CHAPTER SIX

SHORT-TERM IMPRISONMENT AND ALTERNATIVES
UNDER ISLAMIC PENAL SYSTEM

6.1 INTRODUCTION

The earlier chapters of this work have covered the contemporary problems of short-term imprisonment under the penal system of India and Malaysia. The system of imprisonment and concomitant laws have their origin in western philosophy, laws and practices. There is another system of law quite different from western type penal system. This other system is the Islamic penal law system. This chapter is therefore devoted to the examination of the position of imprisonment under the Islamic penal system.

It may be noted at the outset that Islamic punishment is a mixture of mandatory, retaliatory and discretionary punishments. There are offences where a fixed penalty is prescribed under Islamic law whereas the same offence is punishable under the western based penal system by the discretionary sentence of imprisonment. Again the Islamic system confers a right on the victim or next of kin of the deceased to demand retaliation or to remit the punishment altogether, even in some major crimes, like murder, which under the Malaysian Law is punished with the mandatory death sentence. Further, the Islamic law gives the power to the Ruler to create by legislation offences under the Islamic concept of siyasa and to provide discretionary (ta'zir) punishments. Imprisonment in Islamic law falls under the category of ta'zir
punishment. The offences for which it could be prescribed can be created by legislation.

This chapter therefore, examines punishments under Islamic law with particular attention to sentence of imprisonment, its utility and efficacy in relation to short term imprisonment.

6.2 PUNISHMENTS UNDER THE ISLAMIC PENAL SYSTEM

The Islamic conception of justice is based on fair dealing and equity. Allah commands men to judge people with justice. To achieve justice in the field of criminal law, Islam has provided various punishments. Punishments as envisaged by Islamic Criminal law fall into three groups. (i) Hudud; (ii) Qisas and Diyat (Retaliation and Blood money) (iii) Ta’zir (Discretionary punishment)

6.2.1 Hudud

These are the crimes for which the kind and quantum of punishment have been fixed by the Quran as of right of God Almighty. These punishments cannot be increased, decreased or altered by the Ruler or by the judge. The offences for which Hudud punishments are prescribed are as follows:

(a) Adultery and Fornication (zina)
(b) False accusation of adultery
(c) Theft
(d) Highway robbery
(e) Drinking wine
(f) Apostasy
The hadd being a right of Allah, no compromise, settlement, or pardon can be made. The punishments laid down for these offences are deterrent and reformative in nature. The offence of adultery is punishable with stoning to death (rajm), if committed by married persons. But, the offence of fornication committed by an unmarried person is punishable by hundred stripes. The person making false accusation of adultery against a married man or woman will receive 80 stripes. The offence of theft is punishable with cutting of the hand. The person committing highway robbery (hiraba) will lose hands and feet and if the murder is committed in the process of robbery the offender will suffer death either by sword or crucifixion. The offence of drinking wine carries the punishments of 80 stripes. The offence of apostasy is punishable in some cases with death.

6.2.2 Qisas and Diyat (Retaliation and Blood Money)

In Islamic criminal law, some offences have been made punishable by way of retaliation or blood money. The offences so punishable are pre-meditated murder, semi-premeditated murder, murder by mistake and hurt. The punishment for these offences are said to be the right of the next of kin of the victims, which can be, remitted or altered by them in the capacity as legal heirs. The right to remit retaliation is also associated with the right to receive the diyat. The diyat is the compensation fixed to satisfy the victim or deceased relatives.

6.2.3 Ta'zir (Penal punishment)

Crimes other than Hudud, Qisas and Diyat are punishable by “ta’zir” i.e. discretionary punishment. These are the offences for which punishments are not

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1 There are two views concerning this punishment. Some Muslim scholars hold the view that apostasy is punishable with death, while others say apostasy should be punished with ta’zir and must be determined according to the circumstances of the case. See Mohamed S. El-Awa, *Punishment in Islamic Law*, Indianapolis, American Trust Publications (1982) p.62.

specifically mentioned in the Holy Quran or the Sunnah of the Prophet (S.A.W).

However, they have been made punishable because they represent the acts of disobedience to God’s commandments and lead the people astray. The legislator, Rulers or judges have been given a discretion to prescribe punishment in accordance with the nature and the extent of the crime and the circumstances of the case.

