God's Law, King's Court: *Ḥudūd* Jurisprudence under Saudi Monarchical Decrees

Hazim H. Alnemari
Assistant Professor of Law, Islamic University of Madinah

Abstract

This article examines two significant developments in Saudi criminal law during 2018 and 2019 respectively: the abolition of al-ḥukm bi-l-shubha *(criminal convictions based on doubt) and the abolition of* al-taʿzīr bi-l-jald *(discretionary flogging punishments). The King undertook these developments as part of a broader plan to overhaul the Saudi justice system. Considering their grounding in* fiqh*, analyzing these abolished practices yields key insights: the intricate elements of* ḥudūd *enforcement; the susceptibility of* ḥudūd *jurisprudence to interpretive variances that yield unpredictable judicial outcomes; the inadequacy of* ḥudūd *as a capping threshold for* taʿzīr *offenses; and the possibility of implementing broad measures to guide the enforcement of* ḥudūd*, which may eventually evolve or find parallels in other jurisdictions.*

Introduction*

Saudi Arabia stands out in the Muslim world for its formal legal system which has continuously evolved from medieval models.[1] This is particularly evident in the criminal domain. While significant statutes have been enacted in other areas of law,[2] Saudi criminal law remains minimally codified, especially in areas of *ḥudūd* (paramount prescribed punishments), *taʿzīr* (discretionary punishments), and *qiṣāṣ* (criminal retributive justice).[3] This indicates that Saudi judges have consistently wielded considerable discretion in applying Islamic criminal rules and precedents, reflecting a continuation of classical *sharīʿa* judgeship. Taking into account the monarchy's interest in upholding *sharīʿa*, an examination of recent royal edicts regarding *ḥudūd* provides an invaluable opportunity to analyze the jurisprudence of *ḥudūd* within both an authentic setting and a contemporary context.

Recent developments revolve around Royal Edict No. 56485 (2018), which abolished the precedent widely called

* I thank Adam Druckman, Bahman Khodadadi, and Cem Tecimer for their editorial assistance, and the anonymous reviewers for their valuable suggestions.

1 Frank E. Vogel, *The Rule of Law in Saudi Arabia: Exploring Contradictions and Traditions*, *in* The Rule of Law in the Middle East and the Islamic World 135 (Eugene Cotran & Mai Yamani eds., 2000).

2 The Saudi government recently enacted three major statutes: (1) Statute of Evidence (2021), (2) Statute of Personal Status (2022), and (3) Statute of Civil Transactions (2023). These statutes, along with others cited in this article, are available—primarily in Arabic—on the official Saudi government websites of the Bureau of Experts at the Council of Ministers and the National Center for Archives and Records.

3 There are reports about a forthcoming criminal code in Saudi Arabia. *See HRH Crown Prince Announces 4 New Laws to Reform the Kingdom's Judicial Institutions*, Saudi Press Agency (Feb. 8, 2021) https://www.spa.gov.sa/en/c706708f22. Anecdotal reports suggest that the penal code's enactment is foreseeable. Although a draft was reportedly leaked in July 2022, the government maintains that the alleged draft is inaccurate and that the code remains under review. *See Saudi Arabia: Repressive Draft Penal Code Shatters Illusions of Progress and Reform*, Amnesty International (Mar. 20, 2024), https://www.amnesty.org/en/latest/news/2024/03/saudi-arabia-repressive-draft-penal-code-shatters-illusions-of-progress-and-reform/; *Senior Official at Saudi Ministry of Media: Alleged Draft of Penal Measures Recently Shared on Social Media Incorrect, Actual Draft Currently Undergoing Legislative Review*, Saudi Press Agency (Mar. 18, 2024), https://www.spa.gov.sa/2372150.

al-ḥukm bi-l-shubha (convictions based on doubt),[4] and Royal Edict No. 25634 (2019), which abolished *al-taʿzīr bi-l-jald* (discretionary flogging punishments).[5] The precedent of *al-ḥukm bi-l-shubha* allowed judges to issue problematic convictions in cases lacking evidentiary certainty, while the precedent of *al-taʿzīr bi-l-jald* sanctioned corporal punishment at judicial discretion without clear, standardized guidelines. Such powerful edicts are not unusual for the assertive Saudi monarchy, where the monarch rules and reigns simultaneously.[6] However, even by Saudi standards, these edicts stand out as direct royal commands to the judiciary to change some of its established *ḥudūd* precedents.

These commands highlight embedded tensions in the application of *ḥudūd*, particularly its treatment of doubt and its boundary-setting relationship with *taʿzīr* offenses. Furthermore, these changes signal a deliberate shift in the Saudi legal system's approach to the application of *ḥudūd*, reflecting an evolving relationship between the monarchy and the judiciary. They also raise questions about the extent to which Islamic legal principles remain flexible under monarchical authority. Given that *ḥudūd* are traditionally seen as divinely mandated limits, royal intervention in their application introduces a theologically sensitive layer. These edicts offer a lens through which to explore how human authority exercises agency in relation to what are understood as God's fixed commands. As such, these edicts illuminate the broader dynamics of Islamic law's evolution, highlighting how classical Islamic legal doctrines are being adjusted within contemporary structures of political authority and through direct involvement in judicial practice.

Considering these royal edicts' concise, conclusive nature, I contextualize them using relevant rules and precedents applied in Saudi courts. I then analyze them in light of their proceedings and impacts, in relation to their contexts. Ultimately, this analysis is guided by two notions: First, Saudi monarchical decrees are open to public scrutiny and bound by public interest, as they are part of the *res publica* sphere because collective

4 Royal Edict No. 56485 (5/11/1439) corresp. July 18, 2018.
5 Royal Edict No. 25634 (20/4/1441) corresp. Dec. 18, 2019.
6 Basic Law of Governance (1992), arts. 55–58.

efforts are made to enact and implement them,[7] and second, monarchical decrees are interventions in contexts, not the context itself, and thus they ought to have significant impacts (presumably positive), otherwise, they would be unwarranted.[8]

An Overview of the Saudi Legal System

Two forms of rules apply in Saudi Arabia: *sharīʿa* rules and statutory rules. This duality of legislation is upheld across all levels, beginning with the Basic Law which states that: "Courts shall apply to cases brought before them the provisions of *sharīʿa*, as indicated by the Qurʾān and Sunna, as well as the statutes issued by *walī al-amr* [i.e., the monarch] that do not contradict the teachings of the Qurʾān and Sunna."[9] The same principle is

7 *Res publica* is the counterpart of *res privata*, with both terms denoting the idea of two spheres—public and private—where different sets of affairs exist simultaneously in a political order. *See* Antoni Z. Kaminski, *Res Publica, Res Privata*, 12 Int'l Pol. Sci. Rev. 337–51 (1991); John Ehrenberg, Civil Society: The Critical History of an Idea 30–39 (2017). It is undisputed that Saudi monarchical decrees are within the public sphere (*manākh ʿāmm*) and pertain to public affairs (*shaʾn ʿāmm*).

8 *See* Michal Tamuz & Eleanor T. Lewis, *Facing the Threat of Disaster: Decision Making When the Stakes are High*, *in* The Oxford Handbook of Organizational Decision Making 156–73 (Gerard P. Hodgkinson & William H. Starbuck eds., 2008); Karen M. Hult & Charles E. Walcott, *Influences on Presidential Decision Making*, *in* The Oxford Handbook of The American Presidency 529–48 (George C. Edwards III & William G. Howell eds., 2009); Bénédicte Vidaillet, *When "Decision Outcomes" are Not the Outcomes of Decisions*, *in* The Oxford Handbook of Organizational Decision Making 419–36 (Gerard P. Hodgkinson & William H. Starbuck eds., 2008); George Wright & Paul Goodwin, *Structuring the Decision Process: An Evaluation of Methods*, *in* The Oxford Handbook of Organizational Decision Making 535–51 (Gerard P. Hodgkinson & William H. Starbuck eds., 2008); Emily Hoole & Jennifer Martineau, *Evaluation Methods*, *in* The Oxford Handbook of Leadership and Organizations 168–96 (David V. Day ed., 2014); Sharon K. Parker & Chiahuei Wu, *Leading for Proactivity: How Leaders Cultivate Staff Who Make Things Happen*, *in* The Oxford Handbook of Leadership and Organizations 381–404 (David V. Day ed., 2014); Geoffrey Brennan & Michael Brooks, *Rational Choice Approaches to Leadership*, *in* The Oxford Handbook of Political Leadership 162–75 (R. A. W. Rhodes & Paul't Hart eds., 2014); David Brulé, Alex Mintz & Karl DeRouen, *Decision Analysis*, *in* The Oxford Handbook of Political Leadership 226–39 (R. A. W. Rhodes & Paul't Hart eds., 2014); W. Warner Burke, *Organizational Change*, *in* The Oxford Handbook of Organizational Climate and Culture 458–83 (Benjamin Schneider & Karen M. Barbera eds., 2014).

9 Basic Law of Governance (1992), art. 48.

affirmed in the Judiciary Statute,[10] Statute of Procedures Before *Sharīʿa* Courts,[11] Statute of Procedures Before the Board of Grievances,[12] and Statute of Criminal Procedures.[13]

These provisions guide the Saudi judiciary's application of *sharīʿa* rules. Primarily, Saudi courts apply conclusive *sharīʿa* rulings (*aḥkām qaṭʿiyya*) which are provided by the conclusive texts of the original sources of *sharīʿa*, the Qurʾān and Sunna (*nuṣūṣ/adilla qaṭʿiyya*).[14] It is conventionally held that for a text to be deemed conclusive, it needs clarity and certainty in authenticity and indication (*qaṭʿī al-thubūt wa-l-dalāla*).[15] Texts and sources that do not satisfy the criteria are considered probable, speculative indicators of legal rulings (*adilla ẓanniyya*), which provide deductive, probable rulings (*aḥkām ẓanniyya/ijtihādiyya*).[16] The corpus of determinations and precedents that

