the peculiarly pluralistic context of the Malaysian multi-ethnic experience. However, the problem with applying English common law in Malaysia goes beyond mere methodology – it is about a non-English culture submitting to English common law rules. An elementary instance of this is the decision taken by a court in Perak with reference to a principle in English law (namely the ruling in *Ryland v Fletcher*), where damages were awarded for causing silt to be deposited on adjoining land without any attempt to reference the Islamic and/or customary Malaysian laws applicable to this situation.[8]

Given this, many ask the question, should not the country move to another plateau of achievement by inculcating Malaysian beliefs and traditions into the Malaysian legal system? This measure, however, would not necessitate a complete departure from the English common law system, nor a total exclusion of all foreign legal tradition.[9] This is due to the abovementioned fact that the common law method is capable of adaptation to local laws and values. Therefore, what is actually needed is for judges, lawyers, and scholars to work in concert to identify Malaysia's local repository of knowledge, values, and wisdom, to be infused into the legal system.

Certainly, the development of Malaysian common law would not entail any amendment to the Civil Law Act 1956, since there is a proviso therein which allows local circumstances to be taken into consideration in any judgment.[10] Indeed, it is interesting to note that there have already been some instances in which Malaysian courts have departed from their English roots to develop something like a Malaysian common law system.[11] For instance, in Islamic banking cases, Malaysian courts have already recognised Islamic law and principles as their operational framework and point of reference.[12]

The two essential steps that need to be taken, however, when establishing Malaysian common law are, first, to retain the judicial method of developing law and, second, to replace the substantive content of English common law with Malaysian local laws, customs, and belief systems (including the existing codified and non-codified Islamic laws, as well as the customs of the Malay, Chinese, Indians, and Orang Asli).[13]

It could be argued that it would be much easier to develop a Malaysian common law celebrating indigenous values and laws via the legislative channel, since the latter is free to depart from any existing law, while common law systems must rely on the role of judges, which is rather limited. However, in the Malaysian context such an argument does not hold water: although the legislature does introduce

a large amount of legislation, most of the time it does not replace common law. Torts Law, for example, such as defamation cases, are still governed by common law. So too is the process of interpretation, for which courts need to resort to principles beyond legislation.[14] Therefore, it should instead be argued that the materialisation of a Malaysian common law will only be possible if judges, when they adjudicate cases, refer to local principles and values. Judges should be brave enough to approach English common law with a critical eye and develop new laws that more effectively serve their own communities.

Abdul Hamid Mohamed, a former Chief Justice of Malaysia, provides a step-by-step approach for judges who apply the English common law while also seeking to establish a Malaysian common law. According to Abdul Hamid, the primary source for the Malaysian legal system should be the written laws, encompassing acts of Parliament, Ordinances, Enactments and the Federal Constitution.[15] Only if the written law is silent on an issue should a court identify the common law as administered in England. But, after determining the English common law, the court must also consider whether local circumstances allow for its application. It may then be either rejected totally or partially, in line with its compatibility with local circumstances. In the event of rejecting the English common law (whether totally or partially), the court will be free to develop its own law – that is, Malaysian common law.[16]

But, if the creation of a Malaysian common law is possible only through the avenue of a judges' discretionary authority, it is worth noting some on-going debates surrounding the validity of such authority within the Malaysian judiciary system. Basically, there are two contrasting standpoints. On the one hand, Devlin claims that the application of judicial activism is undemocratic, improper and uncertain because judges are not elected by the people and thus have no *locus standi* to make law.[17] This lack of democratic legitimacy is an inherent drawback to any judge-made law. Moreover, judicial discretion in Malaysia is restricted by mandatory sentences for a number of offences. The Constitution (Amendment) Act 1988 also granted High Courts and Subordinate Courts (Sessions, Magistrates and Other Courts) jurisdiction and power only as may be conferred by or under the federal law, thereby leaving them subservient to the power of the legislative.[18]

Nevertheless, some parties are of the view that, even though it may lead to flaws, judicial discretion is a flexible system capable of achieving proportionality. In this regard the strongest supporting argument for judicial creativity is its role in law reform.[19] In Britain and Malaysia, for instance, legislation is introduced by the executive, as the party which is in command of both the principles and details of statute. Since judges have no right to direct any minister in his views on statute, they need to develop the law to safeguard social justice for the people.[20] As such, judges may pay due consideration to the nature and degree of an offence,

as well as the circumstances of an offender while committing the crime. This, rather than the mandatory penalties prescribed by Parliament, better fulfills the proportionality of punishment.

In sum, the existing legal system in Malaysia almost certainly possesses the needed prerequisites for developing its own common law system based on local circumstances, knowledge and customs. This article will now focus on an elaboration of the guiding principles (*ḍawābiṭ*) of Islam's unprescribed (*taʿzīr*) laws as the central concept within the field of the 'Islamic laws of common application'. In short, *taʿzīr* will be framed as an important reference for judges to utilise as part of the creation of a Malaysian common law system. This recourse to an Islamic concept, however, does not imply that this is the only discourse available. Rather, the authors recognise the existence of different perspectives within Malaysia and encourage these different points of view to come to the fore in future in order to build a Malaysian common law system suitable for all.

3. *Taᶜzīr* Laws: A Brief Discussion.

