

# Ta'zir Punishment and Delegated Authority in Accordance with Islamic Jurisprudence and Afghanistan's Enacted Laws

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## ABSTRACT

Ta'zir punishment is the punishment of acts that do not have certain legal penalties, whether it is violating the rights of Allah (SWT), the rights of others, or the public interest. The legal basis of Ta'zir punishment is from the Holy Qur'an, the Prophetic Hadiths, the consensus of the Muslim community, and personal reasoning.

In Islamic Sharia, there are many types of Ta'zir punishments, which range from advice up to execution, in consideration of the public order and interests of the community. In Ta'zir punishments, the determination of a sentence for the offender is subject to the authority and ability of the judge, and is specified in consideration of the interests and support of the community, along with the circumstances of the offense, the corrective effect of the sentence, and the character and criminal record of the offender. Many philosophies to legitimize disciplinary punishments, such as protecting humanity's life and interests, reducing the magnitude of crime in society, and the correction and punishment of offenders are also incorporated.

Ta'zir punishment has some unique characteristics, which include the indefiniteness of penalties, whereby the lawmaker's authority and ability to punish is delegated to judges. Not only may the judge forgive the offender, but the personality and criminal record of the offender are also considered in determining the punishment. Because many people in Afghan society do not understand the concept of Ta'zir punishment, how they are applied, and how they are specified, so this Article is designed to help resolve these issues.

**Keywords-** Ta'zir, legitimacy, types, delegated authority.

## I. INTRODUCTION

Islamic Sharia obliges humankind to preserve five things: religion, the soul, offspring, preservation of wealth, and preservation of the mind. Islamic Sharia also impose penalties on people who do not fulfill the above requirements. Islamic Sharia divides these punishments into definite and indefinite, with the following three types of crimes, in consideration of the type of punishment:

A- Qisas (Retaliation) Crimes, including murder, bodily injury, and actions that result in the loss of body parts. Punishments of these types of crimes are specified

as Qisas and Diyat in Sharia, in consideration of the type of crime.

B- Hudud<sup>1</sup> Crimes, which include defamation, adultery, robbery, drinking alcohol, and other similar crimes. Punishments of these crimes are specified as Hudud by lawmakers.

C- Ta'zir (Discretionary) Crimes, for which the punishments are indefinite penalties without Hudud and Qisas. Ta'zir punishment is the punishment of acts that do not have certain legal penalties as defined by Hudud and Qisas. A judge will be the one to specify Ta'zir

<sup>1</sup> The limits ordained by Allah. This includes the punishment for crimes.

punishments in consideration of the personality of the offender and the type of crime.

An introduction to the punishments for Ta'zir crimes and the related delegated authority to judges is the subject of this article discussion, which is tailored in the light of Islamic Jurisprudence and enacted laws of Afghanistan. This research about Ta'zir punishments and delegated authority is not completely new. According to other research, it is clear that many other scholars have focused on Ta'zir punishments; and it would be difficult to mention each one of them. This other research is available in Arabic, Persian, Pashto and Urdu languages, so this article is for a new audience, because no comprehensive article about Ta'zir punishment exists in English language that deals with the questions and issues this Article does. Accordingly, this Article seeks to provide new insight regarding Ta'zir punishments to students of Sharia and law faculties and readers from the English speaking audience.<sup>2</sup>

### 1.1 Relevance of Research

In today's society, research about the introduction of Ta'zir punishments, as well as the delegated authority related to them, is important. Many crimes occur where no explicit penalties exist. Some Ta'zir punishments are specified in Sharia and by enacted Afghan laws. At the same time, the predetermined penalties for some crimes, such as the haad crimes of defamation, adultery, and drinking alcohol, for example, but the identification of Ta'zir punishments, and understanding how they are determined are not as well-known. Therefore, this gap in knowledge related to Ta'zir punishments and delegated authority for specifying Ta'zir punishments will be addressed in this article.

### 1.2 Research problem statement

For many crimes that occur in Afghanistan, certain predetermined punishments in Sharia and enacted Afghan laws apply, but prescribed penalties for some crimes in Sharia do not exist. Regardless, all taboos and crimes are set forth in the Quran. Crimes punishable under Ta'zir must be stipulated specifically in Ta'zirat. This is a basic rule of Islamic law, but also exceptions to this rule do exist in Ta'zirat. However, it is difficult to understand the determination, amount, types and other related provisions of Ta'zir punishments. The number of offenders with Ta'zir punishments is increasing, and solutions to this problem will be discussed in this article.

### 1.3 Research Questions

What are Ta'zir punishments?

Who has the authority to specify Ta'zir punishments?

What is the impact of imposing Ta'zir punishments on society and on offenders?

How many types of Ta'zir punishment are applicable considering the personality of the offender and the requirements of society?

### 1.4 Research Hypothesis

This research addresses the problem that many people in Afghan society do not completely understand the concept of Ta'zir punishment, determining the punishments, and the delegated authority to specify the punishments, and the reasons for this gap in knowledge are assumed to be lack of public awareness, illiteracy, and lack of interest. The solution is to eradicate illiteracy in the community, develop public information campaigns, and write and publish research and articles about the topic.

### 1.5 Objectives of the Research

At the end of this research, the readers will be able to:

- 1- Understand the concept of Ta'zir punishments.
- 2- Understand the Sharia ruling on Ta'zir punishments.
- 3- Understand the reasons and virtues behind the legitimacy of Ta'zir punishment.
- 4- Understand the characteristics and types of Ta'zir punishments.
- 5- Understand the extent of delegated authority to determine Ta'zir punishments.

### 1.6 Research Methodology

As this research is based on library, the following strategies and approaches will be used to complete this research according to human capacity:

- A- Using primary sources.
- B- Using secondary sources such as jurisprudence books.
- C- Using Afghan enacted laws to complete the research.
- D- Throughout the article, the references have been used according to the "green book" system.
- E- Because this research is in English language, all the linguistic rules and definitions of English have been observed.

## II. GENERALITIES

### 2.1 Literal and idiomatic meaning of Ta'zir

Ta'zir is an Arabic word. In Arabic, Ta'zir is rooted from the chapter of Tafaeel and is derived from the word Azar. In Arabic language, this word has many meanings and the Lisan Al-Arab Dictionary, a large dictionary of Arabic language, has provided the following literal meanings of Ta'zir:

Ta'zir is used as blaming, refusal, forbiddance and beating hard and as well as it is used as punishment. As Arabs say: He/she was punished for the sin they have committed. The true meaning of Ta'zir is punishment. For this reason, punishing an offender without Had is "punishment".<sup>3</sup>

In addition, Ta'zir is literally used as support, honor, help and respect. For example, Ta'zir means

<sup>2</sup> This article is originally written in Pashto language.

<sup>3</sup> Mohammad bin Makram bin Ali ibn Manzoor (year 1414). Lisan Al-Arab, Volume (4), Beirut, Darul Sadar, Page 562.

support, honor and respect according to these Quranic verses:

1- قَالَّذِينَ آمَنُوا بِهِ وَعَزَّرُوهُ وَنَصَرُوهُ وَاتَّبَعُوا النُّورَ الَّذِي أُنزِلَ مَعَهُ أُولَئِكَ هُمُ الْمُفْلِحُونَ<sup>4</sup>

(So, they who have believed in him, honored him, supported him and followed the light which was sent with him – it is those who will be the successful.) In this verse, Wa Azzarohu (وَعَزَّرُوهُ) means “support”

2- وَتَعَزَّرُوهُ وَتَوَقَّرُوهُ<sup>5</sup>.