10 Statute of the Judiciary (2007), art. 1.

11 Statute of Procedures Before *Sharīʿa* Courts (2013), art. 1.

12 Statute of Procedures Before the Board of Grievances (2013), art. 1.

13 Statute of Criminal Procedures (2013), art. 1.

14 For literature that discusses *adilla qaṭʿiyya/ẓanniyya* and their respective *aḥkām*, see Abū Ḥāmid al-Ghazālī, 2 al-Mustaṣfā min ʿilm al-uṣūl 390, 411–14, 472–74 (Muḥammad Sulaymān al-Ashqar ed., 1997); Najm al-Dīn al-Ṭūfī, 3 Sharḥ Mukhtaṣar al-Rawḍa 9, 616, 675–79 (ʿAbdallāh b. ʿAbd al-Muḥsin al-Turkī ed., 1987); Badr al-Dīn al-Zarkashī, Tashnīf al-masāmiʿ bi-Jamʿ al-jawāmiʿ 1:327–28, 3:475–76 (Sayyid ʿAbd al-ʿAzīz and ʿAbdallāh Rabīʿ eds.,1998); ʿAbd al-Wahhāb Khallāf, ʿIlm uṣūl al-fiqh 31, 380–83 (Muḥammad Adīb al-Ṣāliḥ ed., 2010); ʿAbd al-Karīm b. ʿAlī al-Namla, al-Muhadhdhab fī ʿilm uṣūl al-fiqh al-muqāran 2:471–72, 5:2424–27 (1999); Muḥammad Muṣṭafā al-Zuḥaylī, 2 al-Wajīz fī uṣūl al-fiqh al-islāmī 311–15 (2006); Wahba al-Zuḥaylī, 2 Uṣūl al-fiqh al-islāmī 1052–54 (1986); Muḥammad Zakariyyā al-Bardīsī, Uṣūl al-fiqh 434–35 (1987); Wael B. Hallaq, A History of Islamic Legal Theories: An Introduction to Sunnī Uṣūl al-Fiqh 38–40, 218–19 (1997); Wael B. Hallaq, The Origins and Evolution of Islamic Law 130–31 (2005); Wael B. Hallaq, Sharīʿa: Theory, Practice, Transformations 81–82, 83 (2009); Khaled Abou El Fadl, Speaking in God's Name: Islamic Law, Authority, and Woman 33–35 (2001); Mohammad Hashim Kamali, Principles of Islamic Jurisprudence 11–15, 470–71 (2003); Baber Johansen, *Dissent and Uncertainty in the Process of Legal Norms Construction in Muslim Sunnī Law*, *in* Law and Tradition in Classical Islamic Thought 133–37 (Michael Cook et al. eds., 2013).

15 ʿAlāʾ al-Dīn al-Bukhārī, 1 Kashf al-asrār ʿan uṣūl Fakhr al-Islām al-Bazdawī 84 (n.p.: Maṭbaʿat al-Sharika al-Ṣaḥāfiyya al-ʿUthmaniyya, n.d.); Muḥammad al-Zuḥaylī, *supra* note 14, at 311–12. The concept is also known as *qaṭʿī al-dalāla wa-l-riwāya*. Hallaq, A History of Islamic Legal Theories, *supra* note 14, at 218.

16 *See generally supra* note 14.

emerge as a result of the jurists' legal reasoning (*ijtihād*) and their disagreement (*ikhtilāf*) in deducting rules from texts and other sources of *sharīʿa* is known as *fiqh*.[17] The dynamics of *ijtihād* and *fiqh* are also influenced by the time-honored structures of Islamic legal schools or guilds (pl. *madhāhib*; sing. *madhhab*), most relevant of them to Saudi courts are the four Sunnī *madhāhib*: Ḥanafī, Mālikī, Shāfiʿī, and Ḥanbalī.[18] It is the overwhelming feature in *sharīʿa* that an area of law contains both conclusive and deductive aspects. For example, in *ḥudūd*, there are certain conclusive rules; however, they do not represent the whole doctrine as *ḥudūd* jurisprudence is chiefly comprised of deductive rules derived from speculative indicators, as outlined in *fiqh* treatises.

The Saudi judiciary's approach falls within these lines—conclusive texts and rulings bind the judiciary, and in areas of *ijtihād*, the judiciary generally gives deference to the Ḥanbalī opinion.[19] The preference of the Ḥanbalī *madhhab* was initially prescribed in 1928 by the Judicial Supervision Commission Resolution No. 3, which obliged judges to adjudicate cases according to the Ḥanbalī *madhhab* only.[20] The Commission's rationale was that the Ḥanbalī *madhhab* is more accessible, and Ḥanbalī jurists are more dedicated to supporting their rulings with evidence.[21] The Commission provided a vague caveat that whenever a Ḥanbalī precedent would cause hardship (*mashaqqa*), other

17 Ṣubḥī Maḥmaṣānī, Falsafat al-tashrīʿ fī al-Islām (The Philosophy of Jurisprudence in Islam) 8–9 (Farhat Ziadeh trans., 2000).

18 On the development of *madhāhib*, see Maḥmaṣānī, *supra* note 17, at 19–32; Hallaq, The Origins and Evolution of Islamic Law, *supra* note 14, at 150–67; Hallaq, Sharīʿa: Theory, Practice Transformations, *supra* note 14, at 60–66; Labeeb Ahmed Bsoul, *The Emergence of the Major Schools of Islamic Law/Madhhabs*, *in* Routledge Handbook of Islamic Law 141–52 (Khaled Abou El Fadl, Ahmad Atif Ahmad & Said Fares Hassan eds., 2019).

19 Maḥmaṣānī, *supra* note 17, at 32; Noel J. Coulson, History of Islamic Law 102 (1964); Frank E. Vogel, Islamic Law and Legal System: Studies of Saudi Arabia 72–81, 125–27 (2000); ʿAbd al-Raḥmān b. Zayd al-Zinaydī, Taṭbīq al-sharīʿa al-islāmiyya fī al-Mamlaka al-ʿArabiyya al-Suʿūdiyya 222–24 (1999).

20 Resolution of the Judicial Supervision Commission No. 3 (7/1/1347) corresp. June 25, 1928, royally endorsed (*taṣdīq ʿālī*) in 24/3/1347 corresp. Sept. 9, 1928, published in Majlis al-Shūrā, Majmūʿat al-nuẓum: Qism al-Qaḍāʾ al-Sharʿī min 1345–1357, at 14 (1357[1938]).

21 Resolution of the Judicial Supervision Commission No. 3 (1928), art. 1.

precedents may be applied after deep consideration.[22] Shortly thereafter, the judiciary's chairmanship included the specification of the Ḥanbalī *madhhab* in one of Saudi Arabia's earliest judicial statutes, the Statute of Unifying the Responsibilities of *Sharīʿa* Judiciary, particularly in notarial areas, such as certifying contracts, deeds, and affidavits.[23]

However, I would argue that adherence to the Ḥanbalī *madhhab* was not strict as there were multiple decrees instructing the judiciary to apply the *madhhab* of the city in certain disputes.[24] In fact, recent scholarship in Saudi Arabia has begun to focus on the judiciary's application of other *madhāhib*, concluding that not only does the Saudi judiciary apply precedents from all of the four *madhāhib* and beyond them, but also that the judiciary tends to favor the Mālikī *madhhab* and Ibn Taymiyya's (d. 728/1328) views over standard Ḥanbalī precedents.[25] From a statutory perspective, some judges argue that Resolution No. 3 has been repealed by Article 1 of the Statute of Procedures Before *Sharīʿa*[26] and, thus, judges are permitted to practice unrestricted *ijtihād* without adherence to the Ḥanbalī *madhhab*.[27]

---

22 Resolution of the Judicial Supervision Commission No. 3 (1928), art. 3. On this point, it is worth noting that exclusive adherence to the Ḥanbalī *madhhab* was not characteristic of the early Wahhābī tradition, which was critical of rigid *taqlīd* and encouraged *ijtihād* beyond the boundaries of the *madhāhib*. *See* Natana J. Delong-Bas, Wahhabi Islam: From Revival and Reform to Global Jihad 94, 110–13 (2004).

23 Statute of Unifying the Responsibilities of Sharīʿa Judiciary (1938), art. 203. (The same rule exists in the 1952 updated version of the statute, art. 179.)

24 Monarchical Decrees (*irāda saniyya*) No. 5/9/2 (13/7/1353) corresp. Oct. 22, 1934, and No. 5/9/4, (26/7/1353) corresp. Nov. 4, 1934, published in Majlis al-Shūrā, *supra* note 20, at 46 (regarding sharecropping, farming, and inheritance disputes).

25 Faiṣal b. Ibrāhīm al-Nāṣir, Mā jarā ʿalīh al-ʿamal fī maḥākim al-tamyyīz ʿalā khilāf al-madhhab al-Ḥanbalī 1135 (2020). *See also* ʿĀṣim b. ʿAbdallāh al-Muṭawwaʿ, al-ʿUdūl ʿan al-qawl al-rājiḥ fī al-futyā wa-l-qaḍāʾ (2018).

26 Statute of Procedures Before *Sharīʿa* Courts (2013), art. 1. ("Courts shall apply to cases brought before them the provisions of *sharīʿa*, as indicated by the Qurʾān and Sunna, as well as the statutes issued by *walī al-amr* [i.e., the monarch] that do not contradict the teachings of the Qurʾān and Sunna. Proceedings before such courts shall comply with the provisions of this statute.")

27 Al-Nāṣir, *supra* note 25, at 147.

With respect to the statutory rules applied in Saudi Arabia, the Fundamental Laws (*al-Anẓima al-Asāsiyya*) are supreme, which have significant constitutional value and comprise of the Basic Law of Governance, Ministers Council Statute, Shura Council Statute, Allegiance Council Statute, and the Statute of Provinces.[28] In turn, the ordinary laws (*anẓima ʿādiyya*) follow, which are the common statutes typically issued with the agreement of the executive (Ministers Council) and the legislative assembly (Shura Council) and enacted by royal decrees.[29] Finally, the regulations (*lawāʾiḥ*) apply, which are rules issued by cabinet ministers, either individually or collectively.[30]

Another form of Saudi statutory rules are monarchical decrees (*irādāt malakiyya*), which are proclamations and instructions issued by Saudi monarchs.[31] There are four types of monarchical decrees: royal decree (*marsūm malakī*), royal edict (*amr malakī*), noble edict (*amr sāmī*), and royal/noble directive (*tawjīh malakī/sāmī*). There is an existing jurisprudence that discusses the different forms and functions of these decrees;[32] however, as this article discusses royal edicts (*amr malakī*), it is sufficient to

28 Khālid ʿAbd al-ʿAzīz al-Ruways & Rizq Maqbūl al-Rayyis, al-Madkhal li-dirāsat al-ʿulūm al-qānūniyya 101 (2012); Muḥammad b. ʿAbdallāh al-Marzūqī, al-Sulṭa al-tanẓīmiyya fī al-Mamlaka al-ʿArabiyya al-Suʿūdiyya 83–85 (2018); Nāṣir b. Muḥammad al-Ghāmidī, al-Madkhal li-dirāsat al-siyāsa al-sharʿiyya wa-l-anẓima al-marʿiyya 402–406 (2019).

29 Al-Ruways & al-Rayyis, *supra* note 28, at 101–103; al-Marzūqī, *supra* note 28, at 85–87; al-Ghāmidī, *supra* note 28, at 407.