Taʿzīr is one of the most important aspects of Islamic criminal procedure. Since Islam is the religion of the Malaysian Federation, and Islamic law is protected by the country's constitution, it is arguably appropriate for judges to refer to the sentencing principles of *ta'zir* when exercising their discretionary authority. For the same reasons, it is also an appropriate first step in the development of the proposed Malaysian common law system. This section briefly elucidates different scopes of *ta'zir*, as well as its objectives, as intended by the God, the Lawgiver.

3.1. The Scope of *Taʿzīr*

In Islamic criminal law, *taʿzīr* denotes an unprescribed punishment for any form of religious disobedience which is not subjected to either *ḥudūd* or *kaffārah*.[21] Judges are therefore granted wide discretionary powers with which to ascertain a suitable punishment. Ultimately, *taʿzīr* is intended to prevent an offender from committing further offences, as well as being a means of self-purification. The term can be applied to both offences and punishments. When describing it as a concept, Kamali concludes that:

> "*Taʿzīr* is basically an open-ended category that extends to almost all other punishments outside the *ḥudūd* and *qiṣāṣ* wherein the judge and the head of state may exercise discretion in determining a deterrent punishment for an offence in light of circumstances surrounding the case and condition of the offender or else to grant amnesty if they deem it to be the best course of action."[22]

An open-ended category, there are three forms of *taʿzīr*: *taʿzīr* for religious disobedience, *taʿzīr* for the public interest, and *taʿzīr* for delinquents.[23] Regarding the first, although any violation of a religious legal order or prohibition results in punishment, it should be noted that some sins are non-punishable, especially those which fall within the ambit of personal sins.[24] Turning to the second form, the implementation of *taʿzīr* to safeguard public interest has traditionally found widespread application since there are actions which can initially be deemed legal but then cease to be so due to public interest. Regarding the last form, there is actually some disagreement amongst jurists regarding delinquents – namely, whether the omission of recommendable acts (*mandūb*) and the commission of the reprehensible (*makrūh*) are subject to *ta'zir* punishment. Some jurists maintain that delinquents are punishable, citing ʿUmar al-Khaṭṭāb's punishment of a man who sharpened his knife in front of a goat reserved for slaughter.[25] By contrast, however, other jurists hold that, since there is no *taklīf* (i.e. religious dictate) in the case of a person committing either *makrūh* or omitting *mandūb*, no punishment should be implemented.[26]

The scope of *taʿzīr* encapsulates the essential role that judges play when determining suitable punishments for different offences under common law. They essentially possess a mandate to choose the punishment. Nonetheless, a question arises: may a judge exercise his own discretion fully, or are his powers limited? There are differing scholarly views on this. According to the Ḥanafīs, there are constraints surrounding a judge's discretion in *taʿzīr*. For instance, if the punishment involves flogging, the Ḥanafīs restrict the number of lashes a judge may opt for to a number under a hundred (or the maximum prescribed by the Qur'an). Both Abū Ḥanīfah and his disciple, al-Shaybānī, therefore opt for a maximum of thirty-nine lashes, while later Ḥanafīs, like Abū Yūsuf, have cited seventy-five.[27] If a judge felt that the maximum number of lashes was insufficient, he needed to choose another suitable punishment, instead of exceeding the prescribed limits.[28] Turning to the Shāfiʿī and Ḥanbalī law schools, both hold that, if a judge decrees a punishment of banishment (for example) the duration of that exile should not exceed one year, or the prescribed punishment (*ḥadd*) for illicit sex between unmarried persons (*ghair al-muḥṣān*).[29] Finally, the Mālikī law school holds that the judge's discretionary power is absolute, in the sense that he is entitled to ascertain suitable punishments beyond the extent of one hundred lashes or one year of banishment. Nevertheless, according to this school, the judge should not opt for a harsher punishment if he has initially chosen a lighter one capable of deterring the offender.[30]

Given the above, it is plain that jurists unanimously agree that judges need to follow certain guidelines (*ḍawābiṭ*) when exercising their discretionary powers in the realm of *taʿzīr*. There are also a number of common *taʿzīr* punishments decreed

by jurists and judges in accordance with their own independent reason (*ijtihād*). Amongst others, these include: the death penalty,[31] warnings, imprisonment, fines, seclusion, banishment, flogging and the suppression of certain basic rights (such as the right to use one's own property).[32]

3.2. The Specific Objectives (*al-Maqāṣid al-Khāṣṣah*) of *Taʿzīr*

It is important to note the cardinal purposes of Sharīʿah when legislating the laws of *taʿzīr*. Arguably, *taʿzīr* falls within the ambit of two categories of purpose: the specific objectives for all Sharīʿah penalties (*al-maqāṣid al-khāṣṣah li al-uqūbāt*) and those which specifically pertain to *taʿzīr* (*al-maqāṣid al-khāṣṣah li al- taʿzīr*).