Islamic punishments are deterrent in nature as well as reformative. We have observed in the earlier chapters that imprisonment has proved to be a source of producing criminals besides being a burden on the public exchequer. Hudud punishments are fixed. There is no scope to vary the punishment in this category of offences. Ta’zir or discretionary punishments are not clearly specified. However, they are left to the discretion of the Ruler or the Court to impose in accordance with the need to reform the criminals. The discussion that now follows begins with objects of punishment in Islamic criminal law followed by an attempt to look into the viability of Ta’zir as a mode of reformation of the offender and as an alternative to short-term imprisonment.

6.3 OBJECTS OF PUNISHMENT IN ISLAMIC PENAL SYSTEM

Islamic criminal law regards punishment as a social necessity imposed to protect society and safeguard man’s interest. Necessity is determined according to its importance for the protection of society. The object of punishment in Islamic law is the reformation of the offender and a lesson to the public. These objects can be summarised as follows.

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(1) One of the objects of punishment is to serve as a deterring and discouraging factor to the criminals. The punishment of the offender serves as a lesson to others so that the inclination to crime is removed and people may not dare to commit crime. Hence, in Islamic law all punishments are executed in public before a large crowd. This public display of punishment is intended to have deterrent effect on prospective offenders. The, Quran says to the effect: “and let a party of the believers witness their punishments” (Surah al-Nur (24):2).

The exemplary punishment of an obstinate wrong doer in Islam carries out a psychological operation on all those in the society having criminal intentions⁴. This is the purpose of inviting the people to witness the execution of punishment.

(2) The other object of punishment is to rehabilitate or reform the wrong doers. Punishment other than those for Hadd and Qisas should be of such a nature that it might admonish and reform the offender and prevent him from repeating the crime again. It should be flexible so that the Court may have the choice to choose the kind of punishment most suitable to the circumstances of the case.

We find in the Holy Quran that whenever punishment has been described for the commission of an offence it has been concluded either by way of advice or threat of punishment in the life hereafter. For example in the case or murder, the Holy Quran says

“And any who does this shall (not only) receive the punishment (but) the chastisement shall be doubled to him on the Day of Judgement and he shall abide therein in abasement.” (Surah al-Furqan (25): 68-69).

The emphasis on reformation can be found reflected in various ayaat of the Holy Quran. For example, the Holy Quran provides:

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⁴ supra note 2, p. 23.
"But whoever repents after his iniquity and reforms himself Allah will turn to him in forgiveness, for Allah is oft Forgiving, most Merciful." (Surah al-Maidah, 5:39).

(3) Another object of punishment is preservation of life and protection of honour and chastity. In the modern criminal justice system more importance is given to the life of a man and the state becomes a party in all such cases and no attention is paid to the aggrieved. The State punishes the offender unmindful of the fact that revenge exists or is removed out of the mind of the aggrieved party. In this way neither the feelings of revenge are satisfied nor reoccurrence of crime is checked. The result is that a long chain of crime continues between the parties. Under the Islamic criminal justice the right of revenge is allowed. Life for life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth and wounds for equal is the law. But this right of revenge is the right of the injured party or of his heirs and not the State. The injured party can forgive the accused or ask for compensation instead of revenge. Thus the main purpose of punishment in Islamic law is to eradicate the grievance from the heart and mind of the injured party.

6.4 TA'ZIR OR PENAL PUNISHMENTS

Ta‘zir literally means to prevent, to correct, to reform or to avoid. It is defined as "discretionary punishment to be inflicted for transgression against Allah, or against an individual, for which there is neither a fixed punishment nor a penance or expiation." This definition does not cover all those crimes for which specific punishments are prescribed by Shariah i.e. Holy Quran and Sunnah of the Prophet Muhammad (S.A.W.) and has been left to the discretion of the judge, or the Ruler to fix it in accordance with the prevailing circumstances of the case so as to treat and
reform the offender and to prevent him from re-offending and restraining others from committing similar offences.