(And honor him and respect the Prophet.) In this verse, Ta'zir means honor and support. Human beings not only receive honor and correction with Ta'zir punishments, but they are also helped to avoid committing Ta'zir crimes in the future so that they are honored and respected in the community.<sup>6</sup>

Scholars have given many definitions of Ta'zir punishments, and some are elaborated below:

In legal terms, Ta'zir punishments are legitimate punishments which are not specifically prescribed and are determined by a judge considering quality and magnitude of the crime, the personality, status, and circumstances of the offender, the interests of society, whether the crime violates the rights of Allah (SWT)<sup>7</sup>, such as one who breaks the fast in Ramadan during the day with no excuse or leaves prayer with no valid excuse, or violating the rights of others such as throwing harmful things on public highways, harming people verbally or physically in the community, and similar offenses that do not have specific and predetermined punishments, and the punishment for such crimes can be anything from a reprimand for the offender to execution.<sup>8</sup>

Likewise, for crimes where neither Had no compensation (atonement) applies, Ta'zir punishments are applicable. Where a person commits Hudud and Qisas crimes, specifically defined punishments from Hudud and Qisas apply. But Ta'zir punishments will be imposed rather than Hudud and Qisas when any of the conditions for Hudud or Qisas are incomplete, such as a theft in which the minimum requirements for Had punishment have not been met.<sup>9</sup>

Sometimes, Ta'zir punishments are also applied in addition to the principal punishment, because Ta'zir punishments are complementary to the principal punishment, such as in Imam Abu Hanifa's (May Allah have mercy upon him) opinion, of the Ta'zir punishment for cases of adultery.<sup>10</sup>

<sup>6</sup> Surah [Al-A'raf] Ayah: 157.

<sup>7</sup> Surah [Al-Fath] Ayah: 9.

<sup>8</sup> Saadi Abu Habib, Qamosul Fiqhi, Syria, Darul Fikr, Page 250.

<sup>9</sup> When writing the name of Allah Muslims of ten follow it with the abbreviation "SWT" which stands for the Arabic words "Subhanahu wa Ta'ala" translates Glory to him, the Exalted.

<sup>10</sup> Wahbatul Zahili (-----). Al-Fiqh Al-Islami Wadalta, Volume (7), Syria, Darul Fikr, Page 5300.

<sup>11</sup> Ibid 514.

<sup>12</sup> Abdul Qader Awda (\_\_\_\_\_) At-Tashria Al-Jinayee Al-Islami Muqarinan BilQanonul Wazae, Volume (1), Darul Katibul Arabi, Page 685.

## 2.2. Sharia ruling on Ta'zir punishment

There is a difference of opinion among jurists regarding the Shariah ruling on Ta'zir punishment:

In this regard, Maliki and Hanbali (may Allah have mercy upon them) said that if the judge finds a community interest in applying a Ta'zir punishment, it must be applied and cannot be ignored, because Ta'zir punishments are legitimized the same way as Hudud for the sake of the rights of Allah (SWT).

In this regard, Imam Shafi (may Allah have mercy upon him) says that if a Ta'zir crime relates to the rights of Allah (SWT), such as the causes of Adultery, Ta'zir punishments are not obligatory considering the interests of the community, and it is permissible to abstain from ordering Ta'zir punishment. However, it is not permissible for the judge to forgive the offender if the nature of the offense relates to the rights of others, such as insulting someone.

Imam Abu Hanifa (may Allah have mercy upon him) has the same view as Imam Shafiee (may Allah have mercy upon him). According to Shafiee, if a Ta'zir crime relates to the rights of Allah (SWT), the punishment is not obligatory, considering the interests of the community. However, if the Ta'zir punishment relates to the personal rights of others, the implementation of punishment is obligatory and cannot be forgiven.<sup>11</sup> In this regard, Article 130 of the Afghan Constitution stipulates the following:

In cases under consideration, the courts shall apply provisions of this Constitution as well as other laws.

If no provision in the Constitution or other laws related to a specific case exists, the courts shall, in accordance with Hanafi jurisprudence and within the limits set by the Constitution, rule in a way that attains justice in the best manner.<sup>12</sup>

## 2.3. Reasons for legitimacy of Ta'zir punishments

In the light of the disagreement amongst scholars, the Sharia ruling on Ta'zir punishment which considers Ta'zir punishments permissible will be followed, and the reasons for the legitimacy of Ta'zir punishments in the light of the Holy Quran, Prophetic Sunnah, consensus and personal reasoning will be detailed below, as follows:

### 2.3.1 In light of Quranic verses

Regarding the legitimacy of Ta'zir punishments, Allah (SWT) says in the Holy Quran:

﴿وَعَلَى الثَّلَاثَةِ الَّذِينَ خَلَفُوا حَتَّىٰ إِذَا ضَاقَتْ عَلَيْهِمُ الْأَرْضُ بِمَا رَحُبَتْ وَضَاقَتْ عَلَيْهِمْ أَنفُسُهُمْ وَظَنُّوا أَن لَا مَلْجَأَ مِنَ اللَّهِ إِلَّا إِلَيْهِ ثُمَّ تَابَ عَلَيْهِمْ لِيَتُوبُوا إِنَّ اللَّهَ هُوَ التَّوَّابُ الرَّحِيمُ﴾<sup>13</sup>

(And [He also forgave] the three who were left behind [and regretted their error] to the point that the earth closed in on them in spite of its vastness and their souls confined them and they were certain that there is

<sup>11</sup> Refer to footnote no.9, 525 ودية الزحيلي.

<sup>12</sup> The Constitution of Islamic Republic of Afghanistan (2003), Official Gazette No. 818, Article 130.

<sup>13</sup> Surah [At-Tawba] Ayah: 118.

no refuge from Allah except in Him. Then He returned to them so they could repent. Indeed, Allah is the Accepting of repentance, the Merciful.) When, the Prophet Muhammad (PBUH) started his expedition to Tabuk some of his companions stayed behind because the expedition to Tabuk was during the summer hot weather, and there were few animals for riding and less food. Some interpreters think that 83 companions stayed behind and were divided into the following three categories:

A- A large number of the group were hypocrites, in which some of them falsely excused themselves from the journey, and some others even did not even provide excuses.

B- Among them, seven believers stayed behind due to laziness and planned to go at another time. They tied themselves to pillars of a Mosque in order to be pardoned.

C- Among them, three other believers stayed behind due to laziness, and did not tie themselves to pillars of the Mosque, but did acknowledge their blame, and their Tawbah was accepted after Ta'zir punishment in the above verse.<sup>14</sup>

The reason for the logic of this verse is that the Prophet Muhammad (PBUH)<sup>15</sup> punished those three companions (Ka'b bin Malik, Hilal bin Umayyah and Mararah bin Ar-Rabi) with Ta'zir punishment that stayed behind in the battle of Tabuk due to laziness. The Prophet Muhammad (PBUH) ordered the relatives of these three companions and others to avoid these three companions for 500 days. In this period, these companions faced many problems, and this boycott lasted for 50 days. After that, Allah (SWT) accepted their Tawbah for their sin. This type of social exclusion of the companions is a type of Ta'zir punishment which indicates the legitimacy of the Ta'zir punishments.<sup>16</sup>

### 2.3.2 In light of Prophetic Hadiths

Many Prophetic hadiths speak to the legitimacy of Ta'zir punishment, and a few of them are presented as follows in order to summarize the matter:

1- عَنْ أَبِي بُرْدَةَ رَضِيَ اللَّهُ عَنْهُ، قَالَ: كَانَ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ يَقُولُ: «لَا يُجْلَدُ فَوْقَ عَشْرِ جَلَدَاتٍ إِلَّا فِي حَدِّ مِنْ حُدُودِ اللَّهِ».<sup>17</sup>

(Abu Burdah reported the Messenger of Allah (PBUH) as saying: No more than ten lashes are to be given, except in the case of one of the punishments prescribed by Allah, the Exalted.) This hadith indicates that more than ten lashes is allowed only in Hudud crimes, however there are no more than ten lashes allowed for Ta'zir crimes. Accordingly, the offender is

given no more than ten lashes as Ta'zir punishment in crimes other than Hudud crimes, and this ruling indicates legitimacy of Ta'zir punishment.