Ibn ʿĀshūr argues that the specific aims of Sharīʿah regarding different types of punishments and penalties (*uqūbāt*) are threefold: the reform of the offender, the satisfaction of the victim, and the deterrence of the public from committing similar acts. To elaborate, Ibn ʿĀshūr argues that punishments are primarily intended to remove the evil from the souls of offenders, as that which prompted them to commit the offence in the first place. As for satisfying the victims (including their relatives and/or defenders, *walī*), this prevents the latter from taking justice into their own hands. According to Ibn ʿĀshūr, when the reform of an offender is unattainable, the satisfaction of the victim carries the greater weight. With regard to the third objective, this is a measure of how reformed the community as a whole is; the execution of a punishment should discourage members of the public from committing the same criminal offences.[33]

With reference to the specific purposes (*al-maqāṣid al-khāṣṣah*) of *taʿzīr*, al-Dawāh elucidates a handful of objectives which judges should observe in the execution of their discretionary powers. Firstly, the primary purpose of *taʿzīr* is to protect both the rights of God (*ḥuqūq Allāh*) and the rights of His servants (*ḥuqūq al-ʿibād*). The rights of God denote the general rights and societal benefits of the masses, and include offences such as neglecting the obligatory prayers and fasting, or of spreading innovations (*bidaʿ*), superstitious beliefs (*khurāfāt*) and confusion in religion (*tasykik*). By deterring society from these offences via the application of appropriate punishments, God's rights are preserved in the social sphere. In the meantime, *taʿzīr* also aims to protect individual rights from any kind of violation.[34]

The second purpose al-Dawāh highlights is the preservation of the moral fabric of society. Punishment, he says, aims not only to impose penalties, but also to restore moral order amongst offenders, returning them to the right path. Elementary examples of this can be found in the judgments of the Prophet Muhammad and his Companions, where, for example, the former reportedly punished a man who married his stepmother[35] and ʿUmar al-Khaṭṭāb banished

Naṣr ibn Ḥajjāj to Baṣrah due to his attractive demeanour towards women.[36] In both cases, the aim was to preserve morality in society. Nonetheless, in the context of our current discussion, to prevent the extension of criminal law into morality, this purpose need not be considered.

As a third purpose, *taʿzīr* also aims to deter others from committing crimes, since the punishments imposed are a reminder to other society members. Fourthly, it combats crime and reduces instances of its occurrence, while fifth, and finally, the application of *taʿzīr* seeks to underpin the pillars of society – namely, the institution of the family, private property, and government institutions. Any threat to these pillars is a threat to a stable social order. This can be seen in the judgment of ʿUmar al-Khaṭṭāb, when he decreed that Anas ibn Mālik needed to pay compensation for the loss of deposits entrusted to him. This ruling protected the right to private property as a pivotal pillar of society.[37]

4. The Guiding Principles (*ḍawābiṭ*) of *Taᶜzīr* in the Light of *Maqāṣid al-Sharīᶜah*

In addition to the purposes cited above, scholars like Ibn Taimiyyah, Ibn al-Qayyim, al-Khaṭīb al-Sharbīnī, Abū Zahrah and Salīm al-ʿAwā, outline a number of guiding principles (*ḍawābiṭ*) for judges seeking to apply their own discretion when ascertaining *taʿzīr* punishments.[38] These guidelines ensure that every single *taʿzīr* punishment decreed by a judge satisfies the objectives of the law. Therefore, judges need to pay due close observance to these guidelines in the course of their discretionary judgments. The said guidelines are as follows:

First Guideline: The need to ascertain the legality of a taʿzīr punishment.

This is an important principle, since scholars suggest that there can be no *taʿzīr* punishment that does not have a basis in the Islamic textual tradition (*dalā'il*). Notably, therefore, there are numerous offences depicted in the Qur'an to which *taʿzīr* could be applied – such as the consumption of usury, corruption, illegal consumption of other people's belongings, and so on. The determination of punishments for these offences is left to the discretion of the judges, who take into account several important factors: the category of the acts, the gravity of the offence, the motivation of the offender(s), and the social context. All these points are considered before choosing the right degree of social deterrence, capable of safeguarding the pivotal essentials of religion, life, offspring, intellect, honour and property.[39]

It is important to note that, even though the original principles outlined by scholars indicate that there can be no *taʿzīr* for offences without clear indicants mentioning them, there is a further point to consider. Since human society is in a

perpetual process of evolution, the nature of crime also keeps on changing, both in terms of form and detail. Given this, the Sharīʿah needs to broaden its scope when criminalising offences and look beyond textual indicants. By considering the preservation of religion, life, progeny, intellect, honour, and property as a valid legal reference, Sharīʿah should be able to use *taʿzīr* to criminalise all modern-day actions and/or situations that pose a threat to social order and welfare.[40] Such an approach, however, should involve respect for human rights, the prioritisation of other responses before invoking criminal law, and an appreciation that conduct should not be criminalised if doing so will lead to consequences which are as bad as (or worse than) the conduct itself.[41]

In spite of all this, however, when deciding the form of a *taʿzīr* punishment, it is incumbent on judges to return to the prescribed punishments found in the texts as a limit to their discretion. For example, the offence of falsely accusing a chaste woman of committing illicit sex (*qadhaf*) is prescribed by the texts as eighty lashes. Judges cannot exceed this; all lower defamatory offences must be subject to a lower punishment. Moreover, *taʿzīr* punishments should never undermine the dignity of the offender.[42]

Second Guideline: The need to maintain a balance in punishment.

Taʿzīr punishment needs to maintain a balance between the maximum limits of a prescribed punishment (*ḥudūd*) and an agreed upon minimum punishment. The breach of the maximum limit might render injustice and violate the rights of an offender, who would not be liable for such a level of prosecution.[43] On the other hand, resorting to a punishment which is too lenient might defeat the purpose of *taʿzīr*,[44] which is to reform, warn and deter criminals and society members. Judges therefore need to seek a balance between the two extremes, to assist the realisation of the law's objectives.

Third Guideline: The decreed punishment should not inflict physical harm.