The term tazir has been defined by Al-Mawardi, a Shafei jurist as “punishment inflicted in cases of crimes for which the law (Shariah) has not enacted written penalties. The rules relating to it differ depending upon the circumstances in which it is inflicted and the circumstances with respect to the culprit.” There is concurrence amongst the jurists that tazir also refers to such offences for which no punishment has been fixed in the basic sources of Islamic Criminal law. I.e. the Quran and Sunnah of the Prophet (S.A.W.). These sources empower the Ruler to declare such acts unlawful which are detrimental to the peace and tranquillity of the State under the prevailing circumstances keeping in view fundamental principles of Islamic criminal justice. The Ruler or the Qadi can also formulate rules and regulations. These rules and regulations should not be arbitrary and also should not be contrary to any injunction of Quran or Sunnah. The right to legislate in the field is limited. The Quran says:

“O you who believe! Obey Allah and obey the Messenger and those of you who are in authority.” (Surah an-Nisa (4):59).

The approach of Islamic Criminal law towards the punishment of tazir offences in fact predates out yet is in consonance with the modern methods of reformation and treatment of the offender. It does not prescribe a definite penalty for each tazir offence, but rather leaves it to the Ruler or the Qadi to pass any sentence that may be appropriate in the circumstances of each case. It is with this reason

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5 Al-Mawardi, Al-ahkam al-Sultaniyyah pp. 236-237.
Islamic law has provided numerous punishments ranging from mild punishment to severe punishment and has conferred the powers on the Court to impose any of them as it seems fit for the reformation of the offender and safety and security of the society. Apart from this the Courts have the power to impose one or more of the punishments necessary for the correction of the criminal or it may suspend the punishment if it thinks necessary for the reformation of the offender. In fact the Shariah gives greater latitude to the Courts to use any corrective method that may reform the offender and protect the society.

6.5 TYPES OF TAZIRS OR PENAL PUNISHMENTS

*Ta'zir* punishments under Islamic law disclose a variety of measures against the offenders. They include corporal punishment, monetary punishment, imprisonment and other non-custodial measures.

6.5.1 Caning

The punishment for caning is one of the penalties recognised in Islamic criminal law. It has been used as hadd punishment for adultery, false allegation of adultery and drinking alcohol. It has also been given for many offences punishable with *ta'zir*. But it is not permitted to impose hadd where it is not ordained. So the Prophet (S.A.W.), while supporting this punishment for *ta'zir* said; “He who punishes a criminal with hadd in a crime which is not liable to hadd is a trangressor.”

The punishment of caning has also been given in crimes relating to *ta'zir* by the Caliphs and continued in operation to later periods.

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One of the most important features of caning is that neither the imposition of this punishment costs the State nor the offender suffers his job. The family is not deprived the maintenance and the offender after imposition of sentence is free to go and join the family. One other striking feature of caning is that the offender is saved from the contaminated and corrupt influences of prison life\(^7\). The punishment of caning is provided in Malaysia for some offences\(^8\), but it has been abolished in India since 1955.

6.5.2 Banishment or Exile

Banishment or expulsion is one of the punishments prescribed under Islamic law for offences liable as ta 'zir. Under this punishment the offender is driven away from his town or village to another town or village of the same country or another country. The punishment is given when there is likelihood that the offender may contaminate and influence others.

There is difference of opinion among various schools of thought as to the period of banishment. According to Imam Abu Hanifa the period of banishment may be more than one year. While Shafei and Hanbali jurists are of the view that the offender should not be exiled up to one year, as one year is a period prescribed for adultery, which falls under the \textit{Hadd}. The jurists who hold the view that period of exile should be more than one year, do not fix any definite period of punishment, rather empower the Ruler to allow the offender to end exile if the offender repents or is reformed.

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\(^8\) The punishment of whipping is provided for thirty-two offences under the Malaysia Penal Code. The offences include assault or criminal force (S. 356), rape and unnatural offences (ss. 376, 377, 377B, 377C, 377D and 377E), theft (ss. 379, 380 and 382), extortion (ss. 384, 385, 386 and 387), robbery (ss.
6.5.3 Imprisonment (al-Habs)

Imprisonment is one of the penal punishments used for offences liable to ta'zir. It was known as “al-Habs” which means confinement. The confinement may be in a house, mosque or any other place, or the offender may be handed over to another person to keep him in custody or to restrict his further movement⁹. The punishment of imprisonment has been in existence in pre-Islamic Arabs. Islam did not prohibit it, rather it retained it.

