



Islamic Model Penal Code

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The author invites Muslim Scholars to cooperate to enhance this model penal code either in length or in quality.

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Important Remarks

This Model Penal code focuses on *Hudud*, *Qisas* and a few examples of *Ta'zir* offenses. Rules of evidence naturally are not addressed in this code. However, it is vital to emphasize a few rules of evidence. The burden of proof in *Hudud* and *Qisas* offenses is beyond all doubt. Any doubt precludes the punishment of *Hudud* and *Qisas*. A legislature should enact parallel offenses-to *Hudud* and *Qisas* offenses- under *Ta'zir* category with a less rigid standard of proof. For example, a legislature should enact intentional homicide offense under *Qisas* category punishable by the death penalty. Death penalty may be imposed only if all Islamic requirements of proof are satisfied including two credible Muslims witnesses to the homicide -if the defendant is a Muslim- and there is no doubt whatsoever that the defendant has committed the crime. Also, the legislature should enact another offense of intentional homicide, under *Ta'zir* category of offenses, punishable by a less severe punishment than the death penalty, a term of imprisonment for example, if the Islamic rules of evidence for *Qisas* offenses are not satisfied. For example, if there is a trivial doubt that the defendant has committed homicide, he shall be convicted of intentional homicide punishable by imprisonment, because the Islamic rule of evidence holds that any

doubt precludes the prefixed punishment for *Hudud* and *Qisas* offenses. Similarly, a person charged with theft may be punished under *Ta'zir* category if there is a trivial doubt because such a trivial doubt is sufficient to preclude the punishment of theft under *Hudud* category of offenses.

Exculpatory rules in *Hudud* and *Qisas* offenses shall be constructed broadly in a manner that minimizes the liability under *Hudud* and *Qisas*. However, this policy may not be followed in *Ta'zir* offenses.

Parliament may legislate *Ta'zir* offenses as needed, guided by the general rules of Islamic jurisprudence and, in particular, jurisprudence of *Hudud* and *Qisas* offenses. This code lists a limited number of *Ta'zir* offenses as examples.

Table of Contents

Part I. General Provisions

Section 1.1 Preliminary

Section 1.2 Title, Effective Date and Jurisdiction

Section 1.03 Principles of Construction

Section 1.04 Classes of Offenses

Section 2. Burden of Proof in Criminal Trials

Section 3. General Principles of Liability

Section 3.1 Offense Element

Section 3.2 The Legality Element

Section 3.3 The Physical Element

Section 3.4 Knowledge as a Basis for Culpability

Section 3.5 The Mental Element: Actor's Culpable State of Mind.

Section 3.6 Causation: The Requirement of Contributory Link Between an Actor's Action and a Result.

Part II. Parties Responsibilities

Section 3.7 Parties to Crime and Criminal Conspiracy

Section 3.8 Non-Governmental Artificial Entity Culpability

Part III Defenses

2

Section 3.9 Intoxication

Section 3.10 Duress/Compulsion

Section 3.11 Superior Orders

Section 3.12 Consent

Section 3.13 Entrapment (*Tahreed sore'*)

Section 3.14 Self-Defense and Defense of Others

Section 3.15 Mental Illness and Diminished Capacity

Section 3.16 Young Age\ Infancy

Part IV. Incomplete Crimes

Section 3.17 Attempt

Part V. Offenses Involving Danger to the person: Qisas Offenses

Section 5 Criminal Homicide

Section 5.1 Intentional Homicide - Murder

Section 5.2 Causation

Section 5.3 Consent to Death

Section 5.4 Consent to Harm that Causes Death

Section 5.5 Intentional Homicide - Murder punishment

Section 5.6 Committing, Aiding, Abetting or Conspiring to commit Intentional Homicide Under Duress.

Section 6. Partial Defense to Intentional Homicide – Killing a Person Who is Subject to Death Penalty

Section 7. Quasi Intentional Homicide

Section 7.1 Quasi Intentional Homicide punishment

Section 8 Unintentional Killing - Mistake Killing

Section 8.1 Unintentional Killing - Mistake Killing Punishment

Section 9. Assault Causing Bodily Harm

Section 9.1 Intentional assault causing bodily harm

Section 9.2 Punishment for intentional assault causing bodily harm

Section 9.3. Quasi intentional assault causing bodily harm

Section 9.4. Punishment for Quasi Intentional Assault Causing Bodily Harm

Section 9.5. Mistake causing bodily harm

Section 9.6. Punishment for Mistake Causing Bodily Harm.

Section 10. Assault Causing Death of Unborn Child-feticide.

Section 10.1 An Unborn Child

Section 10.2 Intentional Feticide

Section 10.3 Mistake Killing of the Unborn Child

Section 10.4 Punishment for Assault Causing Death of Unborn Child-Feticide

Section 10.5 Assault on a Pregnant Woman That Does Not Cause Death of Unborn Child

Section 11. Assault Not Causing Bodily Harm

Part VI. *Hudud* Offenses

Section 12. Sexual Offenses

Section 12.1 Mental Elements in Sexual Offenses

Section 12.2 Consensual Illicit Sexual Behavior

Section 12.3 Broadcasting Sexual Acts

Section 12.4 Zina

Section 12.5 *Zina* Punishment

Section 12.6 The Act of the People of Lut

Section 12.7 Bestiality

Section 12.8 Zina, Bestiality and the Act of the People of Lut - Methods of Proof

Section 12.9. Excuses Precludes the Execution of Punishment of *Zina*, Bestiality and Act of the People of Lut Offenses

Section 13. Aggravated Insult - *Qazf* Punishable by *Hadd*

Section 13.1 Standing in Aggravated Insult

Section 13.2 Exemptions from Prosecution, Mitigating Circumstances and Pardoning the Offender.

4

Section 13.3 Proof of *Qazf* Punishable by *Hadd*

Section 13.4 *Qazf* by *Hadd* Rebutting Circumstances

- Section 13.5 Punishment for Qazf Punishable by *Hadd*
- Section 14. Insult. Qazf Punishable by Ta'zir
 - Section 14.1 *Qazf* Punishable by *Ta'zir* Punishment
- Section 15. Crime Against Religious Peace
 - Section 15.1 Defense for Crime Against Religious Peace
- Section 16. Crime Against Sacred Text, God and Prophets
- Section 17. Muslim Consumption of Intoxicants
- Section 18. Muslim Consumption of Intoxicant Methods of Proof
- Section 19. Public Intoxication
- Section 20. Public Intoxication Offenses Methods of Proof
- Section 21. Excuses That Preclude the Execution of Punishment for Intoxication and Public Intoxication Offenses
- Section 22. Theft Punishable by *Hadd*.
 - Section 22.1 Theft Punishable by *Hadd* Offense - Methods of Proof
 - Section 22.2 Punishment for Theft Punishable by *Hadd*
- Section 23 Theft Punishable by *Ta'zir*
 - Section 23.1 Theft Punishable by *Ta'zir* Punishment
- Section 24. Property's Interference of Use
 - Section 24.1 Property's Interference of Use - Aggravating Circumstances
- Section 25. Forceable Theft of a Property – *Hirabah*
 - Section 25.1 Forceable Theft of a Property Offense - Methods of Proof
 - Section 25.2 Excuses That Preclude the Execution of Punishment of Forceable Theft of a Property Offense.
 - Section 25.3 Homicide and Theft Occurring During the Commission of Forceable Theft of a Property Prior to Repentance.
- Section 26. Insurgency- *Baghi* 5
 - Section 26.1 Insurgency Punishment
- Section 27 Attempting Insurgency

Section 28 **Apostasy**

Section 29 **Excuses That Preclude the Execution of Punishment in *Hudud* Offenses**

Section 30 **Partial Defense to *Hudud* or *Qisas* Offenses**

The Model Penal Code

Part I. General Provisions

Section 1.1 Preliminary

(1) A Citizen of the State is a Muslim who resides in the State and a non-Muslim, *Dhimmi*, who resides in the State and accepts the State's social contract, *Dhimmi* contract, including its laws and norms.

(2) A Non-citizen temporary visitor (*Mosta'men/ Mo'ahed*) is a temporary visitor who enters the Islamic State under the Safety Contract. The Safety Contract is a reciprocal contract between the Islamic State and the visitor that specifies duties and obligations of both parties including the visitor's right to security for himself and his property and the visitor's obligations to respect and uphold the law of the land. Obtaining the State's visa implies that the temporary visitor accepts the laws and customs of the State.

(3) A Non-citizen (*Harbi*) is a person who does not reside in the State and his country of citizenship has no treaty with the State that would grant *Harbi* treatment similar to that of citizens of the State with respect to security of a person.

Section 1.2 Title, Effective Date and Jurisdiction

(1) This Act is called the Penal Code and it shall become effective immediately after publication.

(2) The Code does not apply to offenses committed prior to its publication date; those offenses shall be governed by the prior law.

(3) The Penal Code is applicable to all offenses committed in the State regardless of the offender's status in the State (i.e. citizen, temporary visitor).

(4) The Penal Code is applicable to all offenses committed by a citizen outside the State even though the offense is permissible where committed unless a certain provision of this code expressly declares otherwise.

(5) The Penal Code is applicable to all offenses committed by a non-citizen outside the State when a certain provision of this code expressly declares so or when the offender's conduct shall cause harm to the State.

(6) The Penal Code is not applicable for offenses committed outside the State if committed by:

(a) A Non-Muslim citizen who departed the State permanently, renounced the *Dhimmi* contract, and expressed a desire not to return to the State.

(b) A citizen who was a Muslim but had renounced Islam at the time the offense was committed outside the State; even if he later reverted to Islam and returned to the State.

(7) The Penal Code is not applicable for offenses committed by Non-Muslim citizen who committed offenses in the State when certain provisions of this code expressly so declare.

Explanatory Note

This section identifies the individuals who are subject to Islamic penal law based on Islamic scholar's classifications of individuals who reside inside and outside the State. See 10 *Ibn Qudamah, Al-Mughni wa Al-Sharh Al-Kabir* at 72. Generally, citizens and temporary visitors are subject to State's penal law. A Non-Muslim citizen might be exempt from liability in a number of offenses such as in trade or consumption of alcohol. Generally, a *Harbi* is not subject to the State's penal law unless the legislature realizes the need to do so. For example, anyone, including *Harbi*, who is accused of offenses involving the State's security, international humanitarian law or international human rights shall be subject to the State's Penal code. This Jurisdictional limitation embraces the view of Shafi'i, *Hanbali* and *Maliki* schools of thought. See 9 *Ibn Qudamah, Al-Mughni wa Al-Sharh Al-Kabir* at 383.

Section 1.3 Principles of Construction

(1) The code is based on Islamic Law. Crimes and punishments for *Hudud* and *Qisas* categories are prefixed as defined in the *Qur'an* and *Sunnah* while crimes and punishments for *Ta'zir* are flexible to respond to social needs and to ensure sufficient protection for life, religion, progeny, intellect, and property.

(2) Liability is personal.

(3) No statement shall be attributed to a person who remains silent. The Defendant's silence is considered a denial.

(4) Fundamental Islamic Human Rights prevail over any law including the Penal code. Any apparent conflict between this code and Islamic human rights shall be resolved in favor of Islamic Human Rights.

(5) The punishment is not beneficial in itself nor is it favored; rather it is important to deter future crimes against the Islamic legitimate interest, i.e. protection of life, religion, progeny, intellect, and property.

(6) In some instances, the advancement of Islamic law goals may sacrifice a particular individual's interest, in the realization of future societal gains.

(7) The provisions of the Code shall be construed according to the plain, ordinary meaning of the words, taking into consideration rules of grammar, and the purpose of the provisions. When the language lends itself to differing constructions, it shall be interpreted to further the general purposes stated in the Section, the special purposes of the particular provision involved and to advance the most general and lasting interests with a view towards the long-term impact for promoting the five interests aforementioned.

(8) Some offenses might produce some benefits, such as consumption of alcohol, but the harm produced greatly outweighs the benefits. Unambiguous and definitive *Qur'an* and *Sunnah* principles, expressed and implied, are the criteria to determine the harm incurred and the benefits sought. Ambiguous and speculative *Qur'an* and *Sunnah* principles, expressed and implied, may provide interpretational guidance when unambiguous and definitive *Qur'an* and *Sunnah* principles are not present.

(9) People's desires and views regarding defining an offense or defense may not necessarily align with the interest protected in Islamic law. A judge should not favor popular views or the commands of the executive branch of the government at the expense of *Qur'an* and *Sunnah* principles.

(10) The application of this code is subject to the Rule of Law doctrine.

(11) The code safeguards individuals by invoking Islamic principles listed in *Quran* and *Sunnah*, against excessive, disproportionate or arbitrary punishment.

(12) All provisions in the code shall be applied prospectively. The *Qur'an* prohibits retroactive application of punishment.