30 In some cases, with the participation of the Shura Council. Al-Ruways & al-Rayyis, *supra* note 28, at 109–11; al-Marzūqī, *supra* note 28, at 88–94; al-Ghāmidī, *supra* note 28, at 407–11. On the development of Saudi statutory law, see generally Bryant W. *Seaman, Islamic Law and Modern Government: Saudi Arabia Supplements the Shari'a to Regulate Development*, 18 Columbia J. Transnat'l L. 413–81 (1980); Jeanne Asherman, *Doing Business in Saudi Arabia: The Contemporary Application of Islamic Law*, 16 Int'l Lawyer (ABA) 321–38 (1982); Maren Hanson, *The Influence of French Law on the Legal Development of Saudi Arabia*, 2 Arab L.Q. 272–91 (1987); Hossein Esmaeili, *On a Slow Boat towards the Rule of Law: The Nature of Law in the Saudi Arabia Legal System*, 26 Arizona J. Int'l & Comp. L. 1–48 (2009); Anna Rogowska, *English Law in Saudi Arabia*, 27 Arab L.Q. 271–80 (2013); Chibli Mallat, The Normalization of Saudi Law 19–26 (2022).

31 All monarchical decrees possess the same statutory validity, despite variations in form and function.

32 Al-Marzūqī, *supra* note 28, at 379–409; Muḥammad Nasīb Arzaqī, Muḥammad b. ʿAbd al-ʿAzīz al-Jarbāʾ & ʿIṣām b. Saʿad Bin Saʾīd, al-Qānūn al-dustūrī al-Suʿūdī 479–81 (2011).

explain this type only. A royal edict is the fitting translation for *amr malakī*, often translated as "royal order/command." Saudi legal scholars regard this type of decrees as the strongest;[33] the phrase royal edict better captures its associated wide jurisdiction and distinctive power. Considering the constitutional and governmental utilization of a royal edict, it is best defined as a formal and official document issued by the monarch of Saudi Arabia in his kingship capacity (i.e., in his role as the head of state), serving as his primary instrument of governance.[34] However, while royal edicts are formally issued by the monarch, they are rarely the product of his efforts alone; heirs and advisors play a central role in shaping and implementing them. In this context, although the edicts examined in this article were issued in the name of King Salman, the influential position of Crown Prince Muhammad b. Salman should not be overlooked.[35]

The Saudi royal prerogative to enact positive laws through decrees derives from the classical doctrine of *siyāsa sharʿiyya* (governance per *sharīʿa*).[36] This doctrine emerged in classical Islamic constitutional jurisprudence when jurists recognized that rulers often needed to establish rules beyond the frameworks of *fiqh* and *ijtihād*. Nevertheless, most jurists agreed that actions undertaken under the statehood prerogative (*taṣarruf bi-l-imāma*) must align with *sharīʿa* and promote the public interest (*maṣlaḥa ʿāmma*), which are the key stipulations

33 ʿĀṣim b. Suʿūd al-Siyāṭ, al-Qānūn al-dustūrī al-Suʿūdī 435 (2023).

34 Arzaqī et al., *supra* note 32, at 479; al-Marzūqī, *supra* note 28, at 383; al-Siyāṭ, *supra* note 33, at 435.

35 Crown Prince Muhammad bin Salman was appointed second heir to the throne (*walī walī al-ʿahd*) in 2015, first heir (*walī al-ʿahd*) in 2017, and Prime Minister of Saudi Arabia in 2022. *See* Royal Edict No. A/160 (10/7/1436) corresp. Apr. 29, 2015; Royal Edict No. A/255 (26/9/1438) corresp. June 21, 2017; Royal Edict No. A/61 (1/3/1444) corresp. Sept. 27, 2022. For a detailed profile of the Crown Prince, see Ben Hubbard, MBS: The Rise to Power of Mohammed bin Salman (2020); Graeme Wood, *Absolute Power*, The Atlantic (Mar. 3, 2022), https://www.theatlantic.com/magazine/archive/2022/04/mohammed-bin-salman-saudi-arabia-palace-interview/622822/.

36 Al-Ghāmidī, *supra* note 28, at 344–51; Vogel, *supra* note 19, at 173–75, 341–43; Muhammad Al-Atawneh, Wahhabi Islam Facing The Challenges of Modernity: Dar al-Ifta in The Modern Saudi State 39–41 (2010). For an insightful discussion on *siyāsa sharʿiyya* and the modern state, see Omar Gebril, *Recasting Al-Siyāsa al-Sharʿiyya in 1920s Egypt: Formulating a Theory of an Islamic Modern State*, 1 J. Islamic L. 106–40 (2024).

of *siyāsa sharʿiyya*.[37] Accordingly, under this doctrine, statutory rules are deemed legitimate and enforceable as long as they do not contravene *sharīʿa* and serve the public interest.

The Saudi Basic Law references the doctrine of *siyāsa sharʿiyya*, directly linking it to the King's powers and duties. Article 55 states: "The monarch shall undertake the governing of the nation in accordance with *siyāsa sharʿiyya* and the dictates of Islam. He shall supervise the implementation of Islamic *sharīʿa*, the laws, the general policy of the state, and the protection and defense of the country."[38] Regarding public interest (*maṣlaḥa ʿāmma*), the Basic Law reflects the understanding embedded in *siyāsa sharʿiyya* insofar that state agents may act only when pursuing a public interest (*jalb maṣlaḥa*) or avoiding public harm (*darʾ mafsada*).[39] Article 67 specifies: "The legislative authority shall have the power to promulgate statutes and regulations conducive to the realization of public interest or the prevention of harm in state affairs, in accordance with the principles of Islamic *sharīʿa*."[40]

In regard to the judiciary's relationship with the monarch, Saudi statutes emphatically proclaim judicial independence. Article 46 of the Basic Law states: "The judiciary shall

37 *See* Intisar A. Rabb, *Governance* (al-Siyāsa al-Sharʿiyya), *in* The Princeton Encyclopedia of Islamic Political Thought 198 (Gerhard Böwering et al. eds., 2013); Clark B. Lombardi, State Law As Islamic Law In Modern Egypt: The Incorporation of the Sharīʿa Into Egyptian Constitutional Law 49–54 (2006); Mohamad Hashim Kamali, *Siyasah Shar'iyah or the Policies of Islamic Government*, 6 Am. J. Islam & Soc'y 61 (1989); Aḥmad b. ʿAbd al-Ḥalīm Ibn Taymiyya, al-Siyāsa al-sharʿiyya fī iṣlāḥ al-rāʿī wa-l-raʿīyya 5, 193, 240 (ʿAlī al-ʿUmrān ed., 1429[2008–2009]); Muḥammad b. Abī Bakr Ibn Qayyim al-Jawziyya, Iʿlām al-muwaqqiʿīn ʿan Rabb al-ʿĀlamīn 2:16, 6:513 (Mashhūr Āl Salmān ed., 1423[2002–2003]); Aḥmad b. Idrīs al-Qarāfī, al-Iḥkām fī tamyīz al-fatāwā ʿan al-aḥkām wa-taṣarrufāt al-qāḍī wa-l-imām 56 (ʿAbd al-Fattāh Abū Ghudda ed., 1995); Ibrāhīm b. ʿAlī Ibn Farḥūn, 2 Tabṣirat al-ḥukkām fī uṣūl al-aqḍiya wa-l-aḥkām 137 (1986); Zayn al-Dīn b. Ibrāhīm Ibn Nujaym, 5 al-Baḥr al-rāʾiq sharḥ Kanz al-daqāʾiq 118 (Zakariyya ʿUmayrāt ed., 1997); Ibn Nujaym, al-Ashbāh wa-l-naẓāʾir 123 (1983); Jalāl al-Dīn ʿAbd al-Raḥmān al-Suyūṭī, al-Ashbāh wa-l-naẓāʾir fī qawāʿid wa-furūʿ al-Shāfiʿiyya 121 (1983).

38 Basic Law of Governance (1992), art. 55.

39 *See* al-Qarāfī, 4 al-Furūq 39 (2010); al-Munajjā b. ʿUthmān Ibn al-Munajjā al-Ḥanbalī, 3 al-Mumtiʿ fī sharḥ al-Muqniʿ 111 (ʿAbd al-Malik Bin Duhaysh ed., 2003).

40 Basic Law of Governance (1992), art. 67.

be an independent authority. There shall be no power over judges in their judicial function other than the power of the Islamic *sharīʿa*."[41] The Basic Law also states that the courts shall have jurisdiction to adjudicate all disputes and crimes, without prejudice to the jurisdiction of the Board of Grievances over disputes between the state and private parties,[42] and the same principles are affirmed in the Statute of the Judiciary.[43] Appointments and dismissals of judges are carried out by royal edicts at the recommendation of the Supreme Judicial Council,[44] and Saudi judges do not enjoy life tenure, with the retirement age set at seventy years old.[45] In addition to reaching the retirement age, a judge's service can be terminated by death, resignation, an early retirement request, or an inability to perform judicial duties due to poor health.[46]

Ethical and professional reasons for judicial dismissal include proven unfit performance during the trial period; multiple below-average marks (three) in adequacy reports; and disciplinary reasons, which are determined in a disciplinary trial by a committee formed by the Supreme Judicial Council.[47] All judicial administrative tasks and disciplinary actions are regulated and enforced by the Supreme Judicial Council, which also regulates circuits' jurisdictions.[48] Courts' administrative responsibilities and annual budgets are managed by the Ministry of Justice, and the Chairman of the Supreme Judicial Council and Minister of Justice are two separate positions often held by different individuals; however, since 2012, the Minister of Justice has acted as the Chairman of the Supreme Judicial Council. These statutory provisions theoretically establish the independence of the Saudi judiciary,[49] taking into account that the system does not perceive monarchical decrees on judicial issues as a violation of judicial

41 *Id.* art. 46.
42 *Id.* art. 49.
43 Statute of the Judiciary (2007), arts. 1, 25, 58.
44 *Id.* art. 47.
45 *Id.* art. 69.
46 *Id.*
47 *Id.* arts. 44, 59, 66, 69.
48 *Id.* art. 6.
49 For more information on judicial independence in Saudi Arabia, see Ahmed A. Al-Ghadyan, *The Judiciary in Saudi Arabia*, 13 Arab L.Q. 235–51 (1998);

independence. Monarchical decrees in the judicial domain are not discreet but are publicly announced and typically addressed directly to the judiciary through the Chairman of the Supreme Judicial Council or the Chief Justice of the Supreme Court.