Imprisonment as a form of punishment has been in use during the period of the Prophet (S.A.W.). The following ahadith show the practice of imprisonment:

1. It has been said on the authority of Abu Hurairah that the Prophet (S.A.W) confined a man on account of some allegations against him¹⁰.

2. In another hadith it is reported that the Prophet (S.A.W.) detained a man suspected of murder for sometime of the day and then freed him¹¹.

3. It is stated on the authority of Hirmas Ibn Habib who related from his father that he owed a debt to him and he was not paying it. The Prophet said, “confine him”¹².

4. It is also stated that women prisoners were confined in a separate place during the period of the Prophet (S.A.W.)¹³.

During the period of the Prophet (S.A.W.) and caliph Abu Bakar there was no place specially built for the confinement of prisoners, But when the territory of the Islamic State expanded and the population increased during the time of Caliph

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Umar he purchased a house from Sufwan bin Umayyah for four thousand dirhams and made it as a jail\textsuperscript{14}. Later on other caliphs and Muslim Rulers established prisons for the confinement of convicts, suspected offenders and for the persons awaiting trials.

The majority of the Jurists (Fuqaha) are of the view that the Qadi or judge can impose sentence of imprisonment for crimes liable to \textit{ta'zir} and it is the responsibility of the Ruler to establish prisons. The punishment of imprisonment can be awarded exclusively or it can also be given along with other punishments such as a fine or whipping if it is expedient in the circumstances of the case.

In Shariah imprisonment is of two kinds, limited for a term or that of unlimited term. The punishment of imprisonment may be given for a limited period. The minimum period for imprisonment is one day. But the jurists differ on the unlimited term of imprisonment. Some jurists fix the maximum period to six months, while others fix it one year and some hold the view that maximum period of imprisonment will be left to the Ruler to decide\textsuperscript{15}. The Maliki, Hanafi and Hanbali Schools hold the view that maximum period of imprisonment cannot be fixed because it differs for each Offence and from person to person. However, according to Shafei's school, the maximum period of imprisonment is one month for investigation and six months as punishment and in any case it must not be more than one year. This view is based on the analogy that the offence of Zina (fornication) committed by an unmarried person is punishable with banishment for one year therefore imprisonment as \textit{ta'zir} must not go beyond the one year of the

\textsuperscript{14} Ibn al-Qayyim p. 102.
\textsuperscript{15} Oudah Vol. 3 p. 96.
banishment permitted for fornication which is hadd punishment according to Shafei jurists\textsuperscript{16}. However, some of the Shafei jurists also hold the view similar to the other schools of jurisprudence as to the indefinite period of imprisonment. Accordingly, the Qadi is free to determine the maximum period of definite imprisonment as he thinks proper depending on the types of crime committed by the accused and the period of imprisonment required for the reformation. Besides, the Islamic Penal system also allows the Qadi to impose imprisonment as an additional penalty if it is required according to the circumstances of the case\textsuperscript{17}.

The evils of imprisonment were well known to the jurists of Islamic law. They discouraged the imposition of imprisonment rather they encouraged to the use of other types of ta'zir punishments. Islamic law permitted unlimited terms of imprisonment to be applied on those offenders who had committed serious offences or were habitual criminals and who had no sign of reformation by any other kind of punishment. The offenders will remain in prison till they repent or mend their ways. If they are not reclaimed they will remain in prison and the society will be protected from dangerous criminals. The concept of unlimited imprisonment was introduced in Europe in the end of the 19\textsuperscript{th} century, while Islamic law introduced it thirteen hundred years before\textsuperscript{18}.

As we have observed in the earlier chapters of this work that the problem of prisons and their inmates is very alarming. Imprisonment is used as the basic punishment for most of the offences. The result is that most of the prisons are

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\item[\textsuperscript{16}] El Awa op. cit. P. 105.
\item[\textsuperscript{17}] Id. 105.
\item[\textsuperscript{18}] Oudah Vol. 3 p. 99.
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filled beyond capacity. Besides, the prisons are the centres for training the offenders in further crimes, notwithstanding the fact that prisons are established to reform the prisoners. The association and mixing together provide an opportunity to the prisoners to plan criminal activities and benefit from each others' knowledge and expertise. This knowledge which they receive during their confinement may turn first offenders into professional criminals.