(13) There is no crime and no punishment except with breach of law. There is no crime and no punishment without fair warning. Any doubt regarding the nature of the conduct that constitutes an offense shall be construed in favor of the accused.

Section 1.3 (1) emphasizes the supremacy of Islamic law and its limitations. While the crimes of *Hudud* and *Qisas* are prefixed, its punishments may be suspended temporarily if the circumstances warrant. The Caliph Omar Ibn Khaṭṭāb suspended the punishment for larceny offense when famine struck the Islamic State.

Section 1.3 (2) declares that Islamic criminal law does not recognize any form of collective liability. The *Qur'an* affirms: "No bearer of burdens shall be made to bear the burden of another." (35:18). No person shall be liable because of kinship or association of its lack thereof. See also *Qur'an* (17:15).

Section 1.3(3) adopts a well-established scholarly principle that defendants' silence shall be construed in favor of the defendant. A judge can neither infer guilt from the defendant's silence nor attribute a statement to the defendant because of his silence. Section 3.1 creates a presumption that defendant's silence shall be construed as denial of a wrongdoing. See *Al-Ashbah wa-al-Nazai'r, ibn Najim al-Hanafi* at 129 and *Al-Ashbah wa-al-Nazai'r, Jalal al-Din al-Suyuti* at 142. See also, Art. 67 & 1822, *Al-Majalla AL-Ahkam Al-Aaliyyah* (The Ottoman Courts Manual)

Section 1.3 (4) recognizes that Islamic fundamental human rights is the supreme law of the land. In case of conflict between a penal code provision and fundamental Islamic human rights, the latter shall prevail. For example: Islam has recognized the right to the basic necessities of life. See *Qur'an* "And in their wealth there is acknowledged right for the needy and the destitute." (51:19). When an actor fails to find the necessities of life for himself or a family member and accordingly commits a nonviolent crime (e.g. theft) to satisfy the need, the actor may not be liable.

Section 1.3 (5) adopted Imam Al-Shatibi's theory of the higher objectives of Islamic Law; namely, the interests worth protection are : life, religion, progeny, intellect, and property. Interpretation of any provisions in this code shall be construed widely enough to protect the former interests and narrowly enough to exclude other, non-listed interests. Professor Abu Zahra in, *Al-Jarimah wa al-Uqubah fi al-Fiqh al-Islami.*, explained the interest ought to be thoroughly protected.

Section 1.3. (10) emphasizes the Rule of Law doctrine. Law enforcement and judges must apply the law equally to all individuals. A famous authentic *hadith* declares this rule as follows: (Aisha, may Allah be pleased with her, reported that the Qurayshi people were highly concerned about the Makhzoumi woman who stole, so they suggested Usama ibn Zayd be delegated to plead with the Prophet (peace be upon him), for her. The Prophet, (peace be upon him), said: "Are you pleading against Allah's prescriptions?" Then he said: "What caused people before you to perish is that when a noble man steals, they let him go, but when a poor man steals, they punished him. I swear to Allah if Fatima, my daughter, steals I will cut her hand.") Sahih Al-Bukhari.

Section 1.3. (12) emphasizes the prospective application of punishments doctrine. This doctrine has been frequently affirmed in the *Qur'an*, in verses, (17:15), (4:22), (5:95).

Section 1.3(13) emphasize the *Qur'an* doctrine that a punishment is not warranted unless fair warning of the prohibition has been declared. This doctrine necessitates that there is no crime and no punishment without a law that has been communicated to the people. See *Qur'an* 17:15 (... And no bearer of burdens will bear the burden of another. And never would We punish until We sent a messenger.)

Section 1.4 Classes of Offenses

(1) *Hudud*: *Hudud* crimes are *Qazf* (Insult), *Zina* (fornication or adultery), apostasy, *Baghi* (Insurgency), voluntary intoxication, *Hirabah* (forceable theft), and theft.

(2) *Qisas*: *Qisas* crimes encompass homicide and bodily harm offenses.

(3) *Ta'zir*: *Ta'zir* offenses encompass all possible violations that are not enumerated under *Hudud* and *Qisas* offenses and in which there are no prefixed punishments in the *Qur'an* or *Sunnah*.

Explanatory Notes

Section 1.4. (1). Scholars debated apostasy as a crime of *Hudud*. It is up to the legislature in a given jurisdiction to make a determination on apostasy as a crime of *Hudud*, a crime of *Ta'zir* or no crime at all. Political pressure, whether internal or external, whims of the ruler, or other factors unrelated to Islamic Law should not influence the legislature's decision.

The category of *Ta'zir* offenses are subject to the general punishment's guidelines listed in *Qur'an* and *Sunnah*.

Section 2 Burden of Proof in Criminal Trials

2.1 Burden of proof in *Hudud* and *Qisas* offenses: The prosecutor shall prove every element of the offense beyond all doubt. Any doubt precludes *Hudud* and *Qisas* prefixed punishments and may be substituted with *Ta'zir* punishment.

2.2 Burden of Proof in *Ta'zir* offenses: the prosecutor shall prove every element of the offense to the satisfaction of the court. A judge must be satisfied that the defendant had committed every element of the offense. An insignificant doubt shall not preclude the punishment.

Explanatory Notes

10

Section 2 adopts the majority of scholars' opinion that any doubt precludes the punishment in *Hudud* and *Qisas* offenses while minor doubt does not preclude the punishment in *Ta'zir*

offenses. This opinion is based on a *Hadith* that affirms that *Hudud* punishments should be averted by the slightest of doubts or ambiguities. See *Al-Ashbah wa-al-Nazai'r*, Jalal al-Din al-Suyuti and *Al-Ashbah wa-al-Nazai'r*, ibn Najim al-Hanafi. See also 8 *Nihayat Al-Muhtaj Ila Sharah Al-Minhaj* at 16, Imam Shams al-Din Muhammad b. Ahmed al-Ramli, See also, Art.4, *Al-Majalla AL- Ahkam Al-Adliyyah* (The Ottoman Courts Manual)

Section 3. General Principles of Liability

Section 3.1 Offense Element

Any Offense Consists of Three Elements: Legality Element (*Rukn shari'*), Physical Element and Mental Element.

Section 3.2 The Legality Element

The legality element is an indispensable requirement in every offense. The legality element affirms that there is no crime and no punishment without a law. The Legality element consists of a defining law (*hukm taklifi*) and declaratory law (*hukm wad'i*).

(1) The defining law (*hukm taklifi*) is the law that permits, encourages, commands, detests or prohibits an act: There is no crime unless the law explicitly commands performing an act or refraining from committing an act.

(2) The declaratory law (*hukm wad'i*) is the law which declares the purpose(s), the requirement(s) or preclusions for the punishment: There is no punishment unless its purpose(s) and requirement(s) are present and preclusions are lacking.

Section 3.3 The Physical Element

The physical element requires that the act must be voluntary and blameworthy.

(1) Voluntariness:

(a) A person is not guilty of an offense unless he acts voluntarily or fails to act (when there is a legal duty to act). The act can be involuntary in a variety of situations including bodily movement during unconsciousness, automatism or a reflex.

(b) Involuntariness precludes the punishment but does not preclude financial compensation "*Diyā*".

(c) Lack of voluntariness is not a defense if the actor's involuntariness stems from his recklessness.

(2) Blameworthiness:

11

(a) The act or omission commanded by law must be possible.

(b) The actor is capable of acting or refraining from acting according to law.

Section 3.4 Knowledge as a Basis for Culpability

As a general rule, knowledge of the prohibitory norm is an indispensable requirement of every offense. A punishment is warranted only if the actor is aware of the prohibition(s). Lack of knowledge of the prohibitory norm is not an excuse if acquiring such knowledge is attainable. However, lack of knowledge of the prohibition- if acquiring such knowledge is attainable- might be excusable in unusual and extraordinary circumstances.

Section 3.5 The Mental Element: Actor's Culpable State of Mind

(1) Intentional conduct in all offenses excluding homicide and causing bodily harm means that the actor had intention to do the prohibited act.

(2) Intentional conduct in homicide and bodily harm means that the actor had the intention to do the prohibited act in order to achieve the specific consequence of death or bodily harm.

(3) Quasi-intentional conduct:

(a) In homicide, this occurs when an actor intends to cause harm with no intent to kill but the death occurs because of the actor's act.

(b) In bodily harm, this occurs when an actor intends to cause harm but did not desire the particular bodily harm that occurred because of his action.

(c) Quasi-intentional conduct is less culpable than intentional conduct. There is no death penalty for quasi-intentional conduct.

(d) Quasi-intentional conduct exists only in homicide and bodily harm offenses.

(4) Mistaken conduct.

Mistaken conduct occurs when the actor intended to do an act, without intention to violate the prohibitory norm, but a harm occurred because of the actor's recklessness or negligence.

(5) Quasi-mistaken conduct.

(a) Quasi-mistaken conduct occurs when the actor did not intend to do an act, and did not intend to violate the prohibitory norm but a harm occurred because of the actor's recklessness or negligence.

(b) Quasi-mistaken conduct is less culpable than mistaken conduct because in mistaken conduct the actor intended to act and the harm occurred because of his recklessness or negligence while in Quasi-mistaken conduct, the actor did not intend to act though the harm occurred because of his recklessness or negligence.

(6) Criminal liability in intentional and Quasi-intentional conduct stems from the actor's intention to violate the prohibitory norm. Criminal liability in mistaken and Quasi-mistaken conduct stems from the actor's recklessness or negligence.

Section 3.6 Causation: The Requirement of Contributory Link Between an Actor's Action and a Result

1. Causation is not a requirement in every offence. It is required only when a specific result is part of the definition of the offence in order to prove that the specific result would not have occurred but for the act of the actor.
2. An actor is liable for his action's results if:
 - A. The result is a natural consequence of the actor's actions. For instance, an actor is liable for murder when he intentionally injures the victim with intent to kill him and such injury ultimately causes death.
 - B. The actor's action is the significant factor, among other external factors, in causing the result. For instance, an actor is liable for murder when he intentionally injures a wounded victim with intent to kill him and death occurs.
 - C. The result occurred due to external factors but the result would not have occurred but for the actor's action. For instance, an actor is liable for murder when he intentionally injures a victim with intent to kill him and death occurs due to lack of proper medical care or medical negligence.
 - D. The result is a natural consequence of the actor's actions given the victim's infirmity or young age. For instance, an actor is liable for murder when he intentionally injures a victim with infirmity or of young age with intent to kill, so long as the actor is aware of the infirmity or the young age of the victim, although death would not have occurred but for the victim's infirmity or youth.
3. Causation severance: An actor is not liable for his actions if there is a significant intervening factor that severed the relationship between the actor's action and the result. For instance, an actor is not liable for murder when he intentionally caused insignificant injury to the victim and another person caused significant injury that caused death.
4. The aforementioned causation rules apply regardless of whether the actor's action(s) occurred by commission or omission.

Explanatory Notes

Section 3.2 reaffirms a rooted Islamic jurisprudence principle of the legality element (*Rukn shari'*) in offenses including its elements (*hukm taklifi*) and (*hukm wad'i*). See *Abdul Qadir Audah, 1 Al-Tashri' Al-Jinaa'i Al-Islami* at 113-5.

Section 3.3 rearticulates the doctrine that only voluntary actions incur liability. See *Qur'an* (2:286). See also the *Hadith*: The Prophet (peace be upon him) said: There are three (persons) whose actions are not recorded: a sleeper till he awakes, a boy till he reaches puberty, and a

lunatic till he comes to reason. Scholars explained this doctrine in various terms. For example, See *Zayn Al-Dīn ibn Ibrāhīm ibn Nujaym* in 9 *al-Baḥr al-rā'iq sharḥ Kanz al-daqa'iq* at 15. The author contended that if a man falls on another killing him, the offender shall be liable for *Diya* only. See also *Abdul Qadir Audah*, 1 *al-Tashri' al-jinaa'i al-islami* at 590-2.

Section 3.4 reaffirms the Islamic principle that no punishment is warranted without fair warning. The *Quran* (17:15), declares (never would We punish until We sent a messenger). Lack of knowledge of the prohibition is excusable only in extraordinary and unusual circumstances such as in the case of a temporary visitor to the Muslim State or a new convert to Islam who is unaware that selling alcohol to Muslims is prohibited.

Sections 3.5(4) & (5) deals with Mistake. Mistaken conduct can be divided into mistake in an act and mistake in desire. Mistake in an act occurs when the actor intended his act - For example, shooting at a bird- while not intending to cause a harm to a human, and erroneously killing or harming a human being. Mistake in desire occurs when the actor intended to do an act to achieve a particular consequence - For example, shooting to kill an enemy at war- but missing and achieving a different consequence such as killing a fellow soldier.