Royal Edict No. 56485 (2018) on *al-Ḥukm bi-l-Shubha*

1. Discussion of the Precedent

Saudi statutory rules have fully adopted the principle of innocent until proven guilty, prohibiting any criminal liability without a judicial conviction following a trial, in accordance with *sharīʿa* provisions.[50] The Statute of Criminal Procedures stipulates that no criminal punishment shall be inflicted upon any person without a proven conviction,[51] and that judicial rulings may result in either conviction or acquittal.[52] Conviction is generally understood by Saudi lawyers to require proof beyond a reasonable doubt,[53] with the notable exception of those who uphold *al-ḥukm bi-l-shubha*. Moreover, Saudi statutes have incorporated exclusionary rules that bar the use of evidence obtained in violation of procedural regulations.[54] Saudi law also limits the executive authority's power to detain individuals, setting a maximum of 180 days for criminal offenses and 12 months for terrorism-related cases, with any extension beyond these periods requiring judicial approval.[55] If these limits are violated, wrongfully detained individuals may

Ayoub M. Al-Jarbou, *Judicial Independence: Case Study of Saudi Arabia*, 19 Arab L.Q. 5–54 (2004).

50 Statute of Criminal Procedures (2013), arts. 3, 186, 207, 213; Basic Law of Governance (1992), arts. 38, 26.

51 Statute of Criminal Procedures (2013), art 3. (The same rule exists in the 2001 version of the statute.)

52 *Id.* art. 186 (The same rule exists in the 2001 version of the statute.)

53 *See* Jalāl Hāshim Saḥlūl, *Miʿyār al-shakk al-maʿqūl wa-l-miʿyār al-muqābil lahu fī al-niẓām al-jazāʾī al-Suʿūdī*, 37 al-Majalla al-ʿArabiyya li-l-Dirāsāt al-Amniyya wa-l-Tadrīb 1, 107–11 (2021).

54 Statute of Criminal Procedures (2013), arts. 187–191. (The same rules exist in the 2001 version of the statute.)

55 *Id.* art 114; Statute of Combating Terrorism Crimes and Financing (2017), art. 19.

seek compensation through the courts in standard criminal cases.[56] For terrorism-related offenses, compensation claims must first be reviewed by a specialized committee, which must render a decision within 90 days, after which the individual may then pursue legal action in court if not satisfied.[57]

These rules are statutory translations of well-known juristic maxims (*qawāʿid fiqhiyya*) in *sharīʿa*, first of which is the presumption of innocence or non-liability (*al-aṣl barāʾat al-dhimma*).[58] In criminal law this means that no one is required to prove their innocence, as they are presumed innocent until the judiciary rules otherwise. This maxim is rooted in one of *fiqh*'s universal canons (*qawāʿid kulliyya*), the more expansive maxim that certainty is not superseded by doubt (*al-yaqīn lā yazūl bi-l-shakk*), establishing the primacy of certainty in all aspects of Islamic law.[59] Hence, *sharīʿa* places the burden of proof on the plaintiff (as he is the one claiming to the contrary of the original presumption), while the defendant takes an oath of denial (*al-bayyina ʿalā al-muddaʿī wa-l-yamīn ʿalā man ankar*).[60] The

56 Statute of Criminal Procedures (2013), art. 215.

57 Statute of Combating Terrorism Crimes and Financing (2017), art. 16. It is important to note that while the consistent enforcement of these statutory safeguards remains a subject of debate, their legal design reflects a formal commitment to the presumption of innocence. A more detailed discussion of detention practices falls outside the scope of this article, which focuses on the judicial application of *ḥudūd* penalties.

58 Al-Suyūṭī, *supra* note 37, at 53; Ibn Nujaym, *supra* note 37, at 59; The Ottoman Majalla (1877), art. 8; Aḥmad al-Zarqā, Sharḥ al-Qawāʿid al-fiqhiyya 105 (Muṣṭafa al-Zarqā ed., 1989); ʿAlī Aḥmad al-Nadawī, al-Qawāʿid al-fiqhiyya 356 (1994); Muḥammad ʿUthmān Shubayr, al-Qawāʿid al-kulliyya wa-l-ḍawābiṭ fiqhiyya 146–47 (2015); Luqman Zakariyah, Legal Maxims in Islamic Criminal Law: Theory and Applications 85–86 (2015); Mohammad Hashim Kamali, *Legal Maxims and Other Genres of Literature in Islamic Jurisprudence*, 20 Arab L.Q. 84 (2006).

59 Al-Suyūṭī, *supra* note 37, at 50–51; Ibn Nujaym, *supra* note 37, at 56–57; The Ottoman Majalla (1877), art. 4; al-Zarqā, *supra* note 58, at 79–82; al-Nadawī, *supra* note 58, at 316–31; Shubayr, *supra* note 58, at 127–31; Zakariyah, *supra* note 58, at 80–84; Kamali, *supra* note 58, at 83; Intisar A. Rabb, *Islamic Law Through Legal Canons*, *in* Routledge Handbook of Islamic Law, *supra* note 18, at 229; Intisar A. Rabb, Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law 353 (2014).

60 Al-Suyūṭī, *supra* note 37, at 508–509; Ibn Nujaym, *supra* note 37, at 59; The Ottoman Majalla (1877), art 76; al-Zarqā, *supra* note 58, at 369; al-Nadawī, *supra* note 58, at 400; Shubayr, *supra* note 58, at 339; Hallaq, Sharīʿa:

original innocence presumption (*al-barāʾa al-aṣliyya*) is also linked to the established maxim of avoiding the imposition of *ḥudūd* penalties in cases of doubt or ambiguity (*idraʾū al-ḥudūd bi-l-shubahāt*).[61] Because innocence is presumed, doubt should favor the accused, as the opposing party has failed to satisfy the burden of proof. The maxim *idraʾū al-ḥudūd bi-l-shubahāt* centers on the term *shubha* (doubt or ambiguity). This word is key to the now-abolished Saudi precedent of *al-ḥukm bi-l-shubha* (conviction based on doubt).

The different *madhāhib* of *fiqh* have diverse evaluations of *shubha* and its corresponding impact.[62] The principal developmental accounts of *shubha* in *fiqh* by the Ḥanafī and the Shāfiʿī schools divide *shubha* into *shubha fī al-fiʿl* (legal doubt/mistake of law), *shubha fī al-maḥall* (factual doubt/mistake of fact), *shubha fī al-ʿaqd* (contractual doubt) or *shubha fī al-fāʿil* (mistake of law), *shubha fī al-maḥall* (mistake of fact), and *shubha fī al-jiha/al-ṭarīq* (ambiguity due to juristic difference).[63] However, the precedent of *al-ḥukm bi-l-shubha* concern a type of *shubha* that, albeit known in *fiqh*, is not always explicitly stated, which is *shubha fī al-ithbāt/al-dalīl*, doubt on evidentiary and procedural rules of proving *ḥudūd*.[64] Failure to meet the evidentiary burdens of *ḥudūd* create a measure of uncertainty about whether the criminal elements have been established,[65] and thus,

---

Theory, Practice, Transformations, *supra* note 14, at 345; Zakariyah, *supra* note 58, at 105; Rabb, *supra* note 59, at 234–35.

61 Al-Suyūṭī, *supra* note 37, at 122; Ibn Nujaym, *supra* note 37, at 127; al-Nadawī, *supra* note 58, at 278–79; Hallaq, Sharīʿa: Theory, Practice, Transformations, *supra* note 14, at 311; Zakariyah, *supra* note 58, at 98–102; Rabb, *supra* note 59, at 49–59, 323–30.

62 *See generally* Zakariyah, *supra* note 58, at 103–104; Rabb, *supra* note 59, at 135–315.

63 Al-Suyūṭī, *supra* note 37, at 123–24; Ibn Nujaym, *supra* note 37, at 127–29; ʿAbd al-Qādir ʿAwda, 1 al-Tashrīʿ al-jināʾī al-islāmī 212–14 (1968); ʿAbdallāh al-ʿAlī al-Rukbān, Darʾ al-ḥudūd bi-l-shubahāt 28–30 (1978); Rabb, *supra* note 59, at 185–203, 204–23.

64 Muḥammad b. ʿAlī al-Shawkānī, 7 Nayl al-Awṭār 270–71 (1973); Muḥammad Abū Zahra, al-Jarīma wa-l-ʿuqūba fī al-fiqh al-islāmī – al-ʿUqūba 196–97 (Cairo: Dār al-Fikr al-ʿArabī, n.d.); al-Rukbān, *supra* note 63, at 32; Rabb, *supra* note 59, at 180–84.

65 Rabb, *supra* note 59, at 181.

shubha fī al-ithbāt is conventionally held as sufficient grounds for acquittal.[66]

The now-abolished precedent *al-ḥukm bi-l-shubha*, developed by the Saudi judiciary, allowed imposing criminal sanctions upon charged persons without meeting the prescribed evidence threshold. For example, a person may be charged with an offense, often a *ḥudūd* offense, and if the public prosecutor fails to prove the case beyond a reasonable doubt in court, this should be enough for an acquittal. However, according to Saudi precedent, some judges may consider the prosecutor's evidence to constitute a *shubha* (doubt) or *tuhma qawiyya* (strong accusation), which the judiciary believes justifies a criminal penalty.[67] In other words, the prosecutor's efforts would have raised enough *shubha* against the accused to justify a non-acquittal; however, as the court cannot impose the penalty for the charged offense, it imposes a discretionary penalty under *taʿzīr*. Hence, this precedent became known as *al-ḥukm bi-l-shubha* (ruling based on doubt), as judges used doubt—ordinarily the grounds for acquittal—as the foundation for criminal liability.

State-edited collections of judgments offer numerous examples of *al-ḥukm bi-l-shubha*. Cases involving alcohol and drug use illustrate how the public prosecutor may fail to prove their case, yet the defendant is still sentenced. For example, one defendant was charged with using hashish and possessing 170 amphetamine tablets intended for sale.[68] He confessed to hashish use and received 80 lashes, but he claimed the amphetamines were for his personal use only, a point the prosecutor could not refute.[69] Despite acknowledging that the prosecutor failed to prove intent to sell, the judge held that the accusation (*tuhma/shubha*)[70]

66 ʿAwda, *supra* note 63, at 215; al-Rukbān, *supra* note 63, at 32; ʿAbdallāh al-ʿAlī al-Rukbān, 1 al-Naẓariyya al-ʿāmma li-ithbāt mūjibāt al-ḥudūd 227–28 (1981); Abū Zahra, *supra* note 64, at 196–98.

67 ʿAbdallāh b. Muḥammad Āl Khunayn, Sulṭat al-qāḍī fī taqdīr al-ʿuqūba al-taʿzīriyya 117–18 (2013).

68 Judgment No. 34170615 (24/3/1434) corresp. Feb. 5, 2013, in Wizārat al-ʿAdl, Majmūʿat al-aḥkām al-qaḍāʾiyya 1434, at 21:36–37 (1436[2015]).