2- عَنْ بَهْزِ بْنِ حَكِيمٍ، عَنْ أَبِيهِ، عَنْ جَدِّهِ: «أَنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ حَبَسَ رَجُلًا فِي تَهْمَةٍ»<sup>18</sup>حکم الألباني: حسن.

(Narrated by Bahz bin Hakim, from his father, from his grandfather, the Messenger of Allah (PBUH) detained a man who was under suspicion, and then he let him go.)<sup>19</sup>

This hadith indicates that an accused has been sentenced to imprisonment and then released upon someone's discretion. Accordingly, an offender can be sentenced to imprisonment in the first instance for crimes where Had punishments or compensation are not applicable. Imprisonment is one of the types of Ta'zir punishments, and this hadith supports the legitimacy of Ta'zir.

### 2.3.3 Acts and Sayings of the Companions of the Prophet (PBUH) regarding Ta'zir Punishments

Ta'zir punishments are also supported by the saying and acts of the companions of the Prophet (PBUH), which are briefly mentioned below:

1- Acts of Hazrat Abu Bakar Siddiq and Hazrat Umar (May Allah be pleased with them):

أَنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ ضَرَبَ وَغَرَّبَ وَأَبُو بَكْرٍ رَضِيَ اللَّهُ عَنْهُ ضَرَبَ وَغَرَّبَ وَعُمَرُ رَضِيَ اللَّهُ عَنْهُ ضَرَبَ وَغَرَّبَ.<sup>20</sup>

(The Messenger of Allah (PBUH) applied the punishment of flogging and also that of exile, Abu Bakr (RA)<sup>21</sup> applied the punishments of flogging and exile, and Umar applied them too.) The Prophet Muhammad (PBUH), Hazrat Abu Bakr (RA), and Hazrat Umar (RA) have beaten offenders as Ta'zir punishment, and exiled them from the country.

2- Likewise, actions of Hazrat Umar bin Al-Khitab also support Ta'zir punishments:

وقد ثبت أن عمر بن الخطاب رضي الله عنه كان يعزر ويؤدب، بجلق الرأس والنفي والضرب، كما كان يحرق حوانيت الخمارين، والقرية التي يباع فيها الخمر).<sup>22</sup>

(Umar bin Al-Khitab would punish offenders by shaving their heads, expelling them from the country, and beating them, as they would burn the shops and villages where liquor was sold.)

3- A saying of Hazrat Ali (RA) supports Ta'zir punishment:

عَنْ عَطَاءِ بْنِ أَبِي مَرْوَانَ، عَنْ أَبِيهِ، قَالَ: أَتَيْتُ عَلِيًّا بِالنَّجَاشِيِّ قَدْ شَرِبَ الْخَمْرَ فِي رَمَضَانَ فَضْرَبَهُ ثَمَانِينَ ثُمَّ أَمَرَ بِهِ إِلَى السِّجْنِ ثُمَّ أَخْرَجَهُ مِنَ الْعَدِّ

<sup>15</sup> Sultan Aziz Aziz (1391 Hijri) Azizul Tafaseer, Volume (5) Peshawar, Darul Kanoz Al-Elmiyah, Page 473.

<sup>16</sup> When writing the name of prophet Muhammad Muslims often follow it with the abbreviation "PBUH" which stands for the "peace be upon him".

<sup>17</sup> Emaduddin Abu Al-Fida Ismail bin Kasir Al-Damishqi (1969). تفسير القرآن العظيم (تفسير ابن كثير) Volume (2), Beirut, Darul Marifa, Page 398.

<sup>18</sup> Mohammad bin Ismail Abu Abdullah Al-Bukhari Al-Jafi, (year 1422). Sahih Al-Bukhari, Beirut, Dar ibn Kasir Al-Yamamah, volume (8), page 174.

<sup>19</sup> Suliman bin Ashas Al-Sajistani, (\_\_\_\_), Sunan Abi Daud, Peshawar, Mahaallah Jangi, Mataba Haqqania, volume (3), page 314.

<sup>20</sup> . Albani said: This hadith is Hassan (well).

<sup>21</sup> Mohammad bin Ahmad bin Abi Sahl Shamsul Aimah Al-Sarkhasi (1993), الميسوط للسرخسي, volume (9), Beirut, Darul Maarifa, Page 44.

<sup>22</sup> RA "Radhi Allah anhu" (may Allah be pleased with him) Muslims use "RA" after the name of male Sahabis, who are friends or companions of the prophet Muhammad.

<sup>23</sup> Sayed Sabiq (1977). فقه السنة, volume (2), Beirut, Darul Kitab Al-Arabi, Page 590.

فَصْرَبَهُ عَشْرِينَ ثُمَّ قَالَ: إِنَّمَا جَدَّدْتُكَ هَذِهِ الْعَشْرِينَ، لِإِفْطَارِكَ فِي رَمَضَانَ....<sup>23</sup>

(Hazrat Atta bin Abi Marwa (RA) said: A man was brought to Hazrat Ali (RA) who drank liquor during Ramadan. So, Hazrat Ali (RA) beat that person with 80 lashes based on the prescribed Had punishment, then ordered him to be imprisoned. He was taken out of the prison the next day and beaten again with twenty lashes. After that, Hazrat Ali (RA) told the offender, these twenty lashes are the Ta'zir punishment for breaking the fast during Ramadan.)

4- A saying of Hazrat Ali (RA) regarding Ta'zir punishment:

سنل علي كرم الله وجهه عن قول الرجل للرجل: يا فاسق، يا خبيث، قال: هن فواحش فيهن التعزير، وليس فيهن حد.<sup>24</sup>

(Hazrat Ali (RA) was asked the punishment if one person tells another "Oh, wicked person! Oh evil-minded!" What should be done to him? Hazrat Ali (RA) said, "These are bad names and Ta'zir punishment applies, but Had is not obligatory.)

#### 2.3.4 In light of Consensus (Ijma) <sup>25</sup>

All scholars agree that Ta'zir punishments are permissible in all sins that do not have predetermined and specific punishments in other areas of jurisprudence.<sup>26</sup>

In light of intellect Personal reasoning is not opposed to Ta'zir punishment, as long as it involves the interests of the community. When crimes occur in the community and Sharia does not have prescribed or specific punishments for those crimes, the corruption of community and spread of crimes in the community are not tolerable by the sound mind; therefore, it is looking for the punishment in order to protect society from crime. Because there is no specific or prescribed punishment in Sharia for Ta'zir crimes, the responsible person shall offer suitable punishment, ranging from advice to execution, in consideration of the interests of the community.

#### 2.4 Philosophies for legitimization of Ta'zir punishments

Prescribed and discretionary punishments, provisions and regulations laid down by Islamic Sharia and laws are not free of philosophy. Therefore, the punishments for Ta'zir crimes are also not free of philosophy. They involve a number of different philosophies, as follows:

- a- Protection of people's interest and their lives.
- b- Prohibition of offenders committing Ta'zir crimes in the community.

<sup>24</sup> Ahmad bin Mohammad bin Salamah bin Abdul Mulik bin Salamah Abu Jafar Al-Tahawi (1399), شرح معاني الآثار, Volume (3) Beirut, Darul Kutub Al-Elmiyah, Page 153.

<sup>25</sup> Refer to footnote (9), وهبة الزحيلي, 514.

<sup>26</sup> Ijma: Consensus of Muslims legal scholars on a legal question.