Part II. Parties Responsibilities

Section 3.7 Parties to Crime and Criminal Conspiracy

A person is guilty of an offense if:

1. He is a principal offender or direct participant (*Shereek Mobasher*):
 - A. He committed or omitted the prohibited act by himself or with aid of another, in full or in part; or
 - B. He directs a person who lacks criminal responsibility or forces another by duress or deception to commit the crime.
2. He is a partner in crime (*Shereek Motasbab*), if he:
 - A. Aids the commission of a crime, or
 - B. Instigates, incites, abets or encourages the commission of a crime, or
 - C. Conspires with the principle offender to commit a crime.
3. The punishment for a direct participant is the same as for the principal offender.
4. The punishment for a partner in crime is the same as for the punishment of the principal offender with respect to *Ta'zir* offenses.
5. The punishment for a partner in crime is not the same as the punishment for the principal offender in *Hudud* and *Qisas* crimes; it must be reduced to a *Ta'zir* punishment.
6. A direct participant (*Shereek Mobasher*) is liable for the consequences he intended to occur only.
7. The mental element required for conviction of a partner in crime is having knowledge of the crime ahead of time and a desire to aid, abet, incite, instigate or encourage the commission of the crime or alternatively conspiring with the principal offender to commit an offense coupled with a desire to effectuate the offense.

8. The partner in crime is liable for all foreseeable consequences of his participation even if he did not intend the consequence. If the partner in crime conspired for the commission of the crime but did not participate in the commission of the crime, he is liable for conspiracy only.
9. Any doubts with respect to the mental element or physical element in crime shall preclude the punishments of *Hudud* or *Qisas*.
10. Voluntary desistance of co-conspirator or the partner who intended the commission of the offense precludes the punishment if the crime is not committed.
11. Voluntary desistance of the partner in crime who instigates, incites, abets or encourages the commission of a crime precludes the punishment if the partner proves that he neutralized the effects of his participation in the crime.
12. Any defense to a party to a crime shall not affect the responsibilities of other parties.

Explanatory Notes

This section limits the application of *Hudud* and *Qisas* punishments to the principal offender and direct participant only because partnership in crime- as distinguished from principle offender or direct participant - actions trigger doubt that is sufficient to prevent the punishment for *Hudud* or *Qisas*. This approach is a direct application of a *hadith* that affirms that *Hudud* punishments should be averted by the slightest doubt or ambiguity.

Section 3.7.1.B adopts the opinion of the scholars Malek, Shafi'I and Ahmed. *See Ibn Qudamah, 9 Al-Mughni Wa Al-Sharh al-Kabir* at 331.

Section 3.7.8 expands the scope of liability for a partner in crime, making him liable for actions of the principal offender even if he did not intend the action to occur. For example, the partner in crime who encourages another to only assault the victim, is liable for homicide if death occurs albeit the partner in crime did not intend death.

Section 3.8 Non-Governmental Artificial Entity Culpability

1. A non-governmental artificial entity may be convicted of an offense if the conduct is performed by an employee of the entity acting on its behalf within the scope of his employment and for the entity's benefit regardless if the conduct was authorized, requested, performed or recklessly tolerated by the entity's administration.
2. A non-governmental artificial entity's liability does not preclude the employee's liability. The entity's employee remains personally liable for their actions irrespective if the employee's conduct was done exclusively for the benefit of or to harm the entity.
3. A non-governmental artificial entity may be convicted of any offense listed in this code.
4. A non-governmental artificial entity is liable for deliberate bankruptcy which is intended to harm others.
5. The mental element required for convicting the entity is assumed when the entity's employee intentionally, knowingly, recklessly or negligently caused harm to an individual or to society at large.

6. Depending on the gravity of the offense(s) committed by an entity, a judge may order the entity to pay a fine or restitution. A judge may also order an entity to be dissolved or to be broken down into multiple competitive entities if the societal welfare so requires.

Explanatory Note

Islamic law recognizes an artificial entity as an independent entity from those who administer it. Accordingly, the artificial entity can be liable and subject to criminal sanction such as fine or dissolution. This is especially true if an entity's conduct causes harm to an individual(s) or society at large.

Part III Defenses

Section 3.9 Intoxication

1. Intoxication is defined as the diminishing mental or physical capacities of a person as a result of the introduction of an intoxicant substance into the body.
2. Intoxication is either voluntary (self-induced) or involuntary.
 - A. Voluntary, self-induced, intoxication occurs when an actor knowingly introduces an intoxicant into his body without lawful excuse.
 - B. Involuntary intoxication occurs when another person introduces an intoxicant substance into the actor's body without the actor's knowledge or permission; it may also occur with the actor's permission, if the actor has no knowledge of its intoxicating effect or if an actor introduces the intoxicant himself into his body without knowing its intoxicating effect.
3. Voluntary intoxication is not a defense.
4. Involuntary intoxication is a complete defense that exculpates the actor from criminal liability.
5. Voluntary intoxication for the purpose of committing a crime is an aggravating circumstance that warrants a more severe punishment.
6. Voluntary intoxication for Muslims is a crime.
7. The sale, consumption, manufacture, transportation, presentation or derivation of benefit from the sale of intoxicants to a Muslim is a crime punishable by a fine not less than... and not exceeding ... and/ or imprisonment for a term not less thanand not exceeding ... or whipping numbering stripes.
8. No less than two credible Muslim witnesses' testimonies or an uncoerced confession suffice for conviction for offenses listed in subsection (7).

Section 3.10 Duress/Compulsion

1. Defense of duress excuses from liability the actor who had engaged in a criminal conduct when:

- A. The actor was subject to expressed or implied unlawful threat of serious physical harm or serious financial loss; and
- B. Threat of harm was sufficient to negate the actor's meaningful consent to commit the prohibited act; and
- C. The criminal conduct committed under duress was proportionate to the threat; and
- D. The threat was from a human being to the actor or close relative; and
- E. The threat was an imminent threat; and
- F. The person who threatened the actor was capable of carrying out his threat; and
- G. The actor had a well-grounded fear that the threat would be carried out if he did not comply and commit the prohibited act; and
- H. There is no safe avenue of escape for the actor but to commit the prohibited act to avoid execution of the threat; and
- I. The actor has mitigated the harm caused by his conduct under duress by committing the lesser harm.

2. Duress is not a defense to homicide and physical injury.

Explanatory Note

Islamic law has recognized duress as an excuse from liability according to the *Hadith* "Verily Allah has pardoned for me my ummah: their mistakes, their forgetfulness, and that which they have been forced to do under duress." Hasan hadith reported by Ibn Majah and Al-Bayhaqi. For defense of duress, generally see *Muhammad Amin Ibn Abidin (Hashiet ibn Abidin)* and see also *Abdul Qadir Audah, 1 al-Tashri' al-jinaa'i al-islami* at 563-577.

Subsection 3.10.1 (A) adopts the Maliki, Shafei, and Hanbali scholars' opinions that neither the threat of insult or defamation nor the threat of moderate financial loss suffices for the defense. Any threat of lawful physical harm or lawful financial harm is not a defense. For example, threat to arrest a person sentenced to imprisonment or to enforce a judgment against a person with serious financial implications does not qualify the actor to use defense of duress. The threat of harm can be implied in a variety of situations including a command from a State agent or public employee. The threat may provide a valid defense if it is known that violating the command may result in death or serious bodily harm. A husband's command to his wife is a sufficient threat if the wife thought that she would be subject to death or serious bodily harm if she did not comply with the husband's command.

Subsection 3.10.1 (b) asserts that the degree of the threat must be sufficient to deprive the actor from providing a meaningful consent¹⁷ to commit the prohibited act. This is a subjective matter and a question of fact that should be left to the judge to decide depending on the individual characteristics of the actor, such as the actor's age, gender, level of sophistication and education.

Subsection 3.10.1 (c) emphasizes the importance of proportionality of the threat and the prohibited act performed. For example, the threat of moderate violence is insufficient for committing serious bodily harm but it can be a defense in the case of unlawful intoxication.

Subsection 3.10.2 adopts Maliki, Shafei, and Hanbali scholars' opinions only. Hanafy scholars allowed the defense of duress for all offenses including homicide. See *Muhammad Abu Zahra, al-'Uqūbah* (the punishment) at 361.

Section 3.11 Superior Orders

It is a full defense that a government employee - including, but not limited to, military and law enforcement individuals – was following superior orders when he performed a conduct that constitutes an offense, providing that the actor does no more than execute an order of his superior and that he does not know that the conduct that constitutes the offense is unlawful under Islamic law.

Explanatory Note

Section 3.11 establishes the defense of superior orders. The actor must do no more than execute an order of his superior in government. In addition, he must not know that the order is unlawful under Islamic law. Any government employee, whether in the military, law enforcement or any other governmental sector, who follows his superiors' orders and commits an offense shall be liable for his actions if he knew that the superior's orders constituted a violation of Islamic law. The Prophet said, "A Muslim has to listen to and obey (the order of his ruler) whether he likes it or not, as long as his orders involve not one in disobedience (to Allah), but if an act of disobedience (to Allah) is imposed one should not listen to it or obey it. *Sahih al-Bukhari*.

Section 3.12 Consent

- (1) In general, the consent of the victim to the conduct charged to constitute an offense is not a defense unless consent negates an element of the offense.
- (2) Consent to bodily injury in a necessary medical procedure conducted by qualified individuals is not an offense. The act of bodily injury is justifiable so long as it is necessary in the medical procedures.
- (3) Unintentional death occurring as a consequence of consent to bodily injury in a necessary medical procedure conducted by qualified individuals is not an offense.
- (4) In non-medical procedures, consent to bodily injury precludes the punishment while the act of bodily injury remains unlawful.
- (5) In non-medical procedures, consent to bodily injury that causes death is not a defense and it is punishable by a term of imprisonment not less than ...and not exceeding ... and/or fine not less than ... and not exceeding....
- (6) Consent of the victim to death is not a defense, rather, it is a mitigating circumstance that reduces the punishment to *Diya* of

- (7) Mutual combat is not a defense. Injuries or death occurring because of the combat shall be subject to the punishments stated in subsection 4, 5 and 6.
- (8) Expressed and implied consent is a defense for bodily injury that is reasonably foreseeable in a lawful competitive sport.
- (9) Consent is ineffective if:
 - (a) It was given by a person unauthorized to consent.
 - (b) A product of mental infirmities such as mental disorder or intoxication.
 - (c) Given by a person under the age maturity.
 - (d) Was a product of duress, misrepresentation or deception.
 - (e) Was uninformed. For the consent to be effective, the victim must be aware of the nature, scope and possible consequences of his consent.

Explanatory Note

Subsection (1) establishes the general rule of consent under Islamic law; that consent is not a defense unless consent negates an element of the offense such as consent to take the property when an actor is accused of theft offense.

Subsections (2) & (3) establishes a long-standing rule in Islamic law that consent in medical treatment negates criminal liability arising from bodily injury or death as a consequence of the treatment providing that death was not intentional and the treatment was conducted by qualified individuals. Other legislations regulating medical professions shall define the meaning of qualified individuals.

Subsection (4) adopts *Abu Hanifa* and *Shafi'i* school of thoughts' opinions.

Subsection (5) is a *Ta'zir* punishment and it adopts the opinion of some of *Shafi'i* scholars.

Subsection (7) is a direct application of the *Hadith* Abu Bakrah Nufaī' ibn al-Hārith Ath-Thaqafi (may Allah be pleased with him) reported that the Prophet (may Allah's peace and blessings be upon him) said: "When two Muslims meet to fight each other with their swords, both the killer and the killed are doomed to Hell." I said: "O Messenger of Allah, that is the case with the killer, but what about the one killed?" He replied: "Indeed, he was keen to kill his companion.") Al-Bukhari and Muslim.

Section 3.13 Entrapment (*Tahreed sore'*)

- (1) Entrapment is a complete defense excusing the defendant when:
 - (a) A law enforcement official or a person acting in cooperation with the official encourages or induces another person to engage in conduct that constitutes an offence and;
 - (b) the inducement or encouragement was not a good faith inquiry to prevent future crime, seize evidence or apprehend criminals and;
 - (c) the law enforcement official or a person acting in cooperation with such an official has no intention to complete the offense.

- (2) A law enforcement official or a person acting in cooperation with the official who induces or encourages the commission of an offense is liable for an offense punishable by the same punishment of the offense induced if committed if:
- (a) He was acting in bad faith and;
 - (b) He induced the commission of the offense without aiming to prevent future crime, seize evidence or apprehend criminals.

Explanatory Note

Entrapment, *Tahreed sore'*, was not addressed by Islamic law scholars in particular but it falls generally under the general rules of parties to offenses, *Shereek Motasbab*, as well as the general rules of fairness of Islamic law. The defense of entrapment exonerates defendants who would not have committed the crime but for law enforcement inducement.

Subsections 3.13. 1 (a) establishes the first condition for successful defense of entrapment - that law enforcement or its agents actually induced the commission of the offense; without such inducement, the offense would not have been committed.