The viewpoint of Islamic criminal law to imprisonment is quite different from the modern penal system. Under the modern penal system, imprisonment is the primary penalty for major as well as minor offences whereas under Islamic penal system, it is a secondary punishment awarded for minor offences as the court has a discretion to impose it or not. If looking at the record of the offender, the Court is of the view that this punishment will not serve any purpose, it will not impose it.

The experience of the countries where Islamic law is enforced is that the number of prisoners is comparatively low whereas in other countries such as Malaysia and India the number of prisoners is very high\(^\text{19}\). The reason for such a limited number of prisoners is that Shariah gives wide options to the Courts to award punishments from a variety of penalties. The Courts are free to select any one of the mode of punishments prescribed by Shariah. This approach of Shariah is far ahead of modern penal system. The Courts are encouraged to use other ta'zir punishments instead of using imprisonment as a method of punishment.

\(^{19}\) See Chapter 3.
6.6 OTHER PENAL MEASURES

Islam gives considerable importance to reformation of offender by searching his own soul and at the same time treating him as an object of deterrence. The following are the measures where these elements are present in abundance.

6.6.1 Fines and Seizure of Property (al-Gharamah wal-Musadarah)

Fine is one of the punishments given in crimes liable to *ta'zir*. During the period of Prophet (S.A.W.) fines were imposed in cases of *ta'zir*. However, the Fuqaha (jurists) appear to be divided as to its legality.

One view is held by jurists of Hanafi and some of the Shafei's. Imam Malik and Abu Yusuf of the Hanafi School and some Shafei jurists are of the opinion that fines can be imposed in some crimes liable to *ta'zir*. Explaining the view of Abu Yusuf, the Hanafi commentators say that the Ruler or the judge does not impose fine for the public exchequer but in order to keep the person away from the crime until he has repented. They support this view on the ground that no one is permitted to take another person's money without any legal reason. If it appears that the offender has not repented the money so realised from the offender may be spent on public welfare.

On the other hand, some fuqaha (jurists) deny fine as a lawful *ta'zir* punishment and claim that it was lawful in the beginning of Islam but later it was abrogated. This view was held by Hanafi jurist Tahawi in his book, "Sharh Ma ani At al Athar" (Explanation of the Meanings of the Traditions). The view of Tahawi as to abrogation of fine or financial penalties was severely criticised and rejected by Imam

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21 El-Awaop. cit. p.104.
Ibn Taimiyya and his disciple Ibn al-Qayyum based on the Prophet’s practices and some of his companions’ decisions. While supporting fine as one of punishments, Ibn al-Qayyim said:

“These are well known cases which have been accurately reported. Those who claim that financial punishment was abrogated are wrong. Their views may be refuted by the cases ascribed to great companions of the Prophet (S.A.W.). Neither the Quran nor the Sunnah can help them in supporting their claim, nor is there any consensus about it. Even if there was a consensus, it would have no power to abrogate the Sunnah. The only thing they may say is: ‘in our school’s view it is not allowed.’ This means they take their own view as standard of what is accepted and what is not.”

The penalty of fine is also accepted as a mode of punishment by the Hanbali, Hanafi and Maliki schools. The commentators of these schools defend it mainly in Ibn al-Qayyim who holds the view, that both elements of financial punishment (i.e. fine and seizure of property), are allowed under Islamic penal system. In some cases the Prophet (S.A.W.) determined the amount of fine e.g. in cases of theft in which the value of stolen property did not reach the minimum nisab required for impositions of hadd punishment, refusing payment of Zakat etc. In other cases it was left to the discretion of Ruler or Qadi to fix the amount according to gravity of the offence and capability of the offender to pay. According to Islamic criminal law it is not correct to imprison an offender who is unable to pay fine. He can only be imprisoned when he is capable of paying the amount of fine but fails to do so. The failure to pay debt is punishable only when the debtor has the means to pay. But if he has no capacity to pay, he cannot be incarcerated because the cause for incarceration is not present.