Taʿzīr punishments (with the exception of the death penalty) should not inflict any physical harm or unbearable suffering. Any kind of punishment that causes such bodily damage is prohibited, whether it emanated from an unwise decision made by a judge or a neglect of the physical condition of the offender. Where an offender is incapable of handling a severe punishment due to ailment or physical disability, a judge must find a suitable alternative.[45]

Fourth Guidelines: Proportionality.

Since each offence is unique in nature, each needs to be dealt with in a distinctive way. Judges need to weigh an offence in terms of its kind and intensity when

reaching a proper and just sentence. Moreover, the judge needs to consider all dimensions of an offence before passing judgment – such as its repercussions on both the individuals involved and wider society.[46] Al-ʿAwā, when commenting on verse 40 from chapter al-Syūra, states:

> "The recompense for an injury is an injury equal thereto (in degree): but if a person forgives and makes reconciliation, his reward is due from Allah, for ((Allah)) loveth not those who do wrong."

Al-ʿAwā elaborates that while this Qur'anic verse validates the 'law of retaliation', in which a person inflicting damage on another will be penalised to a similar degree, the verse also reminds the reader that excessiveness is prohibited and detested.[47]

Fifth Guideline: The need to seek appropriate punishment for each offender.

The characteristics of individuals who commit offences vary widely. Distinctions do not merely pertain to the factors which led offenders to commit their crimes, but also to the ways those unlawful acts were committed, the conditions of each offender at the time they carried out their crimes, and their diverse personal characteristics. In other words, each offender needs to be dealt with differently, since different character traits are liable to different kinds and degrees of punishment. Regarding this matter, Abū Ya'lā contends that:

> "the punishment imposed upon those who have nobility [of character] needs to be more lenient compared to those who are indecent and ignorant. As reported by ʿA'isyah, the Prophet mentioned: "Sentence those who possess nobility with lesser punishment on their transgression except in the prescribed offences."[48]

In the abovementioned hadith, the Prophet clearly indicates that personal character is worthy of consideration in the course of sentencing an offender.

Sixth Guideline: Incremental approaches to punishment.

A flexible approach to determining which sentence is placed upon an offender is required by the Sharīʿah in order to achieve the purposes of self-reform and to avoid imposing a disproportionate punishment. Because the nature, method and gravity of offences varies, an incremental approach to punishment is best. It is important that judges are aware that, if a soft punishment is sufficiently capable of achieving the objectives of *taʿzīr*, resorting to a harsher sentence is not necessary.[49] Regarding this concern, al-Khaṭīb al-Sharbīnī suggests that:

> "It is incumbent upon society's leader (or judge) to closely observe the phase (of punishment). An incremental approach in punishing criminals

> in terms of complying with the proportionate level and form of punishment to an offence needs to be honoured by the leader, similar to the extent that he defends the victim. As such, he should not move away from the extent of punishment which he deems sufficiently effective."[50]

Seventh Guideline: To consider the future consequences of a punishment.

Al-Shāṭibī clearly stresses the importance of foreseeing the future consequences of a ruling as part of safeguarding the *maqāṣid*. He points out that:

> "Due observance to the future consequences (of a ruling) is considered as part and parcel of the Sharīʿah's objective in the way of weighing an act which either confirms or contradicts (the Islamic teachings). In other words, a *mujtahid* must not offer a verdict on any particular action by the *mukallāf* as either lawful or illegal except after paying close attention to the consequences of such conduct."[51]

An awareness of the possible future outcomes of a punishment is therefore a requirement of the Sharīʿah, as an indicator by which leniency, strictness, and even forgiveness can be decided. A punishment needs to be changed whenever it appears to hinder its intended consequences. In addition, the principle of *siyāsah al-sharʿiyyah*, which denotes the government's wisdom in dealing with current political affairs, needs to be duly considered when determining the form and level of punishment to be imposed upon a criminal.[52] For instance, if a punishment imposed on an influential person is predicted to trigger a much bigger social crisis, and even political instability, judges may opt for a more lenient sentence in order to maintain order and balance. This approach can be identified in the life of the Prophet, when he did not apply the death penalty to Labīd ibn al-Aʿsam after he cast a spell on the Prophet in order to prevent tribal conflicts.[53]

5. *Taʿzīr* Guidelines for Sentencing Drug Trafficking Cases in Malaysia

The above taʿzīr guidelines, derived from the rich heritage of Islamic criminal procedure (*fiqh al-jināyah*), deemed part and parcel of the 'Islamic law of common application', are undoubtedly valid judicial references for the proposed common law system of Malaysia. Indeed, the very nature of common law allows for such local values to be taken into consideration in the judiciary process. The application of *taʿzīr* is therefore feasible in the Malaysian context. Indeed, as a set of general principles, judges ought to have them in mind when delivering sentences anyway – the guidelines are comparable to the sentencing principles discussed in the realm of civil law, having similarities in terms of their pursued objectives and aims of deference, prevention, rehabilitation and retribution.[54]

For example, it is interesting to note that the conventional principles of sentencing share the *taʿzīr* system's concerns for reforming criminals, as well as deterring the general public from committing similar offences. There are, however, differences between the two systems. While conventional principles of sentencing provide judges with only general standards of sentencing, the guidelines of *taʿzīr* detail the procedures by which the higher objectives of the Sharīʿah should be attained. Another distinctive feature of the *taʿzīr* guidelines is how they highlight the pivotal importance of preserving justice – not only for victims, but also for offenders.