<sup>27</sup> Mohammad bin Abi Bakr bin Ayub bin Saad Shamsuddin ibn Qayem Al-Joziah (\_\_\_\_), الطرق الحكمية, Al-Qahira, Maktab Al-Madani, Page 145.

c- Correction, reform and directing the offender's behavior toward a better path in the community.<sup>27</sup>

### III. PROVISIONS AND ISSUES RELATED TO TA'ZIR PUNISHMENT

#### 3.1 Difference between Had and Ta'zir, and relevant characteristics

Ta'zir punishments have many characteristics and differences, which will be discussed below:

Ta'zir punishments are undefined, discretionary punishments from the perspective of Islamic Sharia, and a judge is assigned the authority and ability to specify the punishment considering the quality and magnitude of the crime. This is contrary to Hudud, Qisas, Diyat, and compensation (atonement), which are legally prescribed and specified punishments, and it is obligatory for a judge to apply them, and the judge does not have the right to increase, decrease or change them.<sup>28</sup>

Another characteristic of Ta'zir punishments is that the amount or type of Ta'zir punishment is determined in consideration of the character of the offender and quality and magnitude of the crime. However, the character of the offender is not relevant in applying punishments for Hudud, Qisas, Diyat, and compensation. This means that the ruler, the convicted person, the king, the chief, and the general public are all equal in the application of punishments for Hudud, Qisas, Diyat, and compensation.<sup>29</sup>

Enforcement and application of Had is obligatory, but if Ta'zir applies in a case against the rights of Allah (SWT), the judge has the right to abrogate the punishment. If the crime is against the right of an individual, punishment will not be applied without the request of that person. When had is referred to a judge, then forgiveness is not permissible, but forgiveness in Ta'zir is permissible at any time in consideration of the interests of the community. When had is referred to a judge, his or her intercession and instruction are not permissible, but intercession by a judge is permissible at all times in Ta'zir.

Had should be withheld if any doubts exist, but Ta'zir will not be withheld. No one can enforce Had except a judge and his or her deputy, but a judge, husband, father, teacher, or similar person can also apply Ta'zir punishments in consideration of the interests of the community, and for the correction of the offender. Except for defamation (in which there is disagreement over the Had crime of defamation), all Hudud crimes are against the rights of Allah (SWT), but some Ta'zir punishments are particularly against the rights of Allah (SWT), while others are against the rights of individuals.

<sup>28</sup> Ministry of Awqaf and Islamic Affair (1427), الموسوعة الفقهية الكويتية, Volume (12), Kuwait, Darul Salal, Page 257.

<sup>29</sup> Refer to footnote (21), Mohammad bin Ahmad bin Abi Sahl شمس الأئمة السرخسي, Page 71.

<sup>30</sup> Refer to footnote (11), Abdul Qader Awda, 615.

Had is not applied to children, but Ta'zir can be applied to children for corrective purposes. Had shall not be overturned after being proven, but Ta'zir can be overturned if necessary. Had is applied to crimes, not for the purpose of expedience, while Ta'zir is applied not only to crimes, for the purpose of expedience. Had is not overturned where the offender repents, but Ta'zir does not belong to the rights of others, and can be overturned with repentance. In order to prove Had, the testimony of less than two male witnesses is not sufficient, and less than four male witnesses is not sufficient in Had for adultery, whereas one witness is enough in Ta'zir.<sup>30</sup>

### 3.2 Conditions for the application of Ta'zir Punishments

Intellect or a sound mind is necessary for the application of Ta'zir punishment. Therefore, any person of sound mind shall be given Ta'zir punishment in the absence of predetermined punishments for crimes, whether male or female, Muslim or non-Muslim, adult or intelligent child, except for the correction of a child.<sup>31</sup>

### 3.3 Ways of proving Ta'zir Crimes

According to Hanafi scholars, Ta'zir crimes are proven with all the instruments that are used to prove cases related to individual rights, such as confession, evidence or testimony (and women's testimony is also accepted in the presence of men, denial of oath, and a letter of the judge to the judge. The words of a just man are enough for Ta'zir in cases related to the rights of Allah (SWT). For example, Ta'zir crimes are proven with the instruments presented in the following discussion.<sup>32</sup>

### 3.4 Introduction to Ta'zir Crimes

Sharia has a common rule ( لا جريمة ولا عقوبة بلا نص في جرائم التعازير ), which means that is no crime or punishment can be found without a legal text and Ta'zirat. This is the basic rule of Islamic Sharia, but the scope of application for this rule is not as limited as the rules for Hudud and Qisa. As can be seen from the following two fundamentalist rules:

1. There is no ruling on the actions of the wise before the text is received.
2. "The origin of things, deeds and words: permissible" The source of these two rules is Allah the Almighty says in the Holy Quran:

مَنْ اهْتَدَىٰ فَإِنَّمَا يَهْتَدِي لِنَفْسِهِ وَمَنْ ضَلَّ فَإِنَّمَا يَضِلُّ عَلَيْهَا وَلَا تَزِرُ وَازِرَةٌ وِزْرَ أُخْرَىٰ وَمَا كُنَّا مُعَذِّبِينَ حَتَّىٰ نَبْعَثَ رَسُولًا (15) وَإِذَا أَرَدْنَا أَنْ نُهْلِكَ قَرْيَةً أَمَرْنَا مُتْرَفِيهَا فَفَسَقُوا فِيهَا فَحَقَّ عَلَيْهَا الْقَوْلُ فَدَمَّرْنَاهَا تَدْمِيرًا (16) وَكَمْ أَهْلَكْنَا مِنَ الْقُرُونِ مِنْ بَعْدِ نُوحٍ وَكَفَىٰ بِرَبِّكَ بِذُنُوبِ عِبَادِهِ خَبِيرًا بَصِيرًا (17)<sup>33</sup>.

He who follows the right way follows it only for the good of his own soul: and he, who goes astray,

<sup>30</sup> Mohammad bin Abdul Aziz Al-Haziri (year 1435), *آلية تقدير العقوبات*, التعزيرية لدى القضا (المضوابط والمشكلات) (بي جا) مركز التميز البحثي.

<sup>31</sup> Allaudin, Abu Bakr bin Masood bin Ahmad Al-Kasani Al-Hanafi (\_\_\_) *بدائع الصنائع في ترتيب الشرائع*, Volume (7), Peshawar, Maktab Haqqania, Page 63.

<sup>32</sup> Mohammad Amin ibn Aabidin (year 1412), *ردالمحتار على درالمختار*, Volume (3), Quetta, Matab Hanafia, Page 205.

<sup>33</sup> Surah [Al-Isra] Ayah: 15-17.

goes astray only to his own loss. And no bearer of burden shall bear the burden of another. We never punish until we have sent a Messenger. And when we intend to destroy a township, we address our commandment to its rebellious people, but they transgress therein; so, the sentence of punishment becomes due against it, and we destroy it with utter destruction. How many generations have we destroyed after Noah! And thy Lord suffices as the Knower and Seer of the sins of His servants.

The reason for expansion regarding the punishment is not that every crime should have a prescribed punishment, but because the judge has the authority and ability to specify a punishment for the offender in consideration of the interests of the community and for the correction of the offender. The discussion has been expanded in regard to crime because there is no need for an explicit text to define every crime in Ta'zirat, but identification of the attributes of Ta'zir crimes in light of a general text is sufficient.<sup>34</sup>

Because Ta'zir punishments are compulsory in acts that are naturally discreditable and there is text in this respect, there is also an exception that Ta'zir punishments shall be imposed without committing a sin based on texts, but rather in consideration of the interests of the community. This means that Ta'zir punishment shall also be imposed for acts that do not have a textual basis, but are identified due to characteristics, and that those characteristics harm the interests and public order in the community. So, these acts are identified and considered as Ta'zir when this attribute exists.<sup>35</sup>

Therefore, the following is a brief introduction to Ta'zir crimes that have been proven with legal texts.