Subsections 3.13. 1 (b) establishes an important rule that law enforcement inquiries conducted in good faith are permissible and shall not constitute entrapment. For example, law enforcement purchasing narcotics from a known drug dealer is not an entrapment because the dealer would sell it to any person indiscriminately. This should be distinguished from the case of law enforcement inducing an ordinary citizen to purchase narcotics from a dealer in order to apprehend that citizen red-handed. In the former case, the drug dealer would have engaged in his criminal activities regardless of law enforcement's attempt to purchase the narcotic. In the latter case, the ordinary citizen would not have committed the crime but for the incitement of law enforcement officials.

Subsections 3.13. 1 (c) establishes that if a law enforcement official actually intended to complete an offense, he is no longer acting in his official capacity and is liable to a crime. Accordingly, when a law enforcement official and a citizen agree to commit an offense, both the citizen and the law enforcement official are parties to the crime and the defense of entrapment is not available.

Subsections 3.13. 2 establishes an important doctrine that law enforcement officials' role is to apprehend criminals, seize evidence and prevent future crimes. They should not manufacture evidence nor induce ordinary citizens to commit crimes in order to receive a reward or recognition. If they do so, they are liable to the same punishment for the crime they induced to be committed. See *Qur'an* (16:126) (If you retaliate, then let it be equivalent to what you have suffered. But if you patiently endure, it is certainly best for those who are patient.)

Section 3.14 Self-Defense and Defense of Others

An actor may use reasonable force necessary to repel the assailant's harm to himself, to another or to protect a property he is entitled to protect, providing all the following are true:

1. The actor was subject to illegitimate aggression.
2. The aggression was immediate or imminent.
3. There was no other alternative means to repel the aggression but the use of force.
4. The force used was proportionate to the aggression.
5. The actor's justifiable use of force was limited to repelling the aggressive force.
Cessation of aggressive force necessitates termination of the actor's use of force.
6. The actor used force with the sole intent to repel the aggression.
7. The force used to repel the aggression is justified against the aggressor only, not other innocent individuals.

Explanatory Notes

Subsections 3.14.1 establishes that an actor is not entitled to the defense if he used force against a legitimate force, for example, an actor should not use force against law enforcement who did not exceed their authority. An actor should not use force against a person who has a legitimate case of self-defense. An actor may use force to protect a person from harming himself or destroying that person property.

Subsections 3.14.2 establishes the principle that the actor's use of legitimate force is limited to immediate or imminent aggressive force. This necessarily excludes the actor's use of force to repel future or speculative aggressive force.

Subsections 3.14.3 establishes that if there are other means to escape from the aggression such as calling for help, notifying the authorities or simply retreating safely, an actor is not justified in using force to repel aggression.

Subsections 3.14.4 establishes that the actor's use of disproportionate force is not justified and is considered a new aggression that justifies using force to repel it.

Subsections 3.14.5 establishes that the actor's use of legitimate force can continue so long as the aggression continues. Once an aggressor halts his attack and withdraws, the initial defender has no justification for continued use of force or for following the former aggressor to attack him. If a person attacks the former aggressor after cessation of the aggression, the former aggressor may use force to defend himself. However, if the former aggressor had committed theft, the actor or a person authorized to protect the stolen property is justified to follow the aggressor to retrieve the property.

Subsections 3.14.6 establishes that the actor who uses force to repel aggression must possess intent to use only necessary force to repel the aggression. If an actor exploits the case of self-defense and intends to harm the aggressor for another purpose other than repelling the aggression, he is not²¹ entitled to the defense.

Subsections 3.14.7 establishes the doctrine that the actor who utilizes defensive force is liable for his actions against innocent others if he misuses the force because of recklessness or negligence.

Section 3.15 Mental Illness and Diminished Capacity

- (1) A person is not responsible for criminal conduct if, at the time of such conduct, as a result of mental illness or diminished capacity, he lacks complete awareness of the criminality of his conduct or lacks the free will to conform his conduct to law.
- (2) A person is unfit to stand trial, if at that time, he suffers from mental illness or diminished capacity, that deprives him from complete awareness of the proceedings, nature of the charges, outcome of trial or ability to present his defense. When a person is found to be unfit to stand trial, he shall be released immediately.
- (3) Diminished capacity is a mental state akin to the mental state of a child under the age of discretion.
- (4) Evidence of mental illness or diminished capacity that reduces awareness or free will but does not deprive a person of complete awareness or free will raises a doubt sufficient to prevent the application of *Hudud* and *Qisas* punishments. A substituted *Ta'zir* punishment may be instituted if the circumstances warrant.

Explanatory Notes

Free will and complete awareness are indispensable requirements to establish criminal liability in Islamic law. When mental illness negates either requirement, criminal liability ceases to exist.

Awareness is a matter of degree. Section 3.15 employs the term awareness in the sense of the final stage of comprehension of the nature of a person's conduct, its quality, its consequences and the surrounding circumstances.

Section 3.15.2 adopts the Malaki and Hanafi perspective that mental illness or diminished capacity prevents trial or infliction of the punishment.

Section 3.15.4 is a direct application of the Islamic law principle that any doubt precludes the punishment of *Hudud* or *Qisas*.

Section 3.16 Young Age\ Infancy

- (1) a child less than seven years of age is not criminally responsible for any conduct.
- (2) A youth older than seven years and under eighteen years of age, upon conviction of an offense, is not subject to ordinary punishments of *Hudud*, *Qisas* or *Ta'zir*; rather reasonable rehabilitation is instituted.
- (3) A person 18 years old or older is criminally responsible for his conduct.

Explanatory Notes

Section 3.16.1 manifests a doctrine agreed upon by the four Sunni schools of thought that a child under the age of seven is not criminally responsible for any conduct.

Islamic law scholars have disagreed on the age of discretion upon which a person is criminally responsible for his actions. Section 3.16.2 adopts the Hanafi and Malaki schools of thought that a child under the age of 18 is subject to rehabilitation only if convicted of an offense. A legislature may adopt the alternative perspective that a child under age of 15 - instead of 18- is subject to rehabilitation only if convicted of an offense. See, Imam Shafi'i, 7 Kitab Al-Oum at 12.

Part IV. Incomplete Crimes

Section 3.17 Attempt

(1) Anyone who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out the intention and;

- a. The act or omission is more than the act of preparation, planning or considering the commission of the offense and;
- b. The offense was not completed,

is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.

(2) Voluntary desistence prior to an arrest for the attempt precludes the punishment.

(3) The Penalty for *Hudud* and *Qisas* attempt is less than the penalty for the complete offense. The penalty for *Hudud* and *Qisas* attempt is a fine not less than... and not exceeding ... and/ or imprisonment for a term not less thanand not exceeding ...

(4) The minimum penalty for *Ta'zir* offense attempt is admonishment or a fine not less than... and not exceeding ... and/ or imprisonment for a term not less thanand not exceeding

Explanatory Notes

Section 3.17.1 manifests the Islamic law doctrine that the attempt to commit a crime is a crime in itself that triggers a punishment.

Section 3.17.2 adopts the perspective of some scholars of the *Shafi'i* and *Hanbali* madhabs.

Section 3.17.3. follows the jurisprudence proportionality doctrine that the punishment for attempts of *Hudud* or *Qisas* offences must be less than the punishment for the complete offense. The penalty stated in Section 3.17.3. as well as in Section 3.17.4 is subject to change to according to the circumstances.

Section 4. Prohibiting Instrumentality²³ of a Crime

(1) A person commits a *Ta'zir* offense if he knowingly sells, buys, deals in, repairs or makes the instrumentality of a crime.

(2) Intention to commit or participate in the commission of a crime is not required for this offence. The actor's knowledge that he is selling, buying, dealing in, repairing or making the instrumentality of a crime suffices.

(3) The punishment for this section is a fine not less than... and not exceeding ... and/ or imprisonment for a term not less thanand not exceeding ...

Explanatory Notes

Section 4 supports the Islamic doctrine that every sin against "*Huquq-al-Abad:/* rights of man" is a crime that warrants a punishment.

Section 4 should not be confused with section 3.7. in Section 3.7, the mental element required for conviction of the partner in crime is knowledge of the crime ahead of time and a desire to aid, abet, incite, instigate or encourage the commission of the crime. Section 4 on the other hand requires merely knowledge; that the actor knowingly sells, buy, deals in, repairs or makes the instrumentality of a crime. Section 4 does not require a desire to aid, abet, incite, instigate or encourage the commission of the crime.

Instrumentality of a crime under section 4 may take various forms. Examples include selling, buying or dealing in controlled or regulated substances, selling grapes to wine manufacturers who sell wine to Muslims, and selling a butcher knife with the knowledge that it will be used for the commission of a crime.

Part V. Offenses Involving Danger to the person: Qisas Offenses

Section 5. Criminal Homicide

Homicide is the unjustified termination of a human life by an act or omission by another human being. Homicide includes intentional homicide, quasi-intentional homicide or mistake homicide.

Section 5.1 Intentional Homicide - Murder

Intentional homicide is the unjustified termination of a human life when:

- a. The actor desired or was aware of his act or omission; and
- b. The actor desired the consequence of his act or omission (i.e. death) or was aware that the natural consequence of his act or omission is death.

Section 5.2 Causation

Intentional homicide requires that the actor's conduct is likely to cause death.

24

Section 5.3 Consent to Death

The victim's consent to death is not a defense to intentional homicide.

Section 5.4 Consent to Harm that Causes Death

The victim's consent to harm that accidentally causes death reduces the punishment to paying *Diya* to the victim's heirs in amount not less thanand not exceeding

Section 5.5 Intentional Homicide - Murder punishment

1. The punishment for intentional homicide is the death penalty unless;
 - a. The offender is the father, grandfather, great grandfather, mother, grandmother or great grandmother of the victim.
 - b. The victim, before death, or the victim's nearest relative or *Wali* (legal guardian) pardons the offender.
2. When capital punishment is not applicable, the alternative punishment is *Diya* of an amount of not less than....and not exceeding
3. When capital punishment is not applicable, the court may also impose *Ta'zir* punishment of a fine not less than... and not exceeding ... and/ or imprisonment for a term not less thanand not exceeding ...
4. The standard of proof required for inflicting death penalty is beyond all doubt. The prosecutor must prove every element of the offence beyond all doubt. Any doubt precludes the death penalty. *Diya* and *Ta'zir* punishment, if ordered by the court, shall substitute.

Section 5.6 Committing, Aiding, Abetting or Conspiring to commit Intentional Homicide Under Duress.

1. Committing, aiding, abetting or conspiring to commit intentional Homicide under Duress is punishable by *Diya* of an amount of not less than....and not exceeding
2. The court may also impose *Ta'zir* punishment of a fine not less than... and not exceeding ... and/ or imprisonment for a term not less thanand not exceeding

Explanatory Notes

Section 5.1 expressly states the requirements of intentional homicide

1. The victim is a living human. Killing a fetus is not intentional homicide; live birth is required in case of a fetus. Similarly, harming a dead person with intent to kill does not constitute intentional homicide.
2. Death occurred because of the actor's act or omission.
3. Either Intention to cause death²⁵ or knowingly causing death, i.e. the actor is aware that his act or omission will cause death, is required for conviction.

Section 5.2 adopts the Shafi'i and Hanbali schools of thought proposal that the actor's conduct was likely to cause death. This is especially true when the instrument that causes death is likely to cause death, such as the firing of a gun, striking the victim in the head with an iron bar and the like. See 7 *Nihayat al-muhtaj ila sharh al-Minhaj fi al-fiqh ala madhab al-Imam al-Shafi'i* at 238. See also 9 *Al-Mughni wa-yalihi al-sharh al-kabir* at 321.

There must be a nexus between actor's act and the result (causing death). It is not required that the actor's act be the sole cause of death but that the actor's act should be an effective cause of death. The actor remains liable not only for his acts but also for other causes of death that were generated because of the actor's act. Once the actors' act initiates the chain of events that lead to death of the victim, the actor is liable for the actions of others. The ultimate criterion for deciding causation is custom. If the actor's act customarily causes death, then the actor is held liable for death. This is important especially when the chain of events that lead to death is unusual. However, when there is an intervening factor that breaks the chain of events, the actor is not liable.

Section 5.3 adopts the *Hanafi* and *Malaki* schools of thought opinion that consent to death is not a defense to intentional murder. See 7 *Bada'i' as-Sana'i' fi Tartib ash-Shara'i'* at 236.

Section 5.4 adopts the *Hanafi* school of thought opinion that a victim's permission to harm that then accidentally causes death, raises a doubt sufficient to preclude the punishment of death. See 7 *Bada'i' as-Sana'i' fi Tartib ash-Shara'i'* at 236-7.