With this in mind, we should now consider the application of *taʿzīr* principles in the context of drug trafficking offences. Malaysia's Dangerous Drug Act 1952 has been amended twice in the course of the nation's legal history. In 1975, Section 39B was inserted, introducing the death penalty, life imprisonment and flogging as punishments. In 1983, a further amendment made the death penalty mandatory.[55] There is, however, an ongoing global debate about whether drug-related offences are liable to capital punishment. To date, the worldwide trend has been towards the abolition of the death penalty for such offences. Neither the international drug control and enforcement treaties nor the international drug control agencies have ever supported a recourse to capital punishment to deter drug-trafficking activities, even in countries where drug-related crimes are rampant. Consequently, it could be argued that the widely agreed upon position is that the death penalty is disproportionate to the gravity of drug-related offences.[56]

According to the International Covenant on Civil and Political Rights (hereafter referred to as ICCPR), however, capital punishment is not totally prohibited, but should be strictly contained to the most serious crimes. Although the ICCPR does not provide any definitive statement regarding what it understands as the 'most serious crimes', Lines has suggested that these should be defined as crimes with deadly outcomes. Crimes that do not entail life-threatening actions, therefore, such as drug-trafficking, should not be considered under such a category.[57]

During the last few years, Malaysia seems to have submitted to the global trend in doing away with the death penalty for drug-related crimes;[58] at the end of 2015, the Malaysian government announced that the mandatory death penalty for drug trafficking would be abolished by March 2016. Moving forward, judges are going to be entrusted with wide discretionary powers to ascertain suitable punishments for such offences.[59] It is proposed here that the underpinning guidelines of *taʿzīr* may help guide judges in exercising their discretionary powers in drug-related cases, and thereby help fulfil the higher objectives of the Sharīʿah in the sphere of the Malaysian judiciary. A brief account of how this could be done runs as follows:

First guideline: **to consider the legal status of drug-related offences.** Since the punishment for drug-related offences is not prescribed in the textual sources of the Sharīʿah, it is subject to the procedures of *taʿzīr*.

Second guideline: **the need to maintain a balance in punishment.** The move taken by the government of Malaysia to abolish capital punishment for drug-trafficking offences is commendable. Nonetheless, it means a new punishment needs to be identified. This new sentence should be neither too lenient, so that it compromises societal well-being, nor too harsh that it may prove unjust. The urgency for such a balanced solution is underscored by the sharp increase in drug trafficking offences reported under Section 39B of the Dangerous Drug Act (DDA 1952) between the years 2005 to 2011.[60]

Third guideline: **the decreed punishment should not inflict any physical harm upon an offender.** By referring to the third guideline of *taʿzīr*, it is proposed that judges should circumvent any form of punishment that could result in an offender incurring bodily harm. Arguably, imprisonment and measures to reform the convicted offenders are the best option for judges to consider when sentencing drug traffickers. Nevertheless, a number of jurists have suggested that drug-related offences are analogous to intoxication. They argue, however, that since drug addiction is more serious than alcohol addiction, the former is liable to a harsher punishment – that is, more than eighty lashes. As such, and given that drug trafficking is capable of instigating damage on a national level, they argue that the death penalty is acceptable.[61] This analogy (*qiyās*), however, is not without substantial problems. One of the principles of analogy is that the *taʿzīr* ruling be of similar or lesser extent than the original ruling.[62] Hence, if the jurist's initial position is accepted, the punishment for drug offences should be similar to or lesser than that of intoxication. To sentence drug offenders with the death penalty on this basis is therefore at variance with the Sharīʿah, since the right to life can only be taken by an explicit ruling derived from the textual sources (*naṣṣ*).

Fourth guideline: **the need to seek proportionate punishment.** Mandatory death sentences for drug trafficking compels the courts to treat all such cases equally, even though there might be substantial variations between them. The *taʿzīr* guidelines recommend that judges tailor punishments to suit each and every case, so as to temper justice with mercy and bestow fairness on all sides. As such, the punishments for drug-related offences should not be automatically determined based on the quantity of illicit drug found in the possession of offenders, but through careful observation of the case-specific circumstances.

Fifth guideline: **incremental approaches to punishment**. An incremental approach to punishment should guide judges in the use of their discretionary powers. Different levels of punishment should be made available to them, to be applied in proportion to the gravity of the offence and the circumstances of the crime. The most lenient sentences should be given priority.

Sixth guideline: **to consider the future consequences of a punishment**. The future consequences of a punishment should not be taken for granted by judges. Judges need to establish a mechanism by which the future socio-economic effects of a punishment can be effectively gauged. Moreover, judges need to be aware that any punishment metered out for drug trafficking offences could affect both local and global perceptions of Malaysia's judicial institutions. Therefore, any sentence needs to be seen as capable of delivering equal justice for all levels of society.

6. Conclusions and Recommendations

To progress as a nation, Malaysia needs to constantly weigh the effectiveness of its legal system. The death penalty, for instance, seems not to have obtained commendable results in deterring drug trafficking activities. Since the country has already decided to do away with this mandatory punishment for drug trafficking, it is perhaps now time to rethink wider aspects of the judiciary system, too. This article proposes that in future the system needs to be guided by local values, principles and customs. The discretionary power of judges should be influenced by the sentencing principles of *taʿzīr*, as derived from Islamic criminal procedures. This will provide a universal guideline for judges when exercising their prosecutorial discretion. *Taʿzīr* is underpinned by the universal values of the higher objectives of Islamic law (*maqāṣid al-sharīʿah*), which are in fact the common concerns of all religions and customs. Since Islam is constitutionally the religion of the Malaysian Federation, it is feasible for Muslim (and even non-Muslim) judges to refer to the abovementioned guidelines. Even though the guidelines may not result in judges making new laws, they may result in a more humane approach to the treatment of crime and the delivering of justice. Therefore, this article suggests the following recommendations, both for policymakers and judges:

- consider the implementation of the above-mentioned *taʿzīr* sentencing principles in cases where judges need to exercise their discretionary authority.
- consider the above-mentioned principles when developing standard procedural guidelines for judges to use when exercising their discretionary power in the Malaysian common law system.