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However, there is no prohibition under Islamic law to make the offender to work and pay the amount of fine out of the wages earned by him\textsuperscript{24}.

### 6.6.2 Public Disclosure (Tashhir)

Islamic criminal law also recognises Public disclosure or Tashhir as a penal punishment. By this punishment the offence committed by the accused is announced. The Prophet (S.A.W.) used this punishment on a man who after collecting alms (Zakat), gave some to the Prophet (S.A.W.) and the rest he took himself claiming that it had been given to him as a gift\textsuperscript{25}. He was awarded with the punishment of public disclosure.

The use of this punishment is supported by various Muslim judges. Shurahyeh, a well known judge during the time of the caliph Umar and caliph Ali stated that a false witness must be publicly identified so that the people may not trust him\textsuperscript{26}. All the schools agree on this statement of the great judge. In this punishment the offender was taken round every corner of the city by the Court officials for the purpose of telling the city dwellers that for the commission of an offence he has been awarded \textit{ta'zir} punishment. The object of this punishment was to draw the attention of the people to the fact that this offender should not be trusted.

In the earliest times public disclosure was made in public places and markets. But nowadays it may be done by publishing announcements in newspapers, radio, television or by distributing handbooks.

\textsuperscript{24} See Oudah Vol. 3 p. 109.
\textsuperscript{25} Mishkat al Masabih, Vol. 1. P. 560.
\textsuperscript{26} Sarakshi, Mabsut Vol. 16 p. 145.
Public disclosure or tashhir can be a good substitute for offenders liable to offences punishable with short term imprisonment.

6.6.3 Threat (al-Tahdid)

Threat is a form of ta'zir punishment which serves the aim of punishment by putting the offender under fear of punishment. It is carried out by either giving threat to the offender of punishment if he repeated the offence or the execution of sentence is delayed until the offender has committed another offence (within a stated period).

The admonition of the offender is regarded as punishment effective enough in the reformation of the offender. This punishment for ta'zir offences is similar to the modern punishment of suspended sentence\textsuperscript{27}. However, there is marked difference between Shariah and modern form of suspended sentence. In Shariah the period of suspended sentence is not fixed. It is left entirely at the discretion of the judge to fix the period of suspended sentence. Furthermore, under modern law the Courts cannot suspend a sentence other than a sentence of imprisonment\textsuperscript{28} while under Islamic law the judge has the authority to suspend any sentence including imprisonment.

6.6.4 Warning or Admonition (al Waz)

The Shariah prescribes warning as a form of punishment. It is more or less similar to admonition. The purpose of admonition is to caution or remind the offender of his criminal activities. It is mentioned in the Quran as the first stage in

\textsuperscript{27} Section 39 of the English Criminal Justice Act 1967 allows the Court which passes a sentence of imprisonment for a term of not more than two years may suspend the sentence for a specified period. This period may not be less than one year and not more than three years.

dealing with wives who are disobedient. The Holy Quran says: "As to those women on whose part you fear disloyalty and ill conduct, admonish them" (Surah an-Nisa (4) :34).

This punishment is given when the Court feels that the punishment meted out to the offender will cause the offender to mend his ways. The modern penal system also prescribes for the punishment of warning or admonition. This is used in the cases of first offenders and offences of less serious nature.

Under the modern penal system punishment of warning or admonition is enforced differently in various legal systems. Under some legal systems the sentence is pronounced and only its execution is postponed for sometime in order to give an opportunity to the offender to reform. If the offender re-offends again, the sentence is to be executed. While in some other legal systems the Courts defer the imposition as well as the execution of sentence and provide an opportunity to the offender for reformation.

This system is known as probation and is successfully practised in most parts of the world including India and Malaysia\textsuperscript{29}. It is to be noted that warning or admonition are of recent origin under the modern penal system being applied as late as the end of the 19\textsuperscript{th} century and the beginning of the 20\textsuperscript{th} century whereas the Shariah used them thirteen centuries ago\textsuperscript{30}.

\textsuperscript{29} See Chapter 4.