The punishment under Section 5.5 is personal. Accordingly, when more than one actor commits intentional criminal homicide, each actor is punished notwithstanding circumstances that prevent the death penalty application or liability for any other actor(s). For example, if a father and another killed a son intentionally, the father is not subject to the death penalty while the other offender remains subject to death penalty. Similarly, when two actors kill a victim with one actor intending the killing while the other actor is mistakenly committing the killing, the actor who intentionally kills the victim may be subject to the death penalty and the mistaken actor is not. According to *Malaki* and *Hanafi* schools of thoughts, the in case of multiple victims murdered by one offender, if one of the victims' nearest relative or *Wali* opted for *Qisas*- the death penalty- another victim's nearest relative or *Wali* cannot require *Diya*. See 7 *Bada'i' as-Sana'i' fi Tartib ash-Shara'i'* 239. A pregnant woman shall not be subject to death penalty until she delivers the baby. See 9 *Ibn Qudamah, Al-Mughni wa al-sharh al-kabir* at 394. *Malak* and *Abu Hanifa* suggested that death of the offender, for any reason, precludes application of *Diya* since *Diya* requires consent of the offender to its payment. Notably, pardoning the offender with or without the acceptance of *Diya*, as an alternative, is encourageable by virtue of *Qur'an* and *Sunnah*. Once pardoning occurs, the victims' *Wali* or relatives shall be liable for homicide if they kill the offender.

Section 5.5.1 (b) allows pardoning the offender by the victim, before death, or by the victim's nearest relative or *Wali*. Pardon can be conditional on providing specific *Diya*. This reflects the opinions of Abu Hanifa, Shafi'i and Ahmed Ibn Hanbel. See 7 *Bada'i' as-Sana'i' fi Tartib ash-Shara'i'* at 247.

Section 5.6 adopts the *Hanafi* school of thought that an actor who aided, abetted, conspired or committed intentional homicide under duress is not subject to death penalty. See *hadith*: "Verily Allah has pardoned for me my ummah: their mistakes, their forgetfulness, and that which they have been forced to do under duress." A *Hasan hadith* related by *Ibn Majah*, and *al-bayhaqi* and others.

Section 6. Partial Defense to Intentional Homicide – Killing a Person Who is Subject to Death Penalty

Murder punishment may be reduced to no more than imprisonment and /or fine not exceeding if an actor proves that the person he killed:

1. Has committed an offense punishable by death such as Zina offense while he is married or has committed intentional homicide; and
2. The actor is aware at the time of commission of the offense that the person he killed is subject to the death penalty.

Explanatory Notes

Section 6 addresses the issue of killing a person who is subject to the death penalty. The actor vested himself unlawfully with State's judiciary and executive powers and accordingly executed a person subject to the death penalty. This is not permissible and triggers *Ta'zir* punishment. The State may impose any penalty for this offense depending on the State's interest.

Section 6 (2) adopts the *Hanafi* school of thought jurisprudence.

Section 7. Quasi Intentional Homicide

Criminal homicide constitutes Quasi Intentional Homicide when:

1. The actor directly or indirectly terminates the life of a human being; and
2. The actor desired or was aware that his act or omission was likely to cause harm to a human being; and
3. The actor neither desired nor was aware that death was a likely consequence of his act or omission.

Section 7.1 Quasi Intentional²⁷ Homicide punishment

The punishment for Quasi intentional homicide is:

1. *Diya* of an amount of not less than....and not exceeding

2. The court may also impose *Ta'zir* punishment of a fine not less than... and not exceeding ... and/or imprisonment for a term not less thanand not exceeding ...

Explanatory Notes

Section 7., Quasi Intentional Homicide is based on *hadith* {the Messenger of Allah said: "Indeed, the mistake in intention killing, the killing with a whip, stick or stone, for it (the *Diya*) is one hundred camels - a severe penalty - of which forty should be (she-camels) with their young in their wombs."} *Sunan an-Nasa'i* No.4795.

Section 7.1 lists the mandatory punishments for Quasi Intentional Homicide of *Diya* and *kaffarah*. The *kaffarah* is to free a slave (which is not viable option nowadays), or alternatively the offender's fasting for two consecutive months, which cannot be monitored by the State. Accordingly, only *Diya* punishment can be imposed. *Diya* in quasi intentional homicide must be much heavier than *Diya* in Mistake killing. The State may also impose *Ta'zir* punishment of imprisonment if *Diya* is not sufficient to deter the offender from reoffending e.g. the offender is so wealthy that paying *Diya* does not constitute a serious punishment for him.

Section 8 Unintentional Killing - Mistake Killing

Criminal homicide constitutes mistake killing when:

1. Death occurred because of the actor's recklessness or negligence and it was avoidable if the actor had taken reasonable steps to avoid liability; or
2. Death occurred because the actor's acted unlawfully without excuse or necessity.

Section 8.1 Unintentional Killing - Mistake Killing Punishment

The punishment for unintentional homicide is:

1. *Diya* of an amount of not less than....and not exceeding
2. The court may also impose *Ta'zir* punishment of a fine not less than... and not exceeding ... and/or imprisonment for a term not less thanand not exceeding...

Explanatory Notes

Section 8.1 lists mandatory punishments of *Diya* and *kaffarah* for unintentional/mistake Homicide. The *Kaffarah* is to free a slave (which is not viable option nowadays), or alternatively, the offender 's fasting for two consecutive months, which cannot be monitored by the State. Accordingly, only *Diya* punishment can be imposed. *Diya* in unintentional homicide must be much lighter than *Diya* in Quasi intentional homicide. The State may also impose *Ta'zir* punishment of imprisonment if *Diya* is not sufficient to deter the offender from reoffending, e.g. the offender's actions that cause death show utter disregard to the value of human life (for example driving a vehicle with gross recklessness at high speed or in a crowded neighborhood).

Section 9. Assault Causing Bodily Harm

There are three types of assault causing bodily harm:

- A. Intentional assault causing bodily harm.
- B. Quasi intentional assault causing bodily harm.
- C. Mistake cause bodily harm.

Explanatory Notes

Section 9 classification adopts *Imam Ahmed* and *Shafi'i* opinions. See 9 *Ibn Qudamah*, *Al-Mughni Wa al-Sharh al-Kabir* at 410. See also, *Imam Shafi'i*, 6 *Kitab Al Oum* at 45-6.

Bodily harm means any bodily injury including loss of an organ or impairment of the function of any bodily member or organ.

Section 9.1 Intentional Assault Causing Bodily Harm

Intentional assault causing bodily harm occurs when an actor intends to assault to cause a particular harm or that a particular harm was a likely consequence of the assault.

Section 9.2 Punishment for intentional Assault Causing Bodily Harm

1. The punishment for intentional assault causing bodily harm is *Qisas* punishment, that is the offender shall suffer the same harm he caused, unless;
 - a. The offender is the father, grandfather, great grandfather, mother, grandmother or great grandmother of the victim; or
 - b. It is not feasible to perform *Qisas* or that performing *Qisas* would cause more harm than created by the offense; or
 - c. The victim, or the victim's nearest relative or *Wali* (legal guardian) pardons the offender in exchange for an agreed compensation; or
 - d. The victim, or the victim's nearest relative or *Wali* (legal guardian) pardons the offender without any compensation.
2. When *Qisas* punishment is not applicable, the alternative punishment is *Diya* of an amount of not less than....and not exceeding
3. The court may also impose *Ta'zir* punishment of a fine not less than... and not exceeding ... and/or imprisonment for a term not less thanand not exceeding... when *Qisas* is not applicable.
4. The standard of proof for the application of *Qisas* punishment is beyond all doubt. Any doubt precludes *Qisas* punishment. *Diya* and *Ta'zir* punishment, if ordered by the court, shall be substituted if the court finds satisfactory evidence to warrant the punishment.

Explanatory Notes.

Section 9.2 (3) adopts opinions of *Imam Abu Hanifa*, *Imam Ahmed* and *Imam Al-Shafi'i* that *Ta'zir* punishment may imposed for its deterrent effects on the offender and on society in general.

Section 9.3 Quasi Intentional Assault Causing Bodily Harm

Quasi intentional assault causing bodily harm occurs when an actor intended to assault, but did not intend to cause a particular harm and the subsequent harm was an unlikely consequence of the assault.

Section 9.4 Punishment for Quasi Intentional Assault Causing Bodily Harm

1. *Diya* of an amount of not less than....and not exceeding
2. The court may also impose *Ta'zir* punishment of a fine not less than... and not exceeding ... and/or imprisonment for a term not less thanand not exceeding...

Section 9.5 Mistake Causing Bodily Harm

Mistake causing bodily harm occurs when an actor neither intended to cause harm nor was harm a likely consequence of his action.

Section 9.6 Punishment for Mistake Causing Bodily Harm

1. *Diya* of an amount of not less than....and not exceeding
2. The court may also impose *Ta'zir* punishment of a fine not less than... and not exceeding ... and/or imprisonment for a term not less thanand not exceeding....

Explanatory Notes

Diya for committing intentional assault causing bodily harm must be greater than *Diya* for committing mistake causing bodily harm because the offender intending to cause harm is more blameworthy than the offender in the case of mistake causing bodily harm.

Section 9.6 (2) adopts *Imam Abu Hanifa*, *Imam Ahmed* and *Imam Al-Shafi'i* that *Ta'zir* punishment may imposed for its deterrent effects on the offender and on society in general.

Section 10. Assault Causing Death of Unborn Child-feticide

A person commits the offense of feticide if he intentionally or mistakenly kills an unborn child by causing harm to the mother of the child. Two types of Feticide:

- A. Intentional feticide
- B. Mistake feticide

Section 10.1 An Unborn Child

30

An unborn child is a child in utero, a fetus at any stage of development carried in the womb.

Section 10.2 Intentional Feticide

Intentional feticide occurs when an actor intended to kill the unborn child or the actor intended to harm the mother and the actor's conduct was likely to cause death of the unborn child.

Section 10.3 Mistake Killing of the Unborn Child

Mistake killing of the unborn child occurs in all circumstances not listed in section 10.2.

Explanatory Notes

Section 10 adopts the *Maliki* and *Shafi'i* school of thought classification that feticide is either intentional or by mistake. See 7 *Nihayat al-Muhtaj ila Sharh al-Minhaj fi al-Fiqh ala Madhab al-Imam al-Shafi'i'* 363.

To convict a person of feticide, the actor's assault on the mother must cause death of the unborn child. It means that the offense is not committed unless the fetus is totally separated from the mother's womb and is dead. *Imam Shafi'i* and *Imam Ahmed* suggested that it does not matter if the separation between the mother and the unborn child occurred while the mother is alive. Separation may occur after the mother's death. *Imam Malik*, *Imam Abu Hanafi* and *Imam al-Shafi'i* suggest if the fetus departed his mother womb completely alive, he is a live birth.

Section 10.4 Punishment for Assault Causing Death of Unborn Child-Feticide

The punishment for feticide is:

1. *Diya* of an amount of not less than....and not exceeding, if the unborn child was dead when separated from his mother.
2. Death penalty if the unborn child was born alive and died because of the actor's conduct.

Explanatory Notes

The amount of *Diya* in section 10.4 (1) depends on the actor's mental element. In intentional feticide the actor must pay much higher amount than mistake feticide.

Section 10.5 Assault on a Pregnant Woman That Does Not Cause Death of Unborn Child

An assault on a mother that does not cause death of unborn child is punishable by *Ta'zir* punishment of a fine not less than... and not exceeding ... and/or imprisonment for a term not less thanand not exceeding....

Section 11. Assault Not Causing Bodily Harm

Where section 9 and 10 are not applicable, a person is guilty of assault punishable by *Ta'zir* punishment of a fine not less than... and not exceeding ... and/or imprisonment for a term not less thanand not exceeding....

if he:

1. Induces fear of imminent bodily injury by physical threat to another; or
2. Intentionally or knowingly strikes or touches, without consent, another without causing any bodily harm.

Explanatory Notes

Section 11. is broad enough to include all possibilities of undesired conducts that cause physical or emotional harm to individuals. This offense is based on the broad category of *Ta'zir* offences.

Part VI. *Hudud* Offenses

Section 12. Sexual Offenses

Section 12.1 Mental Elements in Sexual Offenses

The mental element required for sexual offenses is:

1. Intention to do the prohibited conduct; or
2. The actor was aware that his actions are contrary to the prohibitions; or
3. The actor was reckless such that he foresees the possibility of violating the prohibitions and then proceeded to commit the prohibited conduct.; or
4. The actor deliberately chose not to know the factual circumstance essential in a sexual offense when given reason to believe further inquiry is necessary and then proceeded to commit the prohibited conduct.

Section 12.2 Consensual Illicit Sexual Behavior

1. Illicit sexual behavior is any act that may lead to sexual intercourse between an unmarried man and a woman or sexual acts between two women or a man inserting his penis in the anus of his wife.
2. Illicit sexual behavior includes, but is not limited to: meeting of a non-married man and woman who are eligible for marriage in a secluded place, a sexual act between a man and a woman short of Zina, a sexual act between a woman and another woman.
3. Illicit sexual behavior is punishable by *Ta'zir* punishment of a fine not less than... and not exceeding ... and/or imprisonment for a term not less thanand not exceeding...