69 Judgment No. 34170615, in Wizārat al-ʿAdl, *supra* note 68, at 21:38.

70 Although I do not equate the two terms, they are used interchangeably in Saudi judicial decisions; hence, the royal edict mentions both. In this case, both

was strong enough to impose a one-year prison sentence and 150 lashes penalty on the defendant.[71] A review of judgment collections reveals that the inability or failure to prove drug possession for trade has not deterred many courts from imposing penalties based on *shubha* and *tuhma*.[72] In another case, a man was charged with alcohol consumption based solely on a written statement from a member of the Committee for the Promotion of Virtue and Prevention of Vice,[73] who claimed that the defendant smelled of alcohol.[74] The defendant contested this throughout the investigation and trial.[75] While the judge noted that the provided evidence did not meet the threshold for a *ḥudūd* offense, the *tuhma* allowed for a sentence of 70 lashes.[76]

Similarly, the precedent of *al-ḥukm bi-l-shubha* had presence in the domain of sexual offenses.[77] In one instance, a male foreign national was charged with "imitating women" for allegedly wearing tight clothing and presenting a more feminine look, along with personal photos found on his phone.[78] Despite his dispute of the charges and claims of duress in his confessions,[79] the judge ruled that "*shubha* surrounded the defendant," resulting in a 30-lash sentence.[80] In another case, a foreign national defendant faced sexual harassment charges for allegedly asking a female customer to let him touch her hand and uncover

terms were mentioned: Judgment No. 34170615, in Wizārat al-ʿAdl, *supra* note 68, at 21:36, 21:39.

71 Judgment No. 34170615, in Wizārat al-ʿAdl, *supra* note 68, at 21:38–39.

72 Judgment No. 34198765 (27/4/1434) corresp. Mar. 9, 2013, in Wizārat al-ʿAdl, *supra* note 68, at 21:131–35; Judgment No. 34293242 (9/8/1434) corresp. June 18, 2013, in Wizārat al-ʿAdl, *supra* note 68, at 21:243–58.

73 Commonly referred to as the religious police.

74 Judgment No. 3443649 (23/2/1434) corresp. Jan. 5, 2013, in Wizārat al-ʿAdl, *supra* note 68, at 16:299–304.

75 Judgment No. 3443649, in Wizārat al-ʿAdl, *supra* note 68, at 16:302–3.

76 Judgment No. 3443649, in Wizārat al-ʿAdl, *supra* note 68, at 16:304.

77 Judgment No. 34288327 (8/5/1434) corresp. Mar. 20, 2013, in Wizārat al-ʿAdl, *supra* note 68, at 14:260–68; Judgment No. 33300169 (16/6/1434) corresp. Apr. 26, 2013, in Wizārat al-ʿAdl, *supra* note 68, at 14:191–211.

78 Judgment No. 3452447 (1/3/1434) corresp. Apr. 26, 2013, in Wizārat al-ʿAdl, *supra* note 68, at 15:6.

79 Judgment No. 3452447, in Wizārat al-ʿAdl, *supra* note 68, at 15:6–7.

80 Judgment No. 3452447, in Wizārat al-ʿAdl, *supra* note 68, at 15:7.

her face.[81] He denied all claims, arguing that earlier confessions, the sole evidence, were coerced.[82] The judge recognized the lack of proof and acknowledged that the defendant had no criminal record; nevertheless, he deemed the *tuhma* sufficient for a one-month prison sentence and 50 lashes.[83] These cases illustrate how the Saudi judiciary came close at one point in exceeding the limits of *sharīʿa* by imposing penalties based on suspicion and wrongful convictions.

Judicial decisions that followed the precedent of *al-ḥukm bi-l-shubha* frequently cited Ibn Nujaym al-Ḥanafī (d. 970/1563) and Ibn Taymiyya, noting that the two jurists permitted imposing punishments on the basis of substantial doubt or accusation.[84] With respect to Ibn Nujaym, many judges took the following excerpt as a rationale for *al-ḥukm bi-l-shubha*: "*Taʿzīr* may be established despite *shubha*; thus, they [jurists] have stated: [*Taʿzīr*] may be proven with that which is sufficient to prove financial transactions. Further, swearing an oath or abstaining from it are considered valid proofs in its proceedings."[85]

According to settled Saudi practice before the royal abolition, a *ḥudūd* offense may be avoided due to *shubha*, albeit the same *shubha* is sufficient for imposing a *taʿzīr* penalty.[86] The flaw in this analysis is that *shubha* in the context of *al-ḥukm bi-l-shubha* pertains to proving the criminal elements of the offense, particularly in adherence to the specified evidentiary rules. Thus, if *shubha* prevents the establishment of the offense—whether it is *ḥudūd* or *taʿzīr*—acquittal is the proper outcome.

Ibn Nujaym's cited position is in another context that does not support *al-ḥukm bi-l-shubha*. Ibn Nujaym clarified that *shubha* does not prevent conviction in *taʿzīr* offenses as it does

81 Judgment No. 34188141 (25/4/1434) corresp. Mar. 7, 2013, in Wizārat al-ʿAdl, *supra* note 68, at 15:100.

82 Judgment No. 34188141, in Wizārat al-ʿAdl, *supra* note 68, at 15:101.

83 *Id.*

84 *See, e.g.*, Judgment No. 3443649, in Wizārat al-ʿAdl, *supra* note 68, at 16:303; Judgment No. 3459573 (12/11/1434) corresp. Sept. 18, 2013, in Wizārat al-ʿAdl, *supra* note 68, at 25:185.

85 Ibn Nujaym, *supra* note 37, at 130.

86 Āl Khunayn, *supra* note 67, at 118; ʿAbdallāh b. Muḥammad Āl Khunayn, 2 Tawṣīf al-aqḍiya fī al-sharīʿa al-islāmiyya 356 (2003).

with the avoidance of imposing *ḥudūd*.[87] To support his argument, he mentioned that some Ḥanafī jurists have analogized the evidentiary standards for *taʿzīr* to those of financial disputes, stating that *shubha* does not affect the proof needed for either.[88] This analogy shows that the higher evidentiary threshold of *ḥudūd* should not apply to *taʿzīr* offenses.[89] Therefore, Ibn Nujaym never suggested that a judge could base a ruling on *shubha* or *tuhma* in either *ḥudūd* or *taʿzīr*.

With regard to Ibn Taymiyya, although he did not fully distinguish between *shubha* and *tuhma*, some Saudi scholars believe that the two are connected and involved in supporting *al-ḥukm bi-l-shubha*. As some scholars have noted, both *shubha* and *tuhma* involve ambiguity, but in *tuhma*, the doubt concerns the person accused, while in *shubha*, it relates to the offense itself or the circumstances, including uncertainty about other actors.[90] Because *tuhma* raises serious doubt about whether the accused committed the offense, it can be seen as a type of *shubha* that falls under the maxim of *ḥudūd* avoidance.[91] From this standpoint, if *tuhma* is regarded as a type of *shubha* with the same effect in *ḥudūd* avoidance, it can likewise serve as a basis for conviction, as *shubha* does in the precedent of *al-ḥukm bi-l-shubha*.

Another aspect to this rationale is Ibn Taymiyya's position on *ahl al-tuhma* (suspicious people). Ibn Taymiyya divided those charged with criminal offenses into three categories[92]:

87 Ibn Nujaym, *supra* note 37, at 130.

88 *Id.*

89 Ibn Nujaym's position does not diminish the fact that Muslim jurists widely invoked the maxim *idraʾū al-ḥudūd bi-l-shubahāt*, applying it not only to *ḥudūd* but also to *taʿzīr* and *qiṣāṣ*. *See* Rabb, *supra* note 59, at 38. Concerning the use of civil evidentiary means and standards in *taʿzīr*, such as refusal to take oaths (*nukūl*), Ibn Qudāma (d. 620/1223) firmly stated that such means cannot be considered proof in cases involving criminal punishments. *See* Muwaffaq al-Dīn Ibn Qudāma, 11 al-Mughnī 189 (ʿAbdallāh b. ʿAbd al-Muḥsin al-Turkī & ʿAbd al-Fattāḥ Muḥammad al-Ḥulw eds., 1997).

90 Ṣāliḥ b. ʿAlī al-ʿAql, al-Tuhma wa-atharuhā fī al-aḥkām al-fiqhiyya 40–41 (2010).

91 *Id.* at 40–41.

92 Ibn Taymiyya, 35 Majmūʿ al-fatāwā 396–98, 400–401 (ʿAbd al-Raḥman b. Muḥammad Ibn Qāsim ed., 2004); Ibn Taymiyya, 7 Jāmiʿ al-masāʾil 205–209 (ʿAlī b. Muḥammad al-ʿUmrān ed., 2018).

1. Those with an honorable reputation, unlikely to have committed the offense, should not be punished until the crime is judicially proven.
2. Those with a blemished record, likely to have committed the offense (*ahl al-tuhma*), may be imprisoned and subjected to light punishment, as leniency could allow them to escape justice.[93]
3. Those with an unknown reputation should be detained until their status is clarified or innocence is proven.

This suggests that while Ibn Taymiyya endorsed the controversial practice of striking detainees under investigation, he did not alter the fundamental principle that a fully proven conviction is required to impose a criminal penalty. His stance specifically centered on how to handle *ahl al-tuhma* during the accusation phase. Ibn Qayyim al-Jawziyya (d. 751/1350), a disciple of Ibn Taymiyya, supported his teacher's view and cited caliphal precedents, such as ʿUmar b. al-Khaṭṭāb (d. 23/644) burning a wine shop.[94] However, his examples show that those punished were proven to have committed offenses, as in the case of the wine shop as ʿUmar did not burn the shop due to hearsay or mere accusation; it was a well-known wine shop.[95]

In other contexts, however, Ibn Qayyim al-Jawziyya was explicit in opposing the imposition of punishments based on *shubha*. For instance, when investigating willful defaulters, he argued that they should not be imprisoned, as imprisonment constitutes a form of punishment that is only legitimate when its cause is clearly verified.[96] He framed the issue within the bound-

93 Ibn Taymiyya's reasoning depended on a Prophetic narration; however, the cited narration only mentions that the Prophet detained a person who was accused of an offense and then set free. Nothing in the narration supports either pounding or the classification of *ahl al-tuhma*. *See* Ibn Taymiyya, Majmūʿ al-fatāwā, *supra* note 92, at 397.

94 Ibn Qayyim al-Jawziyya, *supra* note 37, at 6:513–14.

95 Abū Zayd ʿUmar Ibn Shabba al-Numayrī, 1 Tārīkh al-Madīna al-Munawwara 250 (Fahīm Muḥammad Shaltūt ed., 1399[1979]); Aḥmad b. ʿAlī Ibn Ḥajar al-ʿAsqalānī, 2 al-Iṣāba fī tamyīz al-ṣaḥāba 416 (ʿAlī Muʿawwaḍ & ʿĀdil ʿAbd al-Mawjūd eds., 1995).