\textsuperscript{30} Qudah op. cit. Vol. 3 p. 106.
6.6.5 Boycott (al-Hair)

Islamic law recognises boycott as one of the ta'zir punishments. The Quran supports the use of this punishment. Recommending this punishment, the Holy Quran says “Admonish them and refuse to share their beds” (Surah an-Nisa (4) :34). The Prophet (S.A.W) is said to have used this punishment in the case of his three companions who failed to join the army in the battle of Tabuk. They were punished by the Prophet (S.A.W.) by severance all relations with them. The social boycott proved successful and reformatory. This method dealing with the offenders can be used when the offender cannot be dealt with by any other method of punishment. Modern form of boycott can be traced into the system of “ex-communication” practised among certain communities. An order of ex-communication for a short period could be a good alternative to short-term imprisonment.

6.7 HUMANISM IN ISLAMIC PENAL SYSTEM

In Islam it is believed that there is no criminal who cannot be cured. Even the worst criminal can be reclaimed. He can repent and can be forgiven. Islamic law not only leaves the door open for repentance but it also strives to cure the criminal’s moral life.

Social defence in the sense of rehabilitation and treatment of the offender by eradicating of crime has its origin in Islamic Penal system. Islamic Penal law urged on

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31 Ibn Tamiyyah, al-Siyasa al-Shamiah, Cairo (1951) pp. 120-121.
32 Ibid 53.
prevention of crime before its commission and this can be achieved by adopting the following measures:\(^{33}\)

(i) People should be guided to have faith in religion and protect themselves from going astray.

(ii) Generate love of doing good to the people.

(iii) Doing good to the people in the society and avoiding evil.

Islamic law also prohibits the disclosure of crime so that moral scandals may not widely spread and the offender does not continue with his crimes.

People are also encouraged to pardon offenders. Due consideration is given to promote mutual aid and co-operation in financial and moral affairs with a view to provide a prosperous life to everyone. Islamic penal law does recognise what is known in contemporary criminological terminology as “individualisation of punishment”. It calls upon the judge to consider the circumstances of the criminal that were instrumental in the commission of the crime.

Thereafter the steps are taken by the judge to rehabilitate or reform the offender. Punishment is awarded in proportion to the harm done and in relation to the criminal’s circumstances. The harsh punishment is substituted with lighter one. He may receive medical or psychiatric treatment or moral edification. Islamic law does not prohibit any procedure leading to the disclosure of the criminal’s circumstances either through medical investigation or social enquiry.

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6.8 CONCLUSION

The object of punishment under Islamic Penal system is to eradicate crime from the society. To attain this object various punishments have been provided. These punishments are imposed in accordance with the nature of injury suffered by the society in order to protect humanity from evil and attain peace and security for them. The punishments in Islamic penal system are clearly and strictly prescribed and no room for discrimination and arbitrariness is left to the Courts. The punishments in Islamic criminal law are fixed for limited number of offences which fall in the category of Hadd and Qisas, while punishments for a large number of offences fall under ta'zir or Penal punishments which give full discretion regarding the measure and form of punishment. Ta'zir punishments are many and vary between lighter to more severe punishments. It may range from capital punishment to caning, imprisonment to warning, exile to public disclosure and boycott. The Holy Quran and practices of the Prophet (S.A.W.) support these punishments. The Holy Quran says:

“Nor do evil in the land, working mischief” (Surah ash-Shu’raa (26) :183)

The Ruler of the country has absolute discretion to impose these punishments and make rules for the enforcement of these punishments. In the earlier chapters, we have observed that of all the forms of punishment, imprisonment is one of the most widely used form of punishment. The Islamic penal system, although it recognises the role of imprisonment in crime prevention, however discourages its use due to the evils inherent in imprisonment. The imprisonment is to be imposed only in the circumstances when it is not possible to deal with the offender by any other form of ta'zir punishment. Islamic penal law provides a wide range of punishment in the category of ta'zir. These punishments are both deterrent and reformatory in nature and
are also easier to administer. It is submitted that due to the inherent evils involved in imprisonment and particularly in short term imprisonment, some of the ta'zir or penal punishment can be helpful in dealing with the problem of petty offenders.