Explanatory Notes

Section 12.2 is a *Ta'zir* offence created to serve several purposes including blocking the means to sexual acts, prohibiting and punishing sexual acts not listed in other sexual offenses, decreeing punishments for sexual acts that do not qualify for the more severe *Hadd* punishment due to either the lack of ³²four credible witnesses in *Zina* offense or the presence of doubt that precludes *Hadd* punishment. For example, according to Imam Abu Hanifa the insertion of a man's penis into the anus of his wife is a punishable act under *Ta'zir*. It is not punishable under the offense of the Acts of the People of Lut because there is doubt that

precludes the punishment of the Acts of the People of Lut arising from the fact that a man may engage in sexual intercourse with his wife.

Section 12.3 Broadcasting Sexual Acts

Intentionally, knowing or recklessly advertising, selling, publishing, distributing, making available, or broadcasting by any means sexual activities or nudity is punishable by *Ta'zir* punishment of a fine not less than... and not exceeding ... and/or imprisonment for a term not less thanand not exceeding....

Section 12.4 Zina

The crime of *Zina* is committed when a male consensually inserts his penis into the vagina of a female who is not his wife or when a male consensually inserts his penis into the vagina of a female whom he cannot legally marry or when a male inserts his penis into the vagina of dead female.

Explanatory Notes

Imam Malak, some *Shafi'i* scholars and Imam Ahmed concluded that engaging in sexual intercourse with a dead woman amounts to *Zina* offense. Imam Malak, some *Shafi'i* scholars and Imam Ahmed concluded that an invalid marriage contract does not prevent punishment. However, if one of the requirements of marriage is missing, such as marriage without witnesses, scholars have disagreed on the validity of that marriage, and accordingly the punishment of *Hadd* is precluded because there is doubt that an offense has occurred. Post crime marriage neither excuses the offense nor precludes the punishment. The crime is also committed when one party is under the age of 18 or is mentally ill. A party to a crime who is mentally ill or under the age of 18 shall not be punished under *Zina* offense. However, if a party to *Zina* offense has reached the age of 7 but less than 18 years, he may be subject to rehabilitation. Also, *Zina* offense is applicable when a male consensually inserts his penis into the vagina of a female who is too closely related to be eligible to marry him.

Section 12.5 Zina Punishment

1. The punishment for a married offender of *Zina* is stoning to death.
2. The punishment for an unmarried offender of *Zina* is whipping numbering one hundred stripes and imprisonment for a term of one-year.

Explanatory Notes

Section 12.5.2 includes imprisonment, as a part for the punishment for an unmarried male offender of *Zina*, instead of the punishment of exile for a year as stated in a *hadith*. Many scholars have suggested that exile in our time means imprisonment.

Section 12.6 The Act of the People of Lut.

The act of a male consensually inserting his penis into the anus of either a male or a female who is not his wife is punishable by stoning to death of all parties to the crime.

Section 12.7. Bestiality

Sexual relations between a human and an animal that involves inserting the penis into the anus or vagina is punishable by a term of imprisonment not less thanand not exceeding And/or fine not less than ... and not exceeding.....

Section 12.8 Zina, Bestiality and the Act of the People of Lut - Methods of Proof

1. Witness testimonies are required for conviction either;

a. Four credible mature Muslim male witnesses must collectively testify in one court session that they witnessed the act of penetration of the penis into the vagina or the anus, if one of the defendants is a Muslim. Having less than four testimonies is an offense punishable by whipping numbering eighty stripes administered to the witnesses.

b. Four credible mature male witnesses, Muslim or Non-Muslim, must collectively testify in one court session that they witnessed the act of penetration of the penis into the vagina or the anus, if all of the defendants are non-Muslim. Having less than four testimonies is an offense punishable by whipping numbering eighty stripes administered to the witnesses.

2. Admission

a. A defendant's non-retracted informed admission of all elements of the offense required for conviction suffices to establish guilt.

b. A defendant's admission is not evidence of guilt against other co-defendants.

3. Evidence

Pregnancy is rebuttable evidence of *Zina*. A pregnant woman can rebut *Zina* by showing rebutting evidence such as duress or mistake.

Explanatory Notes

Section 12.8.1.a adopts the *Hanafi* opinion that a non-Muslim's testimony is not admissible against Muslims.

Imams Ahmed, Abu Hanifa and Malak suggested that all four witnesses must testify that they have seen the act of penetration. If one or more of the four witnesses did not actually see the act of penetration but offered only a hearing testimony, all four witnesses will be subject to the punishment of whipping numbering eighty stripes each and their future testimonies will be inadmissible in court.

Testimony of close relatives may not be admissible in court. Testimony of a person who favors or disfavors the defendant is inadmissible in court.

Imams Malak, Ahmed and Shafi'i suggested that testimony of a husband against his wife is inadmissible in court as one of the four testimonies required for conviction.

Imam Abu Hanifa concludes that hearsay evidence is inadmissible in *Zina*, bestiality and the Act of the People of Lut offenses.

The court may not accept the testimony of the witnesses for various reasons such as a discrepancy between witnesses' testimonies.

Imams Malak, Ahmed, Abu Hanifa and some of *Shafi'i* scholars suggested that a judge cannot be one of the four witnesses required for conviction. If a judge wishes to testify, he must recuse himself from hearing the *Zina* case and present himself as a witness.

A one-time admission is enough to prove guilt according to Imams Malak and Ahmed.

Imams Malak, Shafi'i and Ahmed had suggested that admission need not take place in a court session. It may take place elsewhere and later four credible witnesses could testify as to the offender's admission in a court session.

Section 12.9 Excuses Precludes the Execution of Punishment of *Zina*, Bestiality and Act of the People of Lut Offenses.

1. The defendant is excused from the punishment when the offense is proved on the defendant's admission if the defendant retracts his testimony at any stage before or during the execution of the punishment. Escaping from the execution of the punishment is evidence of retracting the testimony.
2. The defendant is excused from the punishment when the offense is proved on witnesses' testimony, if one or more witnesses rescinds their testimony, loses his credibility, dies before the execution of the punishment resulting in less than four testimonies offered to prove the offense.
3. Any doubt arising from erroneous belief in the legality of the act, mistaken identity of a party to the crime or other factual circumstances essential in proving an offense, excuses the defendant from the punishment.
4. Any sexual act committed under duress is excusable.
5. In a *Zina* charge, allegation of marriage by the male, the female or both who are found engaged in sexual activities excuses the defendants from the punishment unless the allegation is rebutted beyond all doubt.
6. In a *Zina* charge, allegation of sexual intercourse between a male and female that involves penetration of the female's vagina is rebutted by the existence of a hymen.
7. Ignorance of law that *Zina* is prohibited is not an excuse from liability unless the defendant shows that he could not have been aware of the prohibition of *Zina*.

Explanatory Notes

Hanafi, Hanbali and Maliki schools of thought concluded that escaping from the execution of the punishment is evidence of retracting the testimony. See *7 Bada'i' as-Sana'i' fi Tartib ash-Shara'i'* at 61.

Imam Abu Hanifa concluded that punishment is not warranted if one or more witnesses lost his credibility or died before the execution of the punishment resulting in less than four testimonies to prove the offense.

Imams Abu Hanifa and Ahmed concluded that in a *Zina* charge, allegation of marriage by the male, the female or both who are found engaged in sexual activities excuses the defendants from the punishment unless the allegation is rebutted beyond all doubt.

Imams Abu Hanifa, shafi'i and Ahmed concluded that in a *Zina* charge, allegation of sexual intercourse between a male and female that involves penetration of the female's vagina is rebutted by existence of a hymen because the existence of a hymen raises doubt sufficient to preclude punishment.

An example of ignorance of law that *Zina* is prohibited under Islamic law is that of a new convert to Islam who is unaware of the prohibition.

Section 13. Aggravated Insult - Qazf Punishable by Hadd

False Accusation of a sane adult Muslim of committing *Zina*, bestiality, Act of the people of Lut, or being born of unmarried parents is *Qazf* punished by *Hadd* unless the accuser proves the truth of the accusation beyond all doubt.

Explanatory Notes

The offense occurs once the false accusation is made. It means that the mental element required for conviction can be (a) intentional - the actor desired making the false accusation and desired its negative effect or (b) knowingly - the actor was aware that he is making false accusation but may not desire a particular effect for making the accusation or (c) recklessness - the actor was not sure about the accuracy of the accusation but nevertheless made it and thereby was taking unjustifiable risk.

Section 13.1 Standing in Aggravated Insult

A complaint can be filed by:

1. The victim, or any person authorized by him/her; or
2. Any of the ascendants or descendants of the victim may continue the complaint process if the victim initiated the process before death. If the victim was aware of the *Qazf* and did not initiate the process before³⁶ his death none of his/her ascendants or descendants may initiate the proceedings.
3. If the victim is dead at the time of *Qazf*, any of ascendants or descendants of the victim may file a complaint.

Explanatory Notes

Section 13.1 adopts Imams Malek, Ahmed and Shafi'i opinions that any of the ascendants or descendants of the victim may continue the complaint process if the victim initiated the process before death.

Section 13.2 Exemptions from Prosecution, Mitigating Circumstances and Pardoning the Offender

1. The offender who commits *Qazf* against any of his descendants is exempt from prosecution.
2. When a victim, the complainer of *Qazf*, dies before the proceedings conclude, the proceedings shall end and the punishment is not enforced.
3. The transmitter of the false accusation of *Qazf* is excused from *Hadd* punishment. However, the court may impose on the transmitter of the false accusation of *Qazf*, *Ta'zir* punishment of a fine not less than... and not exceeding ... and/or imprisonment for a term not less than ...and not exceeding....
4. The victim(s) may pardon the offender at any time before the execution of the punishment.

Explanatory Notes

The offender who commits *Qazf* against anyone from his line of descendants is immune from prosecution because such affinity raises doubt sufficient to preclude *Hadd* punishment. According to Imams Shafi'i and Ahmed the victim(s) may pardon the offender any time before the execution of the punishment. See 10 *Ibn Qudamah, Al-Mughni wa Al-Sharh Al-Kabir* at 204.

Section 13.3 Proof of *Qazf* Punishable by *Hadd*

1. Witness Testimony is Required for Conviction Either;

- a. Two adult credible Muslim male witnesses, other than the victim of *Qazf*, must testify that they witnessed *Qazf* by direct evidence, if the defendant is Muslim.
- b. Two adult credible male witnesses, Muslim or Non-Muslim, other than the victim of *Qazf*, must testify that they witnessed *Qazf* by direct evidence, if the defendant is non-Muslim.

2. Admission

a. A defendant's non-retracted informed admission of all elements of the offense required for conviction suffices to establish guilt.

37

b. A defendant's admission is not evidence of guilt against others.

Section 13.4 *Qazf* by *Hadd* Rebutting Circumstances

1. The defendant may deny committing *Qazf* and provide supporting evidence including rebuttal witnesses.
2. The defendant may admit making the statement subject of *Qazf*, assert that the victim admitted the subject matter of *Qazf* and provide at least two adult credible male Muslim witnesses to testify that the victim admitted the subject matter of *Qazf*, if the defendant(s) is Muslim. The defendant may admit making the statement subject of *Qazf*, assert that the victim admitted the subject matter of *Qazf* and provide at least two adult credible male Muslim or non-Muslim witnesses to testify that the victim admitted the subject matter of *Qazf*, if the defendant(s) is non-Muslim
3. The defendant may admit making the statement subject of *Qazf*, and provide at least four male adult Muslim credible witnesses who testify as to the truthfulness of the subject matter of *Qazf*, if the defendant(s) is Muslim. The defendant may admit making the statement subject of *Qazf*, and provide at least four male adult Muslim or non-Muslim credible witnesses who testify as to the truthfulness of the subject matter of *Qazf*, if the defendant(s) is non-Muslim.
4. According to li'ān procedures, when a husband accuses his wife of *Zina* before a court, he shall swear by Allah four times that he is truthful in his accusation and thereafter call for the Allah's curse on him if he is a liar. Once the husband has fulfilled this evidentiary burden, the accusation is deemed to be proven unless the wife rebuts the evidence by swearing by Allah four times that she is innocent and thereafter calls for Allah's wrath on her if the husband is truthful. When the wife fulfils her aforementioned evidentiary burden, the court shall pass an unappealable dissolution of marriage order. Once the li'ān procedures concludes, a husband shall not be subject to the penalty of *Qazf* with respect to the accusation of *Zina*.

Section 13.5 Punishment for *Qazf* Punishable by *Hadd*

1. Whoever commits *Qazf* punishable by *Hadd* shall be punished by being whipped eighty stripes.
2. The offender of *Qazf* punishable by *Hadd* is deemed to be an uncredible witness unless he shows sincere repentance.

Explanatory Notes

Imams Ahmed, Shafi'i and Malak suggested that the offender of *Qazf* punishable by *Hadd* is deemed to be an uncredible witness unless he shows sincere repentance.