- 1- Prohibition of certain food, which is mentioned in verse 173 of Surah Al-Baqara of the Holy Quran.
- 2- Breach of trust, which is mentioned in verse 27 of Surah Al-Anfal and also in many other verses of the Holy Quran.
- 3- Falsifying weight of a good or item, which is mentioned in verses 1-3 of Surah Al-Mutaffifin of the Holy Quran.
- 4- False statement or false testimony, which is mentioned in verse 30 of Surah Al-Hajj of the Holy Quran.
- 5- Taking interest, which is mentioned in verse 275 of Surah Al-Baqara of the Holy Quran.
- 6- Insulting someone, which is mentioned in verse 148 of Surah An-Nisa of the Holy Quran.
- 7- Taking a bribe, which is mentioned in verse 188 of Surah Al-Baqara of the Holy Quran.
- 8- Gambling, which is mentioned in verse 90 of Surah Al-Ma'ida of the Holy Quran.
- 9- Entering someone's house without permission, which is mentioned in verse 27 of Surah An-Nur of the Holy Quran.

<sup>34</sup> Refer to footnote (11), Abdul Qader Awda, 126.

<sup>35</sup> Refer to footnote (33), Mohammad Amin ibn Aabidin, 251.

10- Spying on other countries or an enemy, which is mentioned in verse 12 of Surah Al-Hujurat of the Holy Quran.

Some of the punishment of the above-mentioned Ta'zir crimes is mentioned in the Afghan Penal Code are as follows:

**Article 241: Aggravating Circumstances for the Crime of Espionage**

If the act stated in Article 240 of this law is committed during a time of war or armed conflict with a foreign state or anti-Afghan government armed group, or if it has resulted in a death, the perpetrator shall be sentenced to grade one continued imprisonment<sup>36</sup>.

**Analyses of Article 241:** Whenever a spy commits armed conflict or armed conflict with foreign government or armed opposition group, or leads to death in this case, the perpetrator will be sentenced first degree imprisonment.<sup>37</sup>

**Article 371: Punishment for Taking a Bribe**

(1) Taking a bribe, with regard to amount of the bribe, shall be punished as follows:

1- If the amount of the bribe is up to 10,000 AFN,<sup>38</sup> the perpetrator shall be sentenced to short-term imprisonment.

2- If the amount of the bribe is more than 10,000 AFN and up to 20,000 AFN, the perpetrator shall be sentenced to medium-term imprisonment of up to two years.

3- If the amount of the bribe is more than 20,000 AFN and up to 50,000 AFN, the perpetrator shall be sentenced to medium-term imprisonment of two to four years.

4- If the amount of the bribe is more than 50,000 AFN and up to 100,000 AFN, the perpetrator shall be sentenced to the maximum number of years for medium-term imprisonment.

5- If the amount of the bribe is more than 100,000 AFN and up to 1,000,000 AFN, the perpetrator shall be sentenced to long-term imprisonment of up to 10 years.

6- If the amount of the bribe is more than 1,000,000 AFN, the perpetrator shall be sentenced to long-term imprisonment of more than ten years.

(2) If the subject of the bribe is not cash, property, or a material benefit, the perpetrator shall be sentenced, according to circumstances, to short- or medium-term imprisonment<sup>39</sup>.

**Analyses of Article 371:** in this 371 article provides for punitive bribery. It is noteworthy that the legislator in the penal code, first there is no difference between the punishment of the briber recipient and bribe taker, secondly according to the amount of bribery different and appropriate punishments were selected. In addition paragraph 2 of 371 articles provides for the punishment of bribery, if it is non-material bribery. All three of these

issues did not exist in criminal law, which is not credible with penal code.<sup>40</sup>

**Article 482: Punishment for False Testimony**

(1) A person who gives false testimony concerning a crime, in favor of or against the accused person, shall be sentenced to medium-term imprisonment of up to two years, or a cash fine of 60,000 AFN up to 120,000 AFN.

(2) If, as a result of the false testimony, the accused is convicted, the witness shall be sentenced to the same punishment to which the accused has been sentenced.

(3) A person who presents false testimony in a non-criminal case or before a judicial officer shall be sentenced to short-term imprisonment or a cash fine of 10,000 AFN up to 20,000 AFN<sup>41</sup>.

**Analyses of Article 482:** the legislator by article (482) punishment of false testimony described in to three cases: First case: If the false testimony be presented in a meeting of court, without accused being convicted by false testimony, punishment of that person is medium-term imprisonment of up to two years, or a cash fine of 60,000 AFN up to 120,000 AFN. Second case: When accused person convicted by false testimony, in this case the liar shall be sentenced by that punishment which accused has been sentenced by false testimony. Third case: this case described personal punishment, like: a person who presents false testimony in a non-criminal case or before a judicial officer shall be sentenced to short-term imprisonment or a cash fine of 10,000 AFN up to 20,000 AFN.<sup>42</sup>

**Article 679: Punishment for Abuser Insult**

1- A person, who abuses or insults another person through public instruments, shall be sentenced to a cash fine of 10,000 AFN up to 30,000 AFN.

2- A person who abuses or insults another person via telephone, email, fax, or electronic devices, by sending a letter, or through another person, shall be sentenced to a cash fine of 5,000 AFN up to 20,000 AFN.

3- A person who abuses the government or parliament shall be sentenced to a cash fine of 30,000 AFN<sup>43</sup>

**Article 691: Gambling**

A person who gambles in a public place or a place open to the public shall be sentenced to a cash fine of 10,000 AFN up to 30,000 AFN<sup>44</sup>.

**Article 721: Punishment for Breach of Trust**

(1) The perpetrator of the crime of breach of trust shall be sentenced as follows:

1. If the value of the property is up to 10,000 AFN, a cash fine of up to 30,000 AFN.

2. If the value of the property is from 10,000 AFN up to 100,000 AFN, short-term imprisonment or cash fine of 30,000 AFN up to 60,000 AFN.

<sup>37</sup> Islamic Republic of Afghanistan, Penal Code, (2017) Official Gazette 1260, article 241

<sup>37</sup> Islamic Republic of Afghanistan (2019). Description Penal Code, Vol (1), kabul the Asia foundation, p.61.

<sup>38</sup> Now a day (19/12/2019) one dollar equal to 79 AFN.

<sup>40</sup> The same, Article 371.

<sup>40</sup> Islamic Republic of Afghanistan (2019). Description Penal Code, Vol (2), kabul the Asia foundation, p.534.

<sup>42</sup> The same, article 482.

<sup>42</sup> Islamic Republic of Afghanistan (2019). Description Penal Code, Vol (3), kabul the Asia foundation, p.95.

<sup>44</sup> The same, article 679.

<sup>45</sup> The same, article 691.

3. If the value of the property is from 100,000 AFN up to 1,000,000 AFN, medium-term imprisonment of up to two years, or cash fine of 60,000 AFN up to 120,000 AFN.

4. If the value of the property is from 1,000,000 AFN to 10,000,000 AFN, medium-term imprisonment of up to three years, or cash fine of 120,000 AFN up to 180,000 AFN.

5. If the value of the property is more than 10,000,000 AFN, the maximum number of years for medium-term imprisonment, or cash fine of up to 300,000 AFN.

(2) In the circumstances contained in paragraph (1) of this Article, if the subject of the crime is not measurable in money, the perpetrator, according to the circumstances, shall be sentenced to short- or medium-term imprisonment from 30,000AFN up to 300,000 AFN<sup>45</sup>.

### 3.5. Authority to determine Ta'zir punishment

For all the crimes that do not have a determined punishment, or for crimes that do not meet the conditions for Hudud or the death penalty, state laws and Sharia apply Ta'zir punishment, and the judge has the authority to determine the specific punishment for a Ta'zir crime. Thus, the judge should take into account the interests of society, and the correction and character of the perpetrator, and apply one of the Ta'zir punishments, whether it is advice and consultation, public punishment, beating, imprisonment, insult, reprimand, or killing<sup>46</sup>.