- consider the implementation of the above-mentioned principles in the adjudication of drug trafficking cases, since the country is ready to abolish its mandatory death penalty and grant judges discretion when sentencing such cases.
- Due care should be taken by the authorities not to extend criminal law to the spheres of morality and religion. Only cases of grave social mischief should be criminalised.

Notes

* *Mohamed Azam Mohamed Adil* is Deputy CEO, International Institute of Advanced Islamic Studies (IAIS) Malaysia and Associate Professor, Academy of Contemporary Islamic Studies (ACIS), Universiti Teknologi MARA, Shah Alam. (Email: mazamadil@iais.org.my).

** *Ahmad Badri bin Abdullah* is Research Fellow at IAIS Malaysia, with a focus on *maqasid al-shariʿah* (the higher objective of Shariʿah), *usul al-fiqh*, and contemporary Islamic jurisprudence discourse. He is pursuing his PhD in the study of *maslahah*. He can be contacted at badri@iais.org.my.

Acknowledgement

We would like to thank Mr. Marwan Bukhari, a research fellow at the Darul Ehsan Institute (IDE), for sharing his insights regarding the concept of *taʿzīr* and its principles.

1. See Mohamed Azam Mohamed Adil, "Islamic Law and Human Rights in Malaysia" *Islam and Civilisational Renewal*, v.5, no.1 (January, 2014), 44.
2. Farid Suffian, "Towards Malaysian Common Law: Convergence Between Indigenous Norms and Common Law Methods" *Jurnal Undang-Undang*, v.13 (2009), 160.
3. *Ramah binti Taat v Laton binti Malim Sutan* (1927) FMSLR, no.6, 128
4. See Ahmad Ibrahim, *Towards a History of Law in Malaysia and Singapore*, (Kuala Lumpur: Dewan Bahasa & Pustaka, 1992).
5. Cf. Farid Suffian, "Towards Malaysian Common Law", 162.
6. H. Patrick Glenn, *On Common Laws*, (Oxford: Oxford University Press, 2007), 31.
7. Viviene O'Connor, *Common Law & Civil Law Traditions*, (INPROL, 2012), 14. Available online at http://www2.fjc.gov/sites/default/files/2015/Common%20and%20Civil%20Law%2 0Traditions.pdf (accessed on 30th November 2015).
8. See Farid Suffian, "Towards Malaysian Common Law", 161. Government of Perak v AR Adams (1914) 2 FMSLR 144.
9. Cf. Farid Suffian, "Towards Malaysian Common Law", 162.
10. Ibid, 165.
11. *Attorney General, Malaysia v Manjeet Singh Dhillon* (1991) 1CLJ 216, SC.
12. *Malayan Banking Bhd v Ya'kup bin Oje & Nur* (2007), 6 MLJ, 389.