Section 14. Insult: *Qazf* Punishable by *Ta'zir*

Qazf punishable by *Ta'zir* occurs when:

1. An actor intentionally, knowingly³⁸ or recklessly, makes an unambiguous false accusation against another of committing any crime other than *Zina*, bestiality, Act of the People of Lut; or

2. An actor intentionally, knowingly or recklessly makes derogatory remarks against another regardless of whether the degradation is based on fact or is false so long as the derogatory remark objectively inflicted emotional harm to the victim; or
3. An actor intentionally, knowingly or recklessly, falsely accused an insane person, a minor or a non-Muslim of committing *Zina*, bestiality, Act of the People of Lut, or being born of unmarried parents.

Section 14.1 *Qazf* Punishable by *Ta'zir* Punishment

Qazf punishable by *Ta'zir* is punished by a fine not less than... and not exceeding ... and/or imprisonment for a term not less thanand not exceeding...

Explanatory Notes

In section 14(1,) scholars require the falsehood of the allegations of *Zina*, bestiality or the Act of the People of Lut for conviction. If the allegations of *Zina*, bestiality or the Act of the People of Lut are truthful, no crime is committed even though the allegations may have caused emotional harm.

In section14(2), a remark is considered derogatory if society, in general, considers it derogatory. The standard of liability is purely objective. The societal perspective is determinative in considering a remark derogatory.

Section 14(3) addresses a variety of incidents including those where the specific requirements of *Qazf* punishable by *Hadd* offense are not satisfied.

The mental element required for conviction can be either ***intentionally*** - i.e. the actor desired making the false accusation or the derogatory remark and desired its negative effect-, ***knowingly*** - i.e. the actor was aware that he was making a false accusation or derogatory remark but may not desire the particular subsequent effect -, or ***recklessly*** - i.e. the actor was not sure about the accuracy of the accusation but nevertheless made it and thereby took an unjustifiable risk.

Section 15. Crime Against Religious Peace

Anyone, within or outside the State, who intentionally, knowingly or recklessly insults followers of a State's recognized religion in words, either spoken or written, by visible representation or by other means, resulting in damage to the religion's reputation is guilty of committing a crime against religious peace and shall be punished by a fine not less than... and not exceeding ... and/or imprisonment for a term not less thanand not exceeding....

39

Section 15.1 Defense for Crime Against Religious Peace

The offender of Crime against religious peace shall be excused from the liability if he satisfies the court that his actions were intended to initiate or continue civil debates.

Explanatory Notes

Section 15 recognizes that the State's citizens of various religions are required to refrain from disturbing social harmony by defaming others' religions. Islamic law encourages civility in discussion, and endeavors to eliminate religious tension by prohibiting religious hate speech.

The mental element required for conviction can be either intentional, i.e. the actor desired to insult followers of a particular religion, knowingly, i.e. the actor was aware that his actions constituted an insult to a follower of a religion but may not have desired any negative effect or recklessly, i.e. the actor was not sure that his conduct constituted a crime but nevertheless proceeded and thereby took an unjustified risk.

Western opposition to the concept of defamation of religion and the UN Human Rights Committee claim that prohibition of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the International Covenant on Civil and Political Rights (ICCPR) are noted and ignored. Islamic law is independent of non-Muslim opinions. All western States have placed various limitations on freedom of speech that serve their political, religious and social ideologies but they refuse to place limitations on insulting other peoples' religions. It seems that western countries' refusal to place a limitation on freedom of speech in favor of civil social dialogue that show respect to all systems of belief is aimed to guarantee the west's power to degrade the weak, different other whenever they like, disguising their hatred to the other by claiming the "freedom of speech" principle. To be sure, the freedom of speech principle was created to allow individuals to speak up against governmental tyranny. It was never intended to be used as a tool to degrade others. Many western countries have systemically imposed limitations on Muslims' freedom of speech. For example, from 2020 to 2022, France closed at least 22 mosques alleging that the mosques were promoting "a radical practice of Islam" and "cultivating a feeling of hate towards France".

Section 16. Crime Against Sacred Text, God and Prophets

1. Anyone, within or outside the State, intentionally, knowingly or recklessly, directly or indirectly who:
 - a. Desecrates a copy of the Holy Qur'an, in full or in part; or
 - b. Defiles God, Allah, the Holy Prophets listed in Islam Including Prophet Muhammad by words, either spoken or written, by visible representation or by other means shall be punished with death.
2. The actor shall be excused from the punishment if he, after had been being given a fair opportunity to give up the commission of the offense, repents.

Explanatory Notes

40

Section 16 is enforced only by the State. Individuals should not take the law into their own hands to enforce section 16. If anyone takes the law into his own hands and enforces section 16, he shall be liable for every crime he commits.

Some western countries may object to section 16. This objection is ignored for a number of reasons. First, the State is sovereign, it does not need western permission to enact any legal provisions. Second, Islamic law scholars have unanimously agreed that anyone who desecrates a copy of the Holy Qur'an or defiles God, Allah, or the Prophets listed in Islam shall be punished by death. Finally, it should be realized that western States do not ask Muslim majority States' opinion when they enact legislations that negatively affect Muslims.

Section 17. Muslim Consumption of Intoxicants

Any informed Muslim adult who intentionally, knowingly or recklessly consumes intoxicants is guilty of an offense and shall be punished with whipping numbering forty stripes.

Explanatory Notes

The mental element required for conviction is intention, knowingly or at least recklessly, which occurs when:

- A. The actor intentionally, with full awareness of the intoxicating nature of the substance, consumes the intoxicant while desiring its intoxicant effect; or
- B. The actor knowingly, with full awareness of the intoxicating nature of the substance, consumes the intoxicant although he may not desire its intoxicant effect, or
- C. The actor recklessly consumes a substance while he suspects that the substance is an intoxicant.

Consuming an intoxicant for a medical purpose is not permissible according to Imams Shafi'i and Malak. See 8 *Nihayat al-muhtaj ila sharh al-Minhaj fi al-fiqh ala madhab al-Imam al-Shafi'i* at 114. Although many scholars require the oral consumption of the intoxicant, it is not required in this section given that offenders currently may consume the intoxicant by various means to escape punishment. This section lists the punishment of whipping numbering forty stripes according to *Hadith* that stated the Prophet Muhammed (peace be upon him) punished offenders with only forty stripes.

Section 17 equates the consumption of alcohol and narcotics because the Prophet Muhammad (peace be upon him) forbade both. Narrated Umm Salamah, Ummul Mu'minin: The Messenger of Allah forbade every intoxicant and everything which produces languidness. See *Sunan Abi Dawud Hadith # 3686*.

Section 18. Muslim Consumption of Intoxicant Methods of Proof

1. At least two mature credible Muslim male witnesses must collectively testify in one court session that they witnessed⁴¹ the actor consume the intoxicant, or
2. The defendant's non-retracted informed admission of all elements of the offense required for conviction suffices to establish guilt.

Section 19. Public Intoxication

1. The Muslim or Non-Muslim adult who is, intentionally, knowingly or recklessly publicly intoxicated is guilty of an offense punishable by fine not less than... and not exceeding ... and/ or imprisonment for a term not less thanand not exceeding
2. Public intoxication is a state that renders a person unaware of, or incapable of consciously controlling, their behavior.

Explanatory Notes

For section 18 (2) see 10 *Ibn Qudamah, Al-Mughni wa al-Sharh al-Kabir* at 335. The mental element required for conviction under section 19 is that the actor is aware of or suspects that consuming a substance may have an intoxicant effect and the actor is aware of or at risk of being intoxicated publicly after consuming the intoxicant. Public intoxication for the adult Muslim renders the offender liable under section 17 “Muslim consumption of intoxicant” and section 19 “Public Intoxication”.

Section 20. Public Intoxication Offenses Methods of Proof

1. Witness testimony:

- a. At least two mature adult credible Muslim or Non-Muslim male witnesses must collectively testify in one court session that they witnessed the public intoxication of the actor if the defendant is non-Muslim.
- b. At least two adult male mature credible Muslim witnesses must collectively testify in one court session that they witnessed the public intoxication of the actor if the defendant is Muslim.

2. Admission

A defendant’s non-retracted informed admission of all elements of the offense is required for conviction.

Section 21. Excuses That Preclude the Execution of Punishment for Intoxication and Public Intoxication Offenses

1. The defendant is excused from the punishment when the offense is proven on the defendant’s admission if the defendant retracts his testimony at any stage before or during the execution of the punishment. Escaping from the execution of the punishment is evidence of retracting the testimony.
2. The defendant is excused from punishment when the offense is proven on witnesses’ testimony and one or more witnesses⁴²
 - a. Rescind their testimony; or
 - b. Have lost their credibility; or
 - c. Died before the execution of the punishment,

providing that less than two testimonies affirmed the offense. Any doubt arising from an erroneous belief in the legality of the act or other factual circumstances essential in proving an offense excuses the defendant from punishment.

3. Mistake of fact in that the substance consumed is an intoxicant or that intoxication is prohibited is excusable.
4. Duress and necessity are available defenses for intoxication and public intoxication offenses.

Explanatory Notes

Lack of knowledge of the prohibition for Muslims that intoxication is prohibited can be excused if the actor satisfies the court that his circumstances prevented him from knowledge of the prohibition. Lack of knowledge of the punishment is not an excuse. see 9 *Ibn Qudamah, Al-Mughni wa al-sharh al-kabir* at 331. With respect to section 20, as a general rule, scholars do not accept the testimony of a non-Muslim against a Muslim.

Section 22. Theft Punishable by *Hadd*.

Theft punishable by *Hadd* is the surreptitious taking of tangible personal property; **and**

1. The property is a legally recognized property (*Mal Mutaqawwim*) that was kept in the safe keeping of another person (*Hirz*); **and**
2. The value of the stolen property is not less than.... (*niṣāb*); **and**
3. The actor has no right of ownership nor does he suspect that he may have the right of ownership and it has not been entrusted to him; **and**
4. The actor has the intention of owning the property without the owner's consent.

Explanatory Notes

Taking full possession of another's property requires that the stolen property be removed from its safe keeping and possessed by the actor. See 10 *Ibn Qudamah, Al-Mughni wa al-Sharh al-Kabir* at 259. Thus, taking full possession does not occur if the stolen item did not depart its safekeeping location.

Tangible personal property means any property that is not real property or intellectual property.

Mal Mutaqawwim is a legally recognized property in Islam that can be traded at a price. *Mutaqawwim* property does not include perishable items such as fresh meat and fruit still on trees or items that are prohibited for Muslims to trade in; such as liquor and swine if the victim of theft is a Muslim. if the victim of theft is a non-Muslim and owned an item prohibited for Muslims such as liquor or swine, such property is *mutaqawwim* property.

The property must be in safekeeping meaning that fruit still on trees is not in safe keeping until stored in safe place. The property is considered in safe keeping if it was located in a place

designed to keep the property inside it and is not open to the public, for example in houses, barns, or storage places. A property is also considered in safe keeping if it is located in a public place but guarded. Permission to enter a place, expressed or implied, indicates that the property is not in safe keeping for those who are permitted to enter. The majority of scholars have suggested that a wife's theft from her husband is not punishable by *Hadd* punishment because she shares ownership of the husband's property while a husband's theft from his wife is punishable by *Hadd*.

The value of the stolen property (*niṣāb*) shall be determined by the parliament. However, it should not be less three silver coins.

Imams Malak, Ahmed and Shafi'i have suggested that the property's stolen value is determined by its value at the time of theft. See 10 *Ibn Qudamah, Al-Mughni wa al-Sharh al-Kabir at 278 and Sharh az-Zarqani 'ala Muwatta al-Imam Malik*.

If the property remains partially in its safe keeping place and has partially departed its safe keeping and has partially entered the actor's possession, the value of the stolen property is determined by the value of the property that departed its safe keeping and entered actor's possession.

Imam Ahamed's opinion is worth endorsing; that the actor must be aware that the property stolen had reached the minimum amount required for conviction of theft punishable by *Hadd*.

According to Imam Abu Hanifa, the stolen property must be owned by another, who reported the theft to the authorities at the time of execution of the punishment. It follows that if the owner of the stolen property transferred ownership to the actor before the execution of the punishment, the execution will cease to exist. Imams Ahmed and Shafi'i have a different opinion, See Imam Al-Kasani, 7 *Bada'i al-Sana'i fi Tartib al-Shara'i* at 88-89. A trial for the crime of theft shall not proceed unless the owner of the stolen property is known and has reported the theft to authorities. An actor is not liable to theft punishment by *Hadd* if (a) the stolen property is publicly owned; or (b) the actor is a shareholder of the stolen property; or (c) the victim is descendant of the actor; or (d) the actor is a creditor who stole from the debtor who refused to pay providing that the creditor stole only the debts owed; or (e) the actor alleges ownership of the stolen property. Although the actor in the former cases is not liable to theft punishment by *Hadd*, he remains liable to theft punishment by *Ta'zir*. See 10 *Ibn Qudamah, Al-Mughni wa al-Sharh al-Kabir at 284,286 and Sharh az-Zarqani 'ala Muwatta al-Imam Malik*.