### 3.6. Types of Ta'zir (discretionary punishments)

In light of the expediency and reform goals, and the character of the perpetrator, there are many types of discretionary punishments. For example, discretionary punishments include imprisonment, sending into exile, lashing, and dispossession of property, public shaming, and execution. The definitions of each type of punishment, examples, and the reasons of the legitimacy of these punishments will be discussed, in the light of any disagreement between religious scholars on each issue.<sup>47</sup>

#### 3.6.1 Discretionary punishment of imprisonment

Definition of imprisonment (Habs): Habs literally means prohibition. Ibnul Qayyim (May Allah be merciful to him) figuratively defines Habs as barring someone from owning something, no matter if the person is at home, at the Mosque, or in police custody. That is, Habs not only means being imprisoned in a small place, it also means being banned from owning something.<sup>48</sup>

No prisons existed during the time of the Prophet (PBUH) and Hazrat Abubakar Seddiq (R). The criminals were barred from owning things as a

discretionary punishment. During his time, Hazrat Umar (R) bought the house of Safwaan bin Omayya and turned it into a prison.<sup>49</sup>

Legitimacy of imprisonment: scholars disagree over the legitimacy of imprisonment; with the majority of scholars believing that imprisonment is permissible. They provide the following reasons to justify it:

#### 1- Allah the Almighty says in the Holy Quran

وَاللَّاتِي يَأْتِينَ الْفَاحِشَةَ مِنْ نِسَائِكُمْ فَأَسْتَشْهِدُوا عَلَيْهِنَّ أَرْبَعَةً مِنْكُمْ فَإِنْ شَهِدُوا فَأَمْسِكُوهُنَّ فِي الْبُيُوتِ حَتَّى يَتَوَقَّأَنَّ الْمَوْتَ أَوْ يُجْعَلَ اللَّهُ لَهُنَّ سَبِيلًا<sup>50</sup>

(Those of your women who commit unlawful sexual intercourse – bring against them four [witnesses] from among you. And if they testify, confine the guilty women to houses until death takes them or Allah ordains for them [another] way.) At the outset, Islam urged imprisonment of an adulterous woman until death, but this instruction was changed with the revelation of this Ayat:

الرَّانِيَةُ وَالرَّانِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِنْهُمَا مِائَةَ جَلْدَةٍ<sup>51</sup>.

(The adulteress and the adulterer—whip each one of them a hundred lashes.) There is disagreement between religious scholars on the provision of Ayat 15 of Al-Nisa; some scholars believe that the provision of this Ayat has become obsolete, and others believe that it is still valid today. Those who find it still valid argue that the perpetrator is kept in prison until the legal conviction is proven, and this imprisonment is a type of discretionary punishment, so this Ayat indicates the legality and legitimacy of imprisonment.

#### 2- Sunnah of Prophet

There are many Hadiths on the legitimacy of imprisonment, one of which is as follows:

عَنْ أَبِي هُرَيْرَةَ رَضِيَ اللَّهُ عَنْهُ «أَنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ حَبَسَ رَجُلًا فِي تَهْمَةٍ يَوْمًا وَلَيْلَةً...»<sup>52</sup>

(Abu Hurairah narrates that “without doubt the Prophet (S) imprisoned a man for one day and one night on suspicion.) The reasoning of this hadith is based on the fact that the Prophet (S) punished a person on suspicion of committing a crime with discretionary imprisonment. This discretionary punishment was one of the Prophet's acts, and the acts of the Prophet (S) are one of the Sunnahs of the Prophet. This hadith, therefore, indicates the legitimacy of imprisonment.

The Afghan Penal Code addresses imprisonment as follows:

**Article 145:** Imprisonment is to confine a convict based on a final or absolute verdict of a court in one of the prisons allocated by the government for this purpose.

**Article 146:** Imprisonment includes the following types:

<sup>45</sup>The same, article 721

<sup>46</sup>See footnote (28), Ministry of Pilgrimage and Islamic Affairs, Vol (19), 33.

<sup>47</sup>Kamaluddin Mohamad Bin Abdulwahed Ibnulhamam (-). Fathulqadeer, volume (4), Peshawar, Maktaba Haqania , pp 216.

<sup>48</sup>Mohammad Bin Abi bakar bin ayoub bin saad shamsudeen ibni Qayyem aljawzia , p.101.

<sup>49</sup>Ali bin Mohammd ibni Ahmad bin Musa ibni Masoud alkhzayee ( 1491 ), Takhreejuddalaltusameya, Bairut, Darulgharb alislmiya, p. 314.

<sup>50</sup>Al Nisa, Ayat 15.

<sup>51</sup>Al Noor Ayat 2.

<sup>52</sup> Mohammad bin Abdullah bin Mohammad bin Hamdoya alhakemunisabori (1411). Almustadrak Alasaheeen, volume 4.



- 1- Short-term imprisonment;
- 2- Medium-term imprisonment;
- 3- Long-term imprisonment;
- 4- Grade two continued imprisonment;
- 5- Grade one continued imprisonment.

**Article 147:** The duration of imprisonment is as follow:

- 1- Short-term imprisonment is more than 6 months up to 1 year;
- 2- Medium-term imprisonment is more than 1 year up to 5 years;
- 3- Long-term imprisonment is more than 5 years up to 16years;
- 4- Grade two continued imprisonment is more than 16 years up to 20 years;
- 5- Grade one continued imprisonment is more than 20 years up to 30 years.

### 3.6.2 Discretionary punishment of sending into exile

According to Imam Abu Hanifa (R), sending a perpetrator into exile is one type of discretionary punishment, which is a complementary punishment to the Had punishment for adultery. According to Imams Sahfeei and Malik (R), sending into exile is a part of the Had punishment for adultery; it is a discretionary punishment in other crimes. Sending into exile is a discretionary punishment administered when there is a benefit to and expediency for the society, if the perpetrator is sent into exile so that others in the society are encouraged not to imitate the crime or engage in criminal acts, and not to harm society as whole.<sup>53</sup>

The Holy Quran says: **وَيَسْعَوْنَ فِي الْأَرْضِ فَسَادًا أَنْ يُقَتَّلُوا أَوْ يُصَلَّبُوا أَوْ تُقَطَّعَ أَيْدِيهِمْ وَأَرْجُلُهُمْ مِنْ خَلْفٍ أَوْ يُنْفَوْا مِنَ الْأَرْضِ ذَلِكَ لَهُمْ جَزَاءُ فِي الدُّنْيَا وَلَهُمْ فِي الْآخِرَةِ عَذَابٌ عَظِيمٌ.**<sup>54</sup>

(The punishment for those who fight God and His Messenger, and strive to spread corruption on earth, are that they be killed, or crucified, or have their hands and feet cut off on opposite sides or be banished from the land. That is to disgrace them in this life; and in the Hereafter they will have a terrible punishment.) In this Ayat, banishing from the land (or sending into exile) has been mentioned, which indicates that sending into exile is considered one of the discretionary punishments.

Scholars also disagree regarding the duration of exile. Imam Shafeei and Ahmad Bin Hanbal (R) have set the duration of exile to be one year. Imams Abu Hanifa and Malik (R) say that the duration of exile can be extended beyond one year, depending upon the expediency of the extension for the benefit of society.<sup>55</sup>

Prophet Muhammad (PBUH) says:

**وَعَنْ عِبَادَةَ بْنِ الصَّامِتِ قَالَ: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: «خُدُوا عَنِّي، خُدُوا عَنِّي، فَقَدْ جَعَلَ اللَّهُ لَهُنَّ سَبِيلًا، الْبُكَرُ بِالْبُكَرِ جَلْدٌ مِائَةٌ وَنَفْيٌ سَنَةً، وَالشَّيْبُ بِالشَّيْبِ جَلْدٌ مِائَةٌ وَالرَّجْمُ.»**<sup>56</sup>

<sup>53</sup> Abdulqader Awdah , p.699.

<sup>54</sup> Al Maedah ayat 33.