13. See Wan Azhar Wan Ahmad, *Time to Malaysianise Common Law System*, available online at http://www.malaysianbar.org.my/general_opinions/comments/time_to_malaysianise_common_law_system.html, (accessed on 15 November 2015) and Farid Suffian, "Towards Malaysian Common Law", 161.
14. Cf. Farid Suffian, "Towards Malaysian Common Law", 163.
15. See Interpretation Acts 1948 & 1967(Act 388), Sect. 35.
16. *Nepline Sdn Bhd v Jones Long Wooton* (1995) 1 CLJ 865.
17. See Devlin, "Judges and Lawmakers" *Modern Law Review*, no.3(1976), 10-11.
18. See H. P. Lee, "Competing Conception Rule of Law in Malaysia" *Asians Discourses of Rule of Law*, Randall P. Pareeboom (edit.), (London & New York: Routledge, 2004), 243.
19. Ibrahim Ismail, "Judicial Certainty & Creativity: An Evaluation of Stare Decisis" *Jurnal Undang-Undang & Masyarakat*, no. 8 (2004), 96.
20. See W. Friedman, *Law in Changing Society*, (London: Penguin, 1972), 74.
21. See Al-Zailāʿi, *Tabyīn al-Haqāʾiq Sharh Kanz al-Daqāʾid wa Hasiah al-Shalābi*, (Qaherah: Maktabah al-Kubra al-ʿAmiriyyah, 1313 AH), v.3, 207; Ibn Humām, *Sharḥ Fatḥ al-Qadīr ʿala Hidāyah Sharḥ Bidāyah al-Mubtadiy*, ʿAbd al-Razzāq Ghālib (ed.), (Beirūt: Dār al-Kutub al-ʿIlmiyyah, 2003), v.5, 345 See also Nasimah Hussin, "The Discretionary Power of The Judge in The Determination of Ta'zir Punishment," *Jurnal Undang-Undang dan Masyarakat*, no.8 (2004), 126 - 127.
22. Mohammad Hashim Kamali, "Amnesty and Pardon in Islamic Law with Special Reference to Post Conflict Justice," *Islam and Civilisational Renewal*, v.7, no.4 (October, 2015), 455.
23. Cf., Nasimah Hussin, "The Discretionary Power of The Judge," 128.
24. Ibid.
25. See Al-Ghazāli, *al-Muṣtasfa min ʿIlm al-Usūl*, Muhammad ʿAbd Salām (ed.), (Beirūt: Dār al-Kutub al-ʿIlmiyyah, 1993), v.1,85; Al-Āmidi, *al-Ihkām fi Uṣūl al-Ahkām*, ʿAbd al-Razzāq al-ʿĀfifi (ed.), v.1, 160, Ibn Hajār, *Tuhfāt al-Muhtāj*, (Beirūt: Dār Ihyā' al-Turāth al-ʿĀrabi, n.d), v. 8, 18.
26. See Ibn Hazm, *al-Ihkām fi Uṣūl al-Ahkām*, Muhammad Ahmad Syākir (ed.), (Beirūt: Dār al-Afāq al-Jadīdah, 1983), v. 1, 43; See Al-Kasāni, *Badāiʿ al-Sanāiʿfi Tartīb al-Shar āiʿ*, Ali Muhammd Ma'wad & Adil Ahmad (ed.), (Beirūt: Dar al-Kutub al-Ilmiyyah, 2003), v. 7, 63.
27. See Al-Kasāni, *Badāiʿ al-Sanāiʿ*, v. 7, 64; Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, v.5, 334-336.
28. See Ibn Humām, *Sharḥ Fatḥ al-Qadīr*, v.5, 334-336.
29. See Al-Ramli, *Nihāyat al-Muhtāj ila Sharḥ al-Minhāj*, (Beirūt: Dār al-Kutub al-ʿIlmiyyah, 2003), v.8, 23 and Muhammad al-Khātib al-Sharbini, *Mughni Muhtāj ila Maʿrifati Maʿani alfāz al-Minhāj*, ʿAli Muhamad Maʿwad and ʿĀdil Ahmad (tahqiq), (Beirūt: Dār al-Kutub al-ʿIlmiyyah, 2000) v.4, 182, Ibn Qudāmah, *al-Mughni wa al-Sharḥ al-Kabīr*, Muhammad Rashīd Rīdhā (ed.), (Qaherah: Maktabah al-Manār,1928) v.10, 347.
30. See Ibn Farhūn, *Tabṣirāt al-Hukkām fī Uṣūl al-Aqdiyyah wa Manāhij al-Ahkām*, Jamāl Murr ʿIsyli (ed.), (Riyādh: Dār al-ʿAlam al-Kutub, 2003), v. 2, 221-222.
31. Originally, *taʿzīr* did not include the death sentence under its penalties. However, in some exceptional cases, in which a substantial degree of harm emanates from

an offence, the death penalty is unavoidable. Nonetheless, disagreement between schools is evident regarding this issue. See ʿAbd Allah ibn Saʿid al-Dawāh, *Maqāṣid al-Sharīʿah fī ʿUqūbāt al-Taʿzīriyyah wa Tatbiquha al-Qada'iyyah fi Mahākim al-Mamlakah al-ʿArabiyyah al-Suʿudiyyah*, (dissertation in the Department of Criminal Justice, University of Nā'if, Riyādh, 2005), 126.