96 Ibn Qayyim al-Jawziyya, al-Ṭuruq al-ḥukmiyya fī al-siyāsa al-sharʿiyya 57 (Bashīr Muḥammad ʿUyūn ed., 1989).

aries of *ḥudūd*, which should not be enforced in cases of *shubha*; instead, he contended, a judge should exercise restraint.[97] He further likened imprisonment to flogging, noting that both punishments are permissible only when the cause is certain.[98] In cases of *shubha*, he asserted, refraining from punishment aligns more closely with *sharīʿa* principles than imposing it based on doubt.[99] Therefore, in essence, both Ibn Taymiyya and Ibn Qayyim al-Jawziyya aimed to close loopholes in criminal proceedings related to *tuhma* and *shubha*, not to permit the utilization of doubt as a basis for criminal liability.[100]

In light of this, in *al-ḥukm bi-l-shubha*, judges recognized that the threshold for evidence was not satisfied but chose to sanction the accused individuals nonetheless, due to the strong doubts surrounding them or allegations made against them. Consequently, this precedent not only conflicts with Islamic criminal rules but also undermines the tenets of justice. Once an individual is charged with an offense, they are regarded as a member of *ahl al-tuhma*, and any evidence presented against them is considered sufficient *shubha*, thereby warranting punishment.

2. Analysis of Royal Edict No. 56485 (2018) on al-Ḥukm bi-l-Shubha

The edict's timeline shows that in 2014, the Minister of Interior called for reforming the judicial precedent due to execution challenges faced by his Ministry. He sent a telegram requesting a resolution on the matter,[101] which was then forwarded to the Chairman of the Supreme Judicial Council, who referred the matter to the Supreme Court.[102] The General Assembly of the Supreme Court reviewed the matter, issuing a unanimous decision in 2015 that:

97 *Id.*

98 *Id.* at 59.

99 *Id.*

100 To address the problematic point about striking *ahl al-tuhma*, I refer to al-Ghazālī, *supra* note 14, at 1:422.

101 Telegram No. 76223 (28/6/1435) corresp. Apr. 29, 2014.

102 Letter No. 16296 (27/7/1435) corresp. May 26, 2014.

> The criminal penalty that requires a proven conviction is one for which the punishment is prescribed by *sharīʿa* or statute. Beyond that, a proven conviction is not required, and it is sufficient to impose a punishment based on considerable evidence and indicators for issuing a discretionary punishment (*taʿzīr*) according to the judge's discretion.[103]

The decision seems crafted to let judges maintain the problematic precedent while maintaining the appearance of resolving the issue. Hence, the decision was considered unsatisfactory and another telegram was sent by the Minister.[104] The Royal Court received the telegram and issued a noble edict tasking a government committee with reviewing the issue.[105] The committee was led by the Bureau of Experts at the Council of Ministers and included representatives from the Ministry of Justice, the Supreme Judicial Council, the Board of Grievances, and others deemed necessary. After review, the committee recommended that the Supreme Court revise its aforementioned decision (No. M/21, 2015).[106] The Royal Court agreed and referred the matter back to the Supreme Court,[107] which reexamined it in 2017 and decided by a majority that:

> When imposing a criminal penalty for committing a prohibited act, it is necessary to state the proof of the defendant's conviction for the offense that warrants this penalty. If the judge does not have full evidence but a credible indication arises that convinces him of the necessity to impose a discretionary punishment (*taʿzīr*), it is required to state the conviction of the defendant for this punishment.[108]

---

103 Resolution of the General Assembly of the Supreme Court No. M/21 (28/4/1436) corresp. Feb. 18, 2015.

104 Telegram No. 186705 (21/10/1436) corresp. Aug. 7, 2015.

105 Noble Edict. No. 20589 (27/4/1437) corresp. Feb. 7, 2016.

106 Memorandum No. 654 (5/7/1437) corresp. Apr. 12, 2016.

107 Royal Edict No. 38946 (11/8/1437) corresp. May 19, 2016.

108 Resolution of the General Assembly of the Supreme Court No. 32 (14/8/1438) corresp. May 11, 2017.

This second decision, like the first, seems to have failed to address the problematic precedent. As in the first decision, the Court did not discuss the juristic maxims or statutory rules that the precedent violated and assumed judges would not abuse their discretionary power, showing no concern for this in its holding. Furthermore, the Court argued in other parts of the decision that not punishing defendants without a full conviction would allow criminals to evade justice.[109] The Court's decision was delivered to the Royal Court in 2017.[110] Subsequently, the Bureau of Experts received instructions from the Royal Court regarding the matter and issued a memorandum deeming the Court's decision unsatisfactory,[111] leading to the issuance of the following edict[112]:

> In the Name of God, the Most Gracious, the Most Merciful
>
> No. 56485
>
> Date: 5/11/1439 [corresp. July 18, 2018]
>
> The Honorable Acting Chairman of the Supreme Judicial Council:
>
> Peace be upon you, as well as the mercy of God and His blessings:
>
> We have reviewed the letter of the Honorable Chief Justice of the Supreme Court No. 3164771, dated 22/8/1438 [May 18, 2017];
>
> And the telegram of His Excellency the President of the Bureau of Experts at the Council of Ministers No. 1830, dated 29/5/1439 [Feb. 15, 2018];
>
> Concerning what has been observed in some judicial rulings, where a strong accusation (*tuhma*) or suspicion (*shubha*) is directed against the defendants and a criminal penalty is imposed on them without stipulating proof of conviction for committing the [prohibited] act;

109 *Id.*
110 Letter No. 3164771 (22/8/1438) corresp. May 19, 2017.
111 Memorandum No. 673 (29/5/1439) corresp. Feb. 15, 2018.
112 Royal Edict No. 56485 (5/11/1439) corresp. July 18, 2018.

> And the issuance of Resolution No. 32 by the General Assembly of the Supreme Court by majority vote, dated 14/8/1438 [May 10, 2017], on this issue;
>
> And considering what was recommended by the attendees at the Bureau of Experts, according to memorandum No. 673, dated 29/5/1439 [Feb. 15, 2018];
>
> And whereas Article Three of the Statute of Criminal Procedures states that no criminal penalty may be imposed on any person except after establishing their conviction for a *sharīʿa* or statutorily prohibited act, following a trial conducted in accordance with *sharīʿa* provisions;
>
> Therefore, behold that the Supreme Judicial Council shall effectuate whatever measures it deems appropriate regarding the judges' adherence to the aforementioned Article Three of the Statute of Criminal Procedures.
>
> Thus, fulfill what is necessary pursuant to it.
>
> [Signature]
>
> Salman b. Abdulaziz Al Saud

The edict starts with a set of citations that provides a timeline for the sequence of events. It instructs the Acting Chairman of the Supreme Judicial Council—who is also the Minister of Justice—to take necessary measures to abolish *al-ḥukm bi-l-shubha*. It does not address the Supreme Court or seek its approval and remains unclear as to whether the Supreme Judicial Council ranks higher than the Supreme Court. The Council is an administrative body without jurisdiction over judicial rulings, while the Supreme Court reviews decisions and issues binding rulings for lower courts.[113] Judges follow the Council for administrative guidelines, but it is uncertain whether they view its resolutions on judicial precedents as fully authoritative. Despite the hierarchy, the edict suggests that the King believed the Council had the authority to instruct the Supreme Court to issue the proclaimed rules. Royal advisors may have felt it more

113 Statute of the Judiciary (2007), arts. 6–14.

appropriate for the monarch to address the Council, given the Supreme Court's lack of willingness to change its position on two previous occasions.

The edict cited only Article 3 as its rationale, as the Supreme Court had deliberately overlooked it in its decisions. Article 3 of the Statute of Criminal Procedures explicitly forbids judges from imposing criminal liability without a fully proven conviction. This rule is not only legitimate and precise but also consistent with *sharīʿa*, leaving no room for opposition. Consequently, the edict refrained from invoking broader doctrines like *siyāsa sharʿiyya* or *maṣlaḥa*, as the statutory rule itself sufficed. The edict's sole provision reiterates this rule and mandates judicial adherence to it, with the Supreme Judicial Council tasked with ensuring its implementation in light of the Supreme Court's stance.

Approximately five months after the edict, the Supreme Judicial Council issued Resolution No. 40/11/4411 (2018), stating that courts cannot impose criminal penalties based on *tuhma* or *shubha* and must establish full conviction of the indicted person before determining criminal liability.[114] However, the resolution could potentially undermine the edict's aim to protect individual rights and uphold the presumption of innocence.

First, the resolution invokes irrelevant rules like Article 158 of the Statute of Criminal Procedures, which states that courts are not bound by the offense characterization provided by the public prosecutor.[115] In other words, if the court finds the prosecutor's classification incorrect, it has the authority to reclassify the offense, in coordination with the parties involved. While this article may raise its own concerns, it is irrelevant to the issue at hand; the edict and previous memorandums do not address the reclassification of offenses by judges. Thus, by citing this article, the resolution implicitly suggests that judges might consider reclassifying the offense to fit the available evidence, which could conflict with the edict's goal of preventing convictions based on insufficient evidence.

114 Supreme Judicial Council Resolution No. 40/11/4411 (16/4/1440) corresp. Dec. 25, 2018.

115 Statute of Criminal Procedures (2013), art. 158.

Second, the resolution states that courts can base convictions on any type of proof, whether the offense is statutory or not.[116] This broad statement is problematic—while it includes a caveat for *ḥudūd* offenses, it overlooks the fact that courts are bound by specific evidentiary and procedural rules across all offenses, as outlined in *fiqh* and statutes. The statement risks misinforming judges and shifts the focus toward using all available evidence, even if its credibility is questionable. Therefore, the statement is unwarranted, as it overemphasizes using all types of evidence instead of focusing on upholding the presumption of innocence and maintaining proper evidence thresholds.

Third, the resolution fails to address the Supreme Court's responsibility to review and remand rulings based on *al-ḥukm bi-l-shubha*. Instead, it tasks the General Secretary of the Council and the Judicial Inspection Administration with ensuring courts followed the stipulated rules and directed appellate courts to report judgments that violated those rules. However, the Supreme Judicial Council lacks the authority to overrule judicial decisions, as it is not a court of law. This omission overlooks the key issue: the Supreme Court's resistance to ending *al-ḥukm bi-l-shubha* in two prior decisions.

These three points illustrate how the Supreme Judicial Council's resolution could undermine the edict's mission. However, based on personal observations and anecdotal evidence, the edict appears to have effectively abolished *al-ḥukm bi-l-shubha*, especially after support from the civil and legal community. Analyses of future collections of Saudi judicial rulings will determine the validity of this assessment.