<sup>55</sup> Mohammad bin Ahmand bin Abi Sahl Shamsulayemma Alsarkhasi , p. 45.

<sup>56</sup> Mohammd bin Ismail bin Salah bin Mohammad Alhasani, Alkahlani Alsanayee (-) . Sabalussalam, volume 2 , Peshawar, Maktaba Raahidia, p. 407.

(Hazrat Ebaadah Bin Samet (R) narrates that the Prophet (PBUH) said: Receive teaching from me, receive teaching from me. Allah has ordained a way for those women. When an unmarried male commits adultery with an unmarried female they should receive one hundred lashes and banishment for one year. And in case of married male committing adultery with a married female, they shall receive one hundred lashes and be stoned to death.) Imams Malik, Shafeei, Ahmad and Eshaq (R) believe that in this Hadith, exile for one year is a mandatory punishment for adultery. According to Imam Abu Hanifa, sending into exile is not mandatory for adultery, because there is no mention of exile in the Al-Noor Surah. Therefore, though Had and exile seem compulsory in the Hadith, they should not be applied, as there is no mention of exile in the Al-Noor Surah.

In short, according to Imams Malik and Shafeei (R) the duration of exile should be less than one year, because a whole year is part of Had, and the duration of discretionary punishment should not be as great as Had punishment. Regarding the issue, the Prophet (S) says: **"قوله عليه الصلاة والسلام "من بلغ حدا في غير حد فهو من المعتدين"** (A person who extends the discretionary punishment to reach the duration of Had, has gone beyond their limits (or are trespassers).<sup>57</sup>)

### 3.6.3 Discretionary punishment of lashing

Lashing can also be ordered, taking into account the character of the perpetrator and the expediency of the punishment for the interests of society. Scholars agree regarding the minimum number of lashes, but they disagree regarding the maximum number of lashes, which will be explored below.

A- Both Abu Hanifa and Mohammad (R) say: When the discretionary punishment of lashing is proposed for a criminal, the number of lashes, taking into account the expediency of the punishment for the interests of society, will not be more than 39 lashes. That is, the maximum number of lashes cannot exceed 39. In this regard, Imam Abu Yusuf says: When the discretionary punishment of lashing is proposed for the criminal, the maximum number of lashes cannot exceed 75.<sup>58</sup>

The basis of this disagreement is the following Hadith of the Prophet (PBUH):

**قوله عليه الصلاة والسلام " من بلغ حدا في غير حد فهو من المعتدين"**

(A person who extends the discretionary punishment to reach the magnitude of Had has gone beyond their limits.)

In this regard, Imam Abu Hanifa (R) says: This Hadith indicates the minimum number of lashes, which is the number of lashes for the slave in Qazaf Had. In Qazaf Had, the Had for the slave is 40 lashes. Therefore, in discretionary punishments, one lash has been

<sup>57</sup> Abdulqader Awdah, p. 699.

<sup>58</sup> Bakar bin Abdullah abu Zaid bin Mohmmad bin Abdullah bin Bakar bin Osman (1415), Alhududataazirat Enda Abnulqayyem. Bairut, Darulaasematunnashre Watawzeeh, p. 472.

deducted from the number of lashes, so that the punishment does reach the maximum number prescribed by Had. According to Imam Abu Yusuf, the abovementioned Hadith indicates the minimum number of lashes for a free man, which is 80 lashes. In one narrative, one lash has been deducted from the Had punishment, in other narratives, five lashes have been deducted from the Had punishment so that it does not reach the maximum number of lashes for the Had punishment.<sup>59</sup>

### 3.6.3 Discretionary punishment of dispossession of property

Taking the character of the perpetrator, his or her rehabilitation, and the expediency of punishment for the interests of society into account, the discretionary punishment of dispossession of property is also permissible. This discretionary punishment means that the judge orders dispossession of some of the property of the perpetrator for a known period of time so that the perpetrator is rehabilitated. The property will be returned to him or her after being rehabilitated. This discretionary punishment does not mean that the judge keeps the property of the criminal personally or for the public treasury, because Islamic Sharia does not allow anyone to get property from a Muslim without a legal reason to use it for personal benefit or for the public treasury.

Regarding the amount of property in this discretionary punishment, Sarkhasi (R) says: there is no fixed amount in the discretionary punishment of dispossession of property. The judge has the authority to determine the amount of property to be taken. Because this punishment is aimed at reforming the society, the judge can order as much property taken as he or she deems necessary, because perpetrators are different from each other in terms of wealth, and some are richer than others.<sup>60</sup>

Scholars disagree over the discretionary punishment of dispossession of property:

In this regard, Imam Abu Hanifa (May Allah be merciful to him) says that the discretionary punishment of dispossession of property is not permissible. In this regard, Imam Abu Yusuf (May Allah be merciful to him) says that the discretionary punishment of dispossession of property is only permissible when the expediency of the punishment for the interests of society is taken into account, and the punishment results in the rehabilitation of the perpetrator.<sup>61</sup>

According to followers of Imam Malik, (May Allah be merciful to him) the discretionary punishment of the dispossession of property is permissible in some places and for some crimes. According to a statement by Shafieia, (May Allah be merciful to him) the

discretionary punishment of the dispossession of property is not permissible. In their previous statement, they deemed it permissible. According to followers of Imam Hanbal, (May Allah be merciful to him) the discretionary punishment of dispossession of property is not permissible because this leads to the waste of property, and Islamic Sharia would not order the destruction and elimination of the property of the criminal. The discretionary punishment of the dispossession of property is aimed at reforming the society and disciplining the perpetrator.<sup>62</sup>

Regarding cash fines, the Afghan penal code states:

**Article (139) (1):** A cash fine obligates the convict to pay a specified amount of money to the government treasury.

**Analyses of Article (139):** This article defines the cash penalty. In the Afghanistan penal Code of Conduct, the cash penalty set amount in the next article applies to the offender who is unable to imprison the person who has psychological, physical problems. Also, cash in proportion to crime is easier than other penalties, the probability of compliance of the cash penalties with the crime severity or the humility of the offender is high and can determine the extent to which the offender is entitled, such as in Article (3) (309) of the Criminal Code. Who anticipates a person's cash sentence for drug offenses commensurate with the severity of the crime, third, the cash penalty is the best way to combat property and property crime. Fourth, while executing prison sentences is costly for the government, the monetary penalty is not only costly to the government but also a source of income, so it is economically profitable to pay the fine.<sup>63</sup>

### Article (140): Types of Cash Fines and Minimum Amounts

(1) Cash fines shall be determined in Afghani currency.

(2) Cash fines determined by the court may not be less than 5,000 AFN.

(3) The amount of cash fines stated in this law, considering the exchange rate, shall be updated every five years.

**Analyses of Article (140):** Article (140) of the Afghanistan Penal Code states that the Minimum Amounts of cash penalties are such that the cash will be the country's remittance money, such as: afghani. (AFN) Similarly, the court must determine the cash penalty, which will not be less than (500) (AFN), and even if the country's remittance money is flexible against foreign currency, so shall be updated every five years.<sup>64</sup>

<sup>59</sup> Ali bin abi Bakar bin Abduljaleel Alfoghani Almarghenani (-). Alhedaya Fee Sharhe Bedayat Almobtadi , volume 2, Peshwar, Mahalla Jang.

<sup>60</sup> Mohammd bin Hasan bin Ali Alqaderi Alhanafi (-) . Albahrurayeq Sharhe Kanzuddaqayeq, volume 5 , Peshwar, Mahala Jangi Maktaba Haqania, p. 44.

<sup>61</sup> Mohammad Amin ibni Aabedeem 183.

<sup>62</sup> Abdurrahman ibni Qudama ( - ). Asharhulkabeer, volume 1 , Darulketabuarabi , p. 348.

<sup>63</sup> Islamic Republic of Afghanistan (2019). Description Penal Code, Vol (1), kabul the Asia foundation, p.420.