Section 22.1 Theft Punishable by *Hadd* Offense - Methods of Proof

1. Witness testimony:

- A. If the defendant is a non-Muslim⁴⁴, at least two mature credible males must collectively testify that they witnessed the theft.
- B. If the defendant is a Muslim, at least two mature credible Muslim males must collectively testify that they witnessed the theft.

2. Admission

A defendant's non-retracted informed admission of all elements of the offense is required for conviction under this category.

Explanatory Notes

In section 22.1 if less than two males witness the theft - for example, if one witness heard about the theft while the other witness saw the theft - *Hadd* punishment is not warranted.

Section 22.2 Punishment for Theft Punishable by *Hadd*

The punishment for theft punishable by *Hadd* is amputation of the right hand. A repeat offender shall be punished by imprisonment not less than... and not exceeding

Explanatory Notes

Right hand amputation shall be performed only if the left hand is in working order. If the left hand is not in working order, the punishment shall be substituted with imprisonment.

Section 23 Theft Punishable by *Ta'zir*

Theft punishable by *Ta'zir* is every act not listed under section 22 that involves taking another person's property with the intention of owning the property or using another's services without the owner's consent.

Section 23.1 Theft Punishable by *Ta'zir* Punishment

Theft punishable by *Ta'zir* is punished by not less than one day imprisonment and not exceeding years imprisonment and/or fine not less thanand not exceeding

Section 24. Property's Interference of Use

Anyone who knowingly or recklessly damages the property of another, rendering it ineffective for its intended use, or interferes with any person's lawful use or operation of the property is guilty of an offense punishable by not less than imprisonment and not exceeding imprisonment and/or fine not less thanand not exceeding

Explanatory Notes

The mental element required for conviction in section 24 is either ***intentionally***: the actor intended his actions and intended its consequences, ***knowingly***: the actor was aware of the nature of his actions and its consequences, or ***recklessly***: the actor was taking unjustifiable risks that may interfere with the property of another.

45

Section 24 addresses various circumstances including consumption of perishable items and destruction or interference with the use of computer data.

Section 24.1 Property's Interference of Use - Aggravating Circumstances

1. Anyone who commits property's interference of use **and** shows reckless indifference to the value of human life **and** causes actual danger to life is guilty of an offense punishable by not less than ten years imprisonment and not exceeding 25 years imprisonment and fine not less thanand not exceeding
2. Anyone who commits property's interference of use knowing that the property is a place of worship, or is an object held sacred by any class of persons is guilty of an offense punishable by not less than ... imprisonment and not exceeding ...imprisonment and/or fine not less thanand not exceeding

Explanatory Notes

The mental element required for conviction in section 24.1 (1) is reckless indifference to the value of human life while committing Property's interference of use offense. The judge must be satisfied before conviction that the actor while committing the offense of Property's interference of use had considered the consequences of his actions and foresaw the possibility of death because of his actions but nevertheless proceeded with his plans.

The mental element required for conviction in section 24.1 (2) is the actor's awareness that the property he is interfering with is intended for use as a place of worship, or is an object held sacred by a class of persons. The judge must be satisfied before conviction that the actor while committing the offense of Property's interference of use was actually aware that the property he is interfering with is intended for use as a place of worship, or is an object held sacred by a class of persons.

Section 24. 1(2) does not overlap with section 16, Crime against sacred text, God and Prophets. Section 16 is designed to address particular concerns, such as Desecration of a copy of the Holy Qur'an, while section 24.1 (2) is general in nature. It addresses a variety of circumstances that involve interference of use of places of worship, or property sacred to a class of persons.

Section 25. Forceable Theft of a Property - *Hirabah*

Anyone who, directly or indirectly, whether within the State or outside, attempts to take another person's property by force or by threatening the use of force that results in taking a property, spreading public fear or killing of a human being is guilty of an offense and liable as described below:

- A. If the actor kills and steals a property, the actor shall be executed and crucified as a deterrence for others.
- B. If the actor kills another only, ⁴⁶the actor shall be executed.
- C. If the actor steals property and did not kill, the actor's right hand and left foot shall be amputated.

- D. If the actor while attempting to take a property by force or threat of force has terrified individuals but did not participate in killing or stealing a property, the actor shall be punished by imprisonment not less than ... and not exceeding ... and/or fine not less thanand not exceeding

Section 25.1 Forceable Theft of a Property Offense - Methods of Proof

1. Witness testimony:

- A. If the defendant is a non-Muslim, at least two mature credible males collectively must testify that they witnessed the commission of the offense.
- B. If the defendant is a Muslim, at least two mature credible Muslim males must collectively testify that they witnessed the commission of the offense.

2. Admission

A defendant's non-retracted informed admission of all elements of the offense is required for conviction under this method of proof.

Section 25.2 Excuses That Preclude the Execution of Punishment of Forceable Theft of a Property Offense.

When the actor who commits Forceable theft of a property - *Hirabah* - repents and;

1. Communicates his intention to give up committing forceable theft of a property - *Hirabah* - to the authorities and;
2. His intention to give up committing the offense of forceable theft occurred before being apprehended.

Then, the punishments listed in section 25 shall not be executed.

Section 25.3 Homicide and Theft Occurring During the Commission of Forceable Theft of a Property Prior to Repentance

1. The actor who satisfies the requirement of repentance under section 25.2 and had caused death to another during the commission of forceable theft of a property shall be liable for criminal homicide punishments under sections 5-8 of this code.
2. The actor who satisfies the requirement of repentance under section 25.2 and had stolen a property during the commission of forceable theft of a property shall return the property to the victim or pay its fair value to the victim if the property is unrecoverable.

Explanatory Notes

47

This offense is based on the verse "The punishment of those who wage war against Allah and his messenger and strive with might and main for mischief through the land is: execution, or crucifixion or the cutting off of hands and feet from opposite sides, or exile from the land: That

their disgrace in this world, and a heavy punishment is theirs in the hereafter". *Quran, Surah Al-Maidah, (5:33)*

The offense definition was suggested by Imams Ahmed and Abu Hanifa see 7 *Bada'i' as-Sana'i' fi Tartib ash-Shara'i'* at 90. See also 10 *Ibn Qudamah, Al-Mughni wa al-sharh al-kabir* at 302.

This section adopts the opinion of Malak, Shafi'i and Ahmed that the offense is punishable whether committed in the State or elsewhere.

The mental element required for conviction is the intention to take another person's property by force or by threatening the use of force. According to Imams Abu Hanifa and Malak, no intention to kill or cause injury is required for conviction. see 7 *Bada'i' as-Sana'i' fi Tartib ash-Shara'i'* 96-97.

Property requirements in the offense of theft by *Hadd* must be satisfied to convict the actor under section 25 (c). Therefore, the stolen property must be legally recognized property (*Mal Mutaqawwim*) that is tangible personal property; it was kept in the safe keeping of another person (*Hirz*) and the value of the stolen property is not less than.... (*niṣāb*).

Punishments in this section was suggested by *Ibn Abbas*. The punishment for section 25 (A) was also suggested by Imams Shafi'i and Ahmed. The punishment for section 25 (B) was suggested by Imams Abu Hanifa and Shafi'i. The punishment for section 25 (C) was suggested by Imams Abu Hanifa, Shafi'i and Ahmed. The punishment for section 25 (D) was suggested by Imams Abu Hanifa and Ahmed. Notably the majority of scholars have suggested that "exile from the land" stated in *Qur'an* verse 5:33 means imprisonment.

Imams Ahmed and Shafi'i correctly suggested that if the actor is punished under section 25(D) and he caused a bodily injury, he shall also be liable for the punishment of causing a bodily injury. See *Ibn Qudamah, 10 Al-Mughni wa al-sharh al-kabir* at 310.

Section 25.2 is based on *The Holy Quran, Surah Al-Maidah, 5:34*. For the requirements in section 25.2, (1) and (2) See 7 *Bada'i' as-Sana'i' fi Tartib ash-Shara'i'* 96.

Section 26. Insurgency -*Baghi*

1. Insurgency is an ideologically motivated criminal organization composed of ten or more persons who intentionally attempt to use force as a means of change of government or contravening a duly enacted statute.
2. The State may use reasonable force to repel an actor's aggression, detaining actors and their accomplices and seizing any property utilized in the commission of the offense until the insurgency is concluded.
3. No person shall be convicted of an⁴⁸ insurgency offence until:
 - A. He is given an opportunity to explain the reasons and circumstances that led to the commission of the offense and address it if it is redressable; and
 - B. He is given a fair opportunity to give up the commission of the offense and repent.

4. No person shall be convicted of insurgency if the basis of attempting to change the government or contravening duly enacted statute is undoubtedly lawful under Islamic law.

Section 26.1 Insurgency Punishment

1. Insurgency is punishable by not less than one day imprisonment and not exceeding years imprisonment and/or fine not less thanand not exceeding
2. Any other offense committed during or because of the insurgency shall be punished according to this code.

Explanatory Notes

Personal defiance of the government, political system or law is not insurgency. A collective action is the essence of the offense. The actors must be numerous with considerable force. The defendants' motive for insurgency is an erroneous ideology, interpretation of law or erroneous interpretation of government action. Section 26 requires an organization of ten or more to be guilty of this offense. This number is arbitrary and it is up to the government to endorse any number that poses a threat to the State and its citizens.

According to Imams Malak, Ahmed and Shafi'i', actual use of force is necessary for conviction. See 7 *Nihayat Al-Muhtaj Ila Sharh Al-Minhaj* at 383 and 4 *Sharh Fath al-Qadir ala al-Hidayah Sharh Bidayat al-Mubtadi* at 410.

Actors must have sufficient power (*shawka*) to disrupt services or distress society. See 7 *Nihayat Al-Muhtaj Ila Sharh Al-Minhaj* at 382-3.

Government commands and laws that contradict Islamic law are of no force or effect. Subsection 4 excuses actors from liability when the cause of insurgency is lawful under Islamic law. The cause must be clearly, without any doubt, lawful under Islamic law. The cause can be lawful only in cases involving government orders to commit a sin or refrain from doing an Islamic duty - for example, ordering individuals to consume alcohol or to refrain from prayers. Matters subject to debate are not a valid cause for insurgency. If the government adopts a scholarly opinion that does not contradict prefixed adjudications of Islamic law, citizens must obey and the dissenters who initiate insurgency shall be liable.

Section 27 Attempting Insurgency

Any person, group, or organization advocating, publishing or circulating any writings that incite the use of force as a means to change government or to contravene a duly enacted statute is liable to attempting insurgency and shall be punished by not less than ... imprisonment and not exceeding years imprisonment and⁴⁹ or fine not less thanand not exceeding

Explanatory Notes

Section 27 is a *Ta'zir* offense aimed to block the means to possible harm caused by insurgency.

Section 28 Apostasy

1. Any person, without lawful excuse, after being given a fair opportunity to give up apostasy, who intentionally by an act or omission renounces Islam is guilty of an offence and liable to the death penalty.
2. The actor shall be subject to confiscation of assets and loss of legal capacity from the moment of declaration of apostasy.
3. If the actor repents and gives up apostasy, a judge may impose imprisonment for a term not exceeding one year and/or fine not less thanand not exceeding

Explanatory Notes

Renouncement of Islam may occur by pronouncement of words or deeds or by any other means. Only the State authorities may declare that a person has committed apostasy and enforce the punishment. The actor must be an adult, sober, sane and fully aware that his actions or inactions denote renouncement of Islam. According to Imam Malak, the actor must be given a fair opportunity, not less than three days, to give up apostasy and repent.

Section 29 Excuses That Preclude the Execution of Punishment in *Hudud* Offenses

1. When an actor commits a *Hudud* offense then repents and communicates his intention to give up committing the *Hudud* offense to the authorities before his apprehension, he shall not be punished by the *Hudud* punishments listed in this code.
2. The actor remains civilly liable for his actions including the return of the stolen property to the victim or reimbursement of the property's fair value if the stolen property is unrecoverable.

Explanatory Notes

Section 29 adopts the opinion of Imam Ahmed and the majority of the *Shafi'i* school of thought scholars.

Section 30 Partial Defense to *Hudud* or *Qisas* Offenses

Hudud or *Qisas* punishments may be reduced to no more than imprisonment and /or fine not exceeding if an actor vested himself unlawfully with the State's judiciary and executive powers and accordingly executed the punishment against the *Hudud* or *Qisas* offender, and proves beyond all doubt that that the person he harmed:

- A. Has committed a *Hudud* or *Qisas* offense; and
- B. The actor is aware at the time of commission of the offense that the person he harmed is subject to the State's *Hudud* or *Qisas* punishment.