32. See ʿAbd al-ʿAzīz ʿAmīr, *al-Taʿzīr fī al- Sharīʿah al-Islāmiyyah*, (Qaherah: Dār al-Kitāb al-ʿArabiy bi Miṣr, 1955), 418, 445-448.
33. Muhammad al-Tāhir Ibn ʿĀshūr, *Ibn ʿÁshūr's Treatise on the Higher Objectives & Intent of Islamic Law*, Mohamed el-Tāhir el-Mesāwi (trans.), (London & Washington: IIIT, 2006), 334-337.
34. Cf., ʿAbd Allah ibn Sāʿid al-Dawāh, *Maqāṣid al-Sharīʿah fī ʿUqūbāt al-Taʿzīriyyah*, 154 -189; Saqr ibn Zaid al-Mu'im Ahmad, *Al-Maqāṣid al-Khaṣṣah li al-ʿUqūbāt fī al- Sharīʿah al-Islamiyyah wa al-Qanūn al-Wadʿi*, (doctoral thesis in the Department of Criminal Justice, University of Nā'if, Riyādh, 2009), 234.
35. ʿAbd Rahmān Al-Dārimiy, *Sunān al-Dārimiy*, Hussāin Hālim al-Dāraniy (ed.), (Riyādh: Dār al-Mughni li al-Nasyr wa al-Tawziʿ, 2000), v.3, 1438.
36. See Ibn Farhūn, *Tabṣirāt al-Hukkām*, v. 2, 219; Ibn Jawzi, *Dhamm al-Hawā*, 123.
37. Al-Baihaqi, *Sunān Al-Baihaqi, Book of Deposit (Kitāb al-Wadiʿah)*, Chapter '*La Dhamān ʿAla Mu'taman*', v. 6, 474.
38. See ʿAbd Allah ibn Muhammad ʿAli Khinin, "Ḍawābiṭ al-Taqdīr Al-ʿUqūbah al-Taʿzīriyyah" *Majallah al-Qadā'iyyah*, no. 1 (December, 2010), 75.
39. Ibid, 76.
40. See Muhammad Abu Zuhrah, *al-Jarīmah wa al-ʿUqūbah*, (Qaherah: Dār al-Fikr al-ʿArabiy, 1998), 179-180; ʿAbd al-Qadīr ʿAudah, *al-Tasyriʿ al-Jinā'iy al-Islāmiy: Muqāranah bi al-Qanūn al-Waḍʿiy*, (Beirūt: Dār al-Kitāb al-ʿArabiy), v.1, 149.
41. See Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law (Seventh Edition)*, (Oxford: Oxford University Press, 2013), 31.
42. Cf., Abu Zuhrah, *al-Jarīmah wa al-ʿUqūbah*, 179, 280.
43. The preferred opinion on this matter is that the extent of a *taʿzīr* punishment falling within the category (*jins*) of prescribed offences must not transcend the punishment stipulated in the text (*naṣṣ*). See Ibn Taimiyyah, *Siyāsah al-Syarʿiyyah fi Islāh al-Rāʿiy wa al-Raʿiyyah*, ʿAli ibn Muhammad al-ʿUmrān (ed.) (Saudi Arabia: Dār al-ʿAlam al-Fawā'id, n.d), 146-147.
44. See Ibn al-Qayyim al-Jawziyyah, *Iʿlām al-Muwāqiʿin ʿan Rabb al-ʿālamīn*, Mahsyūr bin Ḥassān (*tahqīq*), (Saudi Arabia: Dār Ibn Jawzi, 2002), v. 2, 122.
45. See Shihāb al-Dīn al-Qarāfi, *al-Zākhirah*, Muhammad Abu Khubzah (ed.) (Beirūt: Dār al-Gharb al-Islāmiy, 1994), v. 12, 119.
46. Cf., Abu Zuhrah, *al-Jarīmah wa al-ʿUqūbah*, 88.
47. Muhammad Sāim al-ʿAwa, *Fī Uṣūl al-Nizām al-Jinā'iy al-Islāmiy: Dirāsah al-Muqāranah*, (Qaherah: Nahdah Miṣr, 2016), 262.
48. Reported by Abu Dā'ūd, *Sunan Abu Da'ūd*, Book of *Hudūd*, Chapter '*Fi al-had Yasyfa' fī hi*', v.4, 133.
49. Cf., ʿAbd Allah ibn Muhammad ʿAli Khinin, "*Ḍawābiṭ al-Taqdīr*", 94.
50. Cf., Muhammad al-Khātib al-Sharbini, *Mughni Muhtaj*, 4, 192.
51. Ibrahim ibn Mūsa Abu Ishāq Al-Shāṭibi, *al-Muwāfaqāt fi Uṣūl al-Sharīʿah*, (ed.) ʿAbd Allah Drāz, (Beirūt : Dār al-Maʿrifah, 1997), vol.4, 194-195.

52. Cf., ʿAbd Allah ibn Muhammad ʿAli Khinin, "Ḍawābiṭ al-Taqdīr", 100.
53. See Muhammad Al-Amin al-Syanqithi, *Adwā' al-Bayān fi Idāh al-Qur'ān bi al-Qur'ān*, (Jeddah, Dār al-ʿAlam al-Fawā'id) v.3, 357.
54. According to the former President of the Malaysian Bar, Mr. Mah Weng Kwai, in his paper entitled "Sentencing Principles-Judicial Discretion and Mandatory Sentences," presented at the Commonwealth Law Conference, 1999, there are five sentencing principles which judges should bear in mind when delivering sentences: deterrence, rehabilitation, prevention, retribution, and just desert. Quoted in Ekmil Krisnawati et al., "Deterring Drug Trafficking With death Penalty: Has It Achieved Its Preventive Goals?", 3. Available online at http://versys.uitm.edu.my/prisma/view/viewPdf.php?pid=11709, (accessed on 31 September 2015).
55. See Ching. M. Ho, *Sentencing Practice in Malaysia*, (Petaling Jaya: Sweet & Maxwell, 2007), 30-35.
56. Yingyos Leechaianan & Dennis R. Longmire, "The Use of the Death Penalty for Drug Trafficking in the United States, Singapore, Malaysia, Indonesia and Thailand: A Comparative Legal Analysis" *Laws*, no. 2 (2013), 123-124.
57. Rick Lines, "A Most Serious Crime? – The Death Penalty for Drug Offences and International Human Right Law" *Amicus Journal*, no. 21 (April, 2010), 22.
58. See Shad Saleem Faruqi, *Death Penalty Losing Appeal*, available online at http://www.thestar.com.my/story/?file=%2F2010%2F11%2F17%2Fcolumnists%2Freflectingonthelaw%2F7441764, (accessed on 26 November 2015).
59. Elizabeth Zachariah, *Bill to abolish death penalty for drug offences on the cards, says law minister*, available online at http://www.themalaysianinsider.com/malaysia/article/bill-to-abolish-death-penalty-for-drug-offences-on-the-cards-says-law-minister, (accessed on 25 November 2015).
60. See Ekmil Krisnawati et al., "Death Penalty for Drug Trafficking: Impediments in Achieving the Intention of the Policymakers in Malaysia" *Proceeding of The International Conference on Social Science Research (ICSSR) 2013*, June 2013, Penang, 131.
61. See Nasreen Miza et al., "The Perils of Drug Trafficking: Endangering the Malay and Muslim Society" in Islamic Perspectives Relating to Business, Arts, Culture and Communication: Proceeding of the 1st ICIBACC 2014, Roaimah Omar et al. (edit), (New York & London: Springer, 2014), 200.
62. Michael Mumisa & Mohammad Habbash, *Shari'ah Law and the Death Penalty*, (London: Penal Reform International, 2015), 26.