Royal Edict No. 25634 (2019) on *al-Taʿzīr bi-l-Jald*

1. Discussion of the Precedent

Three *ḥudūd* offenses are punishable by flogging: illicit sexual intercourse by individuals who have never been married (100 lashes),[117] slanderous accusations of sexual impropriety (80

116 Supreme Judicial Council Resolution No. 40/11/4411, *supra* note 114.
117 Qurʾān 24:2.

lashes),[118] and intoxicants consumption (either 40 or 80 lashes).[119] In addition to these prescribed punishments, jurists are in agreement that imposing flogging in *taʿzīr* punishments is permitted under *sharīʿa*.[120] However, there is no textual basis in the original sources of *sharīʿa* (the Qurʾān and Sunna) that obliges the state to utilize flogging in *taʿzīr* or prevents it from choosing not to use flogging for offenses other than *ḥudūd*.

There is a disagreement in *fiqh* concerning the extent of flogging in *taʿzīr* offenses. To synthesize a complex debate, juristic positions can be categorized into two major and minority groups.[121] The first minority group argued that flogging in *taʿzīr* should not exceed 10 lashes in any case, while the second minority contended that the number of lashes is unlimited and left to the judge's discretion. The first majority group maintained that flogging in *taʿzīr* should not exceed the minimum amount specified for *ḥudūd* offenses, which is either 40 or 80 lashes, depending on the *madhhab*. In a similar yet more nuanced approach, the second majority group determined that the number of lashes for a *taʿzīr* offense should not surpass the fixed number established for a *ḥudūd* offense when both offenses fall under the same category. For example, a judge may punish illicit sexual activities between unmarried individuals, short of intercourse, as a *taʿzīr* offense, but the punishment cannot equal or exceed the 100 lashes prescribed for full illicit intercourse under *ḥudūd*, as both fall under the same category.

118 Qurʾān 24:4.

119 Muḥammad b. Ismāʿīl al-Bukhārī, Ṣaḥīḥ al-Bukhārī 1079 (Rāʾid b. Ṣabrī Ibn Abī ʿAlfa ed., 2015) (Ḥadīth No. 6773, Ḥadīth No. 6779). For discussions, see Ibn Qudāma, *supra* note 89, at 12:498–99.

120 *See* al-Bukhārī, *supra* note 119, at 1089 (Ḥadīth No. 6848); Muḥammad b. Idrīs al-Shāfiʿī, al-Umm 7:431–32, 8:363 (Rifʿat Fawzī ʿAbd al-Muṭṭalib ed., 2001); Yaḥyā b. Sharaf al-Dīn al-Nawawī, 11 al-Minhāj sharḥ Ṣaḥīḥ Muslim ibn al-Ḥajjāj 221 (1392[1972–73]); Ibn Qudāma, *supra* note 89, at 12:524; ʿAwda, *supra* note 63, at 1:689–90; ʿAbd al-ʿAzīz ʿĀmir, al-Taʿzīr fī al-sharīʿa al-islāmiyya 307–12 (2015).

121 ʿAlāʾ al-Dīn Abū Bakr al-Kāsānī, 9 Badāʾiʿ al-ṣanāʾiʿ fī tartīb al-sharāʾiʿ 271–72 (ʿAlī Muʿawwaḍ & ʿĀdil ʿAbd al-Mawjūd eds., 2003); Ibn Farḥūn, *supra* note 37, at 294–97; al-Nawawī, *supra* note 120, at 221–22; Ibn Qudāma, *supra* note 89, at 12:523–26; ʿAwda, *supra* note 63, at 1:690–93; ʿĀmir, *supra* note 120, at 312–20; Wahba al-Zuḥaylī, 6 al-Fiqh al-islāmī wa-adillatuhu 206–207 (1989).

Similarly, lashes for drug use (a *taʿzīr* offense) must not exceed those for wine drinking (a *ḥudūd* offense), as both offenses are in the same class. The literature of Islamic state governance (*aḥkām sulṭāniyya*) largely supports the majority positions, with influential scholars such as the Shāfiʿī jurist al-Juwaynī (d. 478/1085) extensively discussing how Mālikī jurists allowed rulers to impose harsh punishments by permitting *taʿzīr* penalties to exceed *ḥudūd* limits.[122]

The recognized Ḥanbalī references, relied upon by Saudi courts, conclude that it is not permissible to exceed 10 lashes in *taʿzīr* punishments, except in cases where someone consumes an intoxicant during the daytime in Ramadan or engages in intercourse with the slave woman of his wife or partner, based on some Prophetic narrations on these exceptions.[123]

The Saudi legislature has limited the scope of flogging, avoiding its broad application across criminal law. Only a few statutory provisions explicitly prescribe flogging as a punishment, with the maximum set at 50 lashes.[124] The majority of criminal statutes favor financial penalties and imprisonment. Flogging is mainly reserved for *ḥudūd* and uncodified *taʿzīr* offenses, reflecting the legislature's intent to restrict its use. However, the judiciary has taken a different stance, embracing flogging, particularly in uncodified *taʿzīr* where judges have wide discretion. Closer scrutiny reveals that Saudi judges frequently went beyond the majority of jurists' opinions as they imposed a greater number of lashes then generally supported in *fiqh*.

To illustrate, in Saudi courts, *taʿzīr* punishments often exceeded the fixed limits of *ḥudūd* offenses, even when both

122 Al-Qāḍī Abū Yūsuf, Kitāb al-Kharāj 167 (1979); ʿAlī b. Muḥammad b. Ḥabīb al-Māwardī, al-Aḥkām al-sulṭāniyya wa-l-wilāyāt al-dīniyya 311–12 (Aḥmad Mubārak al-Baghdādī ed., 1989); ʿAbd al-Malik b. ʿAbdallāh al-Juwaynī, al-Ghiyāthī: Ghiyāth al-umam fī iltiyāth al-ẓulam 351–58 (ʿAbd al-ʿAẓīm Maḥmūd al-Dīb ed., 2011).

123 Manṣūr b. Yūnis al-Buhūtī, 6 Kashshāf al-qināʿ ʿan matn al-iqnāʿ 122–24 (Hilāl Miṣaylḥī ed., 1983); al-Buhūtī, 6 Sharḥ Muntahā al-irādāt 226–27 (ʿAbdallāh b. ʿAbd al-Muḥsin al-Turkī ed., 2000); Ibn al-Najjār al-Futūḥī, 10 Maʿūnat ulī al-nuhā sharḥ al-Muntahā 468–69 (ʿAbd al-Malik Bin Dihīsh ed., 2008).

124 *See, e.g.*, Statute of Combating Narcotics and Psychotropic Substances (2005), arts. 37–40.

offenses fell within the same category. For example, a young, unmarried man received a sentence of four months in prison and 140 lashes for meeting a girl in a café for a romantic date and possessing a phone with "pornographic images."[125] This decision exceeded the *ḥudūd* mandate, which prescribes 100 lashes for fornication, as both dating and illicit sex fall under the same category of sexual offenses. If this adult had been caught fornicating in the café, he would have received no more than 100 lashes; instead, he was punished with 140 lashes, in addition to imprisonment, for a date and inappropriate pictures. The judge justified this excess by stating that the offense occurred in Medina, Islam's second holiest city, prompting him to increase the lashes.[126] This reasoning is fundamentally flawed, as even in *ḥudūd* cases, judges cannot exceed the prescribed limits regardless of location. In fact, the *ḥudūd* mandate was established in Medina, where the number of lashes was fixed, not increased because of the city's sanctity.

In another case, a man was charged with causing a young woman's disappearance and engaging in prohibited seclusion (*khalwa muḥarrama*) after sheltering her for a day.[127] The defendant stated that the young woman approached him at the restaurant where he worked at 3:00 a.m. to use his phone to call her family.[128] When she called, no one answered.[129] Afterward, she requested a ride, which he agreed to provide.[130] He took her to a house she specified, but when no one answered the door, she asked for a place to sleep.[131] Hesitantly, he brought her to his cousin's empty rest house, gave her a phone, and left.[132] Later that day, she contacted him for a ride to the market, which he provided.[133]

125 Judgment No. 34209377 (8/5/1434) corresp. Mar. 20, 2013, in Wizārat al-ʿAdl, *supra* note 68, at 14:342–51.

126 *Id.* at 14:347.

127 Judgment No. 3447032 (1434/2012–13), in Wizārat al-ʿAdl, 11 Majmūʿat al-Aḥkām al-Qaḍāʾiyya 1435, at 144–45 (1438[2017]).

128 *Id.* at 11:145.

129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.*

133 *Id.* at 11:145–46.

Although the prosecutor did not dispute any of these facts, he accused the defendant of being alone with the young woman and contributing to her absence from her family, seeking a discretionary penalty.[134] The defendant expressed regret, stating that he would not have helped her had he known the consequences; he insisted that he acted with good intentions, did not stay with her at the rest house, and that nothing inappropriate occurred.[135] Nonetheless, he was sentenced to 11 months in prison and 90 lashes.[136] After reviewing the ruling, the appellate court's majority opinion observed that the punishment was excessive, especially given the absence of prior offenses by the defendant.[137] They recommended that the judge verify the defendant's good character and reconsider the case accordingly; however, the judge reaffirmed his judgment, which the appellate court eventually upheld.[138]

The inconsistencies in lash counts for *taʿzīr* offenses reveal troubling discrepancies that question the fairness of the penalties imposed. Notably, there are concerning cases where much more severe actions have received less harsh penalties in comparison to previous cases. For instance, for similar offenses of child molestation, one man received 70 lashes and one month in prison,[139] and another received 180 lashes and three months' imprisonment.[140] Viewing these cases alongside past cases highlights a sharp contrast in determining the appropriate count of lashes. Furthermore, the unusual types of *taʿzīr* offenses that arise in Saudi courts contributed to the troubling discrepancies within Saudi jurisprudence. For instance, a butcher received 10 lashes and 10 days in prison for repeatedly keeping his shop open during prayer times,[141] while another man was given only 10

134 *Id.* at 11:145.

135 *Id.* at 11:146.

136 *Id.*

137 *Id.*

138 *Id.* at 11:146–47.

139 Judgment No. 358940 (1435/2013–14), in Wizārat al-ʿAdl, *supra* note 127, at 11:92–94.

140 Judgment No. 3521563 (1435/2013–14), in Wizārat al-ʿAdl, *supra* note 127, at 11:95–98.

141 Judgment No. 3520058 (1435/2013–14), in Wizārat al-ʿAdl, *supra* note 127, at 12:564–66. Note that keeping shops open during prayer times is no lon-

lashes for publicly breaking his fast during Ramadan without a valid excuse.[142] While acknowledging the unique circumstances of each case discussed, these examples underscore systemic issues that extend beyond isolated judicial opinions.

In the absence of clear guidelines or sentencing tables, it became standard practice in the Saudi legal system for judges to determine the number of lashes as they saw fit. As a result, penalties of hundreds or even thousands of lashes became commonplace,[143] prompting criticism from notable clerics.[144] Moreover, albeit still unresolved, the acceptance of capital punishment for *taʿzīr* offenses further complicates the legal landscape.[145] Therefore, the widespread imposition of arbitrary lash sentences revealed significant inconsistencies within the judicial system, highlighting the urgent need for royal intervention to effectively address the precedent of *al-taʿzīr bi-l-jald*.

---

ger a punishable offense in Saudi Arabia. *See* N.P. Krishna Kumar, *Shops in Saudi Arabia can remain open during prayer times: Saudi Chambers*, Al Arabiya English (July 11, 2021), https://english.alarabiya.net/News/gulf/2021/07/16/Shops-in-Saudi-Arabia-can-remain-open-during-prayer-times-Saudi-Chambers.

142 Judgment No. 34511495 (1434/2012–13), in Wizārat al-ʿAdl, *supra* note 127, at 12:572–74.

143 A preliminary survey of *Majmūʿat al-aḥkām al-qaḍāʾiyya 1434 AH* reveals that flogging was prescribed in 177 cases as a *ḥadd* punishment and in 591 cases as a *taʿzīr* punishment. Among the *taʿzīr* punishments, 290 rulings prescribed between 100 and 500 lashes, while 105 rulings prescribed more than 500 lashes. Notably, over twenty rulings exceeded 1,000 lashes, and one case reached an extreme of 4,000 lashes. *See* ʿAbd al-ʿAzīz b. Sulaymān al-Ghaslān, *al-Iktifāʾ ʿan ʿuqūbat al-jald al-taʿzīriyya bi-ʿuqūbāt ukhrā fiqh wa-niẓām*, 31 Majallat Qaḍāʾ 427 n.1 (2023).

144 See, for example, statements by Shaykh Saʾd al-Kathlan, a former member of the state-backed Council of Senior Scholars (*Hayʾat Kibār al-ʿUlamāʾ*), in Saʿd b. Turkī al-Khathlān, 8 al-Salsabīl fī sharḥ al-Dalīl 192–93 (2021). *See also* Khaled Abou El Fadl, Reasoning with God: Reclaiming Shariʾah in the Modern Age 58–59 (2014).

145 Capital punishment for *taʿzīr* offenses is sometimes referred to as *al-qatlu siyāsatan*. *See* al-Ghazālī, *supra* note 14, at 1:423; al-Zuḥaylī, *supra* note 121 at 200–201. For a Saudi discussion about this issue, see Ḥāzim b. Ḥāmid al-Nimarī, Mashāriʿ al-taqnīn: Mubāḥathāt manhajiyya fī taqnīn al-fiqh al-islāmī 57–58 (2022).

2. Analysis of Royal Edict No. 25634 (2019) on al-Taʿzīr bi-l-Jald

It is uncertain how the issue of *al-taʿzīr bi-l-jald* came to the King's attention. It may have arisen from direct appeals by citizens reporting judicial abuses of flogging in *taʿzīr* offenses or through national and international human rights reports.[146] However, the channel that raised this issue to the Royal Court seems to have conveyed genuine concern, prompting the issuance of the following edict[147]:

> In reference to the Royal Edict No. 25634, Dated: 20/4/1441 [corresp. Dec. 18, 2019], stipulating that the General Assembly of the Supreme Court shall issue a judicial principle that abolishes the punishment of flogging in discretionary punishments of *taʿzīr*, deeming other penalties as satisfactory, and imposing this principle on courts to apply it without deviation under any circumstances.

In the edict, the King instructs the Chief Justice of the Supreme Court to issue a judicial principle via the General Assembly of the Supreme Court. The Statute of the Judiciary grants the General Assembly the authority to establish judicial principles concerning judicial matters.[148] Although the statute does not explicitly outline the functions of these principles or their binding nature, conventional legal practices in Saudi Arabia regard these principles as legally binding, provided royal edicts endorse them.[149]

---

146 *See, e.g.*, United Nations Office of the High Commissioner for Human Rights, *Committee against Torture reviews report of Saudi Arabia*, U.N. Off. High Comm'r (Apr. 25, 2016), https://www.ohchr.org/en/press-releases/2016/04/committee-against-torture-reviews-report-saudi-arabia; Stephanie Nebehay, *U.N. Torture Watchdog Urges Saudi to Halt Flogging, Amputations*, Reuters (Apr. 22, 2016), https://www.reuters.com/article/world/un-torture-watchdog-urges-saudi-to-halt-flogging-amputations-idUSKCN0XJ231/.

147 Royal Edict No. 25634 (20/4/1441) corresp. Dec. 18, 2019.

148 Statute of the Judiciary (2007), art. 13.

149 For more on Saudi judicial principles, see Wizārat al-ʿAdl, al-Mabādiʾ wa-l-qarārāt al-ṣādira min al-hayʾa al-qaḍāʾiyya al-ʿulyā wa-l-hayʾa

While the King granted the Supreme Court the authority to issue the judicial principle, the royal edict did not allow for any discretion, as the Court was directly ordered to implement the royal commands. The instructions explicitly tasked the Supreme Court to issue the principle as directed and distribute it to the lower courts. Furthermore, the royal edict lacked detailed definitions of *taʿzīr* offenses, suggesting that the judiciary and the Royal Court share the same understanding of the issue's juristic terms.

The case was different regarding the edict's lack of sufficient reasoning and rationale, which risked potential pushback and inconsistencies in application, as various courts and officials relied on their interpretations rather than a unified understanding of the edict's intent. This ambiguity generated skepticism among members of the General Assembly of the Supreme Court, as a debate emerged within the Supreme Court regarding the King's edict. Ultimately, the General Assembly of the Supreme Court did not reach a unanimous decision affirming the royal edict. The issued judicial principle was endorsed by a majority of nine out of thirteen judges, with four dissenting.[150] The majority opinion rested on three key arguments: (a) flogging in *taʿzīr* offenses carries negative implications (although these were not specified); (b) punishments for *taʿzīr* offenses may vary according to the context of time and place; and (c) *walī al-amr* (i.e., the monarch) retains the authority to determine appropriate punishments for *taʿzīr* offenses.[151] The resolution did not address or include the perspectives of the minority; nevertheless, the resolution was enforced and all courts suspended *al-taʿzīr bi-l-jald*. With regard to the flogging prescribed in statutes, while the rules remain in place, anecdotal reports suggest that they will be abrogated soon.

Concerns persist that the inconsistencies observed in *al-taʿzīr bi-l-jald* may occur with the extensive use of incarceration

---

al-dāʾima wa-l-ʿāmma bi-majlis al-qaḍāʾ al-aʿlā wa-l-maḥkama al-ʿulyā 1391–1437 (2017); Nabīl b. ʿAbd al-Raḥmān al-Jibrīn, 1 al-Tawḍīḥāt al-marʿiyya li-niẓām al-nurāfaʿāt al-sharʿiyya 43, 46 (2018).

150 Resolution of the General Assembly of the Supreme Court No. M/40 (24/6/1441) corresp. Feb. 18, 2020.

151 *Id.*

and monetary fines. In response, the government has revitalized its draft statutory guidelines for alternative sanctions, which encompass community service, home confinement, vocational training, and enrollment in treatment or therapy programs, among other measures.[152] While these guidelines are publicly available, they remain under refinement and are anticipated to be incorporated in the upcoming criminal code, which is expected to establish clear standards for determining appropriate sentences, whether they involve fines or imprisonment.

Conclusion

This analysis of Saudi royal edicts regarding the application of *ḥudūd* in the courts of Saudi Arabia highlights several challenges that arise when traditional approaches to *ḥudūd* enforcement are adapted to contemporary Muslim states. Despite the high level of *sharīʿa* training among Saudi judges, the edicts reveal that expertise alone does not ensure the proper, equitable, or beneficial implementation of *ḥudūd*. Saudi judicial collections, despite the judges' rigorous training, exhibit significant unresolved issues that point to deeper complexities within *ḥudūd* jurisprudence.

This highlights a crucial point: the assumption that *ḥudūd* rules and precedents are so delineated and immutable that they require no external oversight is becoming increasingly untenable. While Saudi judges adhered to authentic Islamic legal methodologies, the edicts demonstrated the presence of numerous gray areas that necessitate both jurisprudential refinement and royal intervention. The monarchy's involvement, rather than undermining judicial authority or the validity of *ḥudūd* rules, has shown that non-judicial oversight can help address problematic precedents and foster a more precise implementation of *sharīʿa*.

152 Statute of Alternative Penalties (draft), art. 4. This law was initially part of King Abdullah's (r. 2005–15) judicial reform project, overseen by Shaykh Mohammed Al-Issa, then Minister of Justice and current Secretary-General of the Muslim World League. *See* Muhammad Al-Sulami, *Alternative Punishments Option Open, Says Al-Eisa*, Arab News (Oct. 16, 2011), https://www.arabnews.com/node/394902.

Moreover, the edicts underscore the limitations of relying on *shubha* as a protective measure against the misapplication of *ḥudūd*. The juristic maxim of *idraʾū al-ḥudūd bi-l-shubahāt* on its face is no longer a sufficient safeguard against flawed rulings. Judicial aspects of *shubha* remain in need of further regulation, and, as seen in cases of *al-ḥukm bi-l-shubha*, even this maxim can create confusion in legal standards, thereby contributing to unpredictable outcomes. Furthermore, the royal edicts prompt a reassessment of the role of *ḥudūd* in curbing the expansion of discretionary *taʿzīr* punishments. *Fiqh* has not fully resolved this issue, and the leeway granted to Saudi judges to adopt minority opinions has led to the expansion of *taʿzīr* punishments beyond the boundaries of *ḥudūd* penalties. Therefore, it is no longer sufficient to claim that the application of *ḥudūd* alone serves as a bulwark against the overreach of *taʿzīr*.

In conclusion, the Saudi royal edicts reflect a nuanced, evolving approach to *ḥudūd* jurisprudence that recognizes the need for both judicial and royal interventions to achieve a more just and balanced application of Islamic law in modern contexts. This approach may also provide a model for other Muslim-majority states facing similar challenges. The royal edicts signal an emerging recognition that applying classical methodologies and precedents may yield unexpected outcomes, which, in turn, require special treatment. Further developments in the Saudi legal system are anticipated, particularly as the government drafts its comprehensive criminal code, drawing upon expertise from diverse legal traditions. In this regard, Saudi Arabia's experience suggests that engaging in thoughtful examination of traditional practices and their applicability to contemporary contexts can foster an authentically informed and contextually grounded application of Islamic law, offering insights that may resonate beyond the Saudi context and contribute to broader jurisprudential discussions in the Muslim world.