<sup>64</sup> Islamic Republic of Afghanistan (2019). Description Penal Code, Vol (1), kabul the Asia foundation, p.421.

### 3.6.5 Discretionary punishment of public shaming

Public shaming is a type of discretionary punishment determined by the Oululamr (those in authority), in light of the expediency of this punishment for the interests of society, rehabilitation of the criminal, differences in the nature of the crimes, the times, and the location. That is, for a crime with no set punishment, if the Oululamr finds the criminal can be rehabilitated through public shaming and then public shaming of the criminal is permissible. The discretionary punishment of public shaming is not specific to a certain act or statement; it differs from criminal to criminal, from time to time, and from place to place.<sup>65</sup>

### 3.6.6 Discretionary punishment of execution

There are some crimes with discretionary punishments committed against Sharia and enacted law, for which there are no set punishments. Therefore, the Olulamr proposes discretionary punishments for the criminal. If the Islamic society benefits from the execution of the criminal, then a verdict will be issued for the execution of the criminal. The Prophet (PBUH) says: «مَنْ أَتَاكُمْ وَأَمْرَكُمْ جَمِيعٌ عَلَى رَجُلٍ وَاحِدٍ، يُرِيدُ أَنْ يَشُقَّ عَصَاكُمْ، أَوْ يَفْرِقَ جَمَاعَتَكُمْ، فَاقْتُلُوهُ».<sup>66</sup>

(When you are holding to one single man as your leader, you should kill whoever seeks to undermine your solidarity or disrupt your unity.) Based on this Nabawi Hadith, religious scholars have given permission to administer the discretionary punishment of execution. However, scholars disagree about the legitimacy of the discretionary punishment of execution in certain crimes. This disagreement is summarized below:

Imam Abu Hanifa (R) deems the discretionary punishment of execution permissible in the following instances: If the depravity caused by the crime is not eliminated from society without killing the criminal, then the discretionary punishment of execution of the criminal is permissible. The discretionary punishment of execution is permissible for espionage that is, the discretionary punishment of execution is permissible for the Muslim who becomes a spy for non-Muslims and enemies, and spies on his or her country. The discretionary punishment of execution is permissible for promoters and dealers of drugs and intoxicating substances.<sup>67</sup>

Malikia and Hanabela deem the discretionary punishment of execution permissible in the following circumstances: Killing of innovator who promote innovation among people and do not repent of the innovation. (The innovation is one of the words and actions that do not have a foundation in holy Quran or Sunnah. The affairs that are not produced during the prophecy period, be invented later; but it is not in conflict with the principles of Islam is not an innovation,

which is forbidden in all parts of Islam. The affairs that are in conflict with the principles of Islam; so, these actions are called innovation. And every innovation is misleading. The place of mislead is hell.) Espionage for the Muslim who becomes a spy for non-Muslims and enemies and spies on his or her country. Dealers and promoters of drugs and intoxicating substances.<sup>68</sup>

With regards to the penalty of execution, the Afghan Penal code states:

**Article 170:** The death penalty shall be applied in the following circumstances, unless otherwise stipulated in the law:

- 1- Genocide, crimes against humanity, war crimes, crimes of aggression against a state, assassination and explosion, kidnapping and hostage-taking, or highway robbery resulting in the death of a person;
- 2- Murder under the conditions anticipated in this law;
- 3- Crimes causing the territory of Afghanistan to partly or entirely fall under the sovereignty of a foreign country, or harming the national sovereignty, territorial integrity, or independence of the country;
- 4- Gang raping of a female;
- 5- Gang raping of a male that result in his death.

**Analysis of Article 170:** One of the main penalties in the Code Penalty is the Execution Penalty, Article 170 of this Code is limited to (5) instances of the Execution, which consists of five substances: Genocide, crimes against humanity, Murder under, Crimes causing the territory of Afghanistan to partly or entirely fall under the sovereignty of a foreign country, or harming the national sovereignty, territorial integrity, or independence of the country, Gang raping of a female, Gang raping of a male that results in his death.

Notwithstanding, Article 547 of this penal code also recommends execution or imprisonment for murder.<sup>69</sup>

### 3.6.7 Discretionary punishment of reprimand

If the judge sees the benefit to society and for the rehabilitation of the criminal in the discretionary punishment of reprimand, then this punishment is permissible. The Prophet reprimanded Hazrat Abu Dhar for using bad language. Hazrat Abu Dhar narrates: **أَبِي سَابِيثٌ رَجُلًا فَعَيَّرْتُهُ بِأَمِّهِ، فَقَالَ لِي النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: «يَا أَبَا ذَرٍّ أَعَيَّرْتَهُ بِأَمِّهِ؟ إِنَّكَ امْرُؤٌ فِيكَ جَاهِلِيَّةٌ...»**<sup>70</sup>

(O Abu Dhar! Did you abuse him by calling his mother names? You still have some characteristics of ignorance.) This reprimand was a discretionary punishment for Hazra Abu Dhar, the legitimacy of which is established in the Nabawi Sunnah.<sup>71</sup>

<sup>65</sup>Wazaratul Awqaf an Shouoonulislamia , 47.

<sup>66</sup>Muslim bin Alhajaj Abulhasan Alqashiri Alnesaboori (-) , Saheeh Muslim, Peshwar, Maktaba Haqania, volume 3, p. 1480.

<sup>67</sup> Mohammad Amin ibni Aabedeem ( 1412) , Radulmuhtar ala durelmukhtar, volume 4 , Quetta, Maktaba Haqania, p. 72.

<sup>68</sup>Mansoor bin Yonus bin Salahuddeen ibni Hasan bin Idrees Albahooti Alhanbali ( ). Kashafulqanaaf an matnulaqna, Bairut, Darulkutubulelmia, p. 124.

<sup>69</sup> Islamic Republic of Afghanistan (2019). Description Penal Code, Vol (1), kabul the Asia foundation, p.520.

<sup>70</sup>Mohammad bin Isamil Abu Abdullah Albukhari Alnajafi (1422), Sahih Albukhari , Bairut, Dare ibn Kaseer Alyamama, volume 1, p. 15.

<sup>71</sup>Abdulqader Awdah, p. 147.

Also, the discretionary punishment of reprimand can be administered in the form of preaching, admonition, Hijr (staying away from a person), threats, firing from the civil service, deprivation of some rights, confiscation of instrumentalities used in crime, and eliminating the effects of crime.<sup>72</sup>

### **3.7 Afghan Constitution provisions**

The articles 130 and 131 of Afghanistan Constitution law have connection with Ta'zir punishment, so we have also studied cases related to these mentioned articles in Khost province courts and Prosecution.

Studying the application of Articles 130 of constitution law in Court of appeal with Explanation of the decision: The constitution, as the highest of all laws, is observed and complied with in all proceedings, in particular, in addressing criminal cases. On the content of the questionnaire, we can say that all crimes needing discretionary punishment should be prosecuted based on Article 130 of the Constitution and other criminal laws. Generally, Article 130 is mentioned in verdicts. For many years after the Constitution came into force, the crimes for which there were no punishments specifically prescribed in laws were punished by discretionary punishments based on Article 131 of the Constitution. Examples included running away (sometimes known as "attempted adultery"), and carrying an unlicensed gun. However, through an approval issued by the High Council of the Supreme Court, issuing verdicts in criminal cases based on Article 131 of the Constitution was ordered to be stopped. Finally, with the enforcement of the Penal Code, the punishments have now become regulated and are registered. According to the principle of the legality of crime and punishment, the court can never prosecute a case and administer punishments using the provisions of Article 130 of the Constitution. So far, such a case has not happened. Because the question was raised about criminal cases, civil proceedings are not addressed. Generally, the provisions of Article 131 and other provisions are observed and applied in civil cases.

Studying the application of Articles 131 of constitution law in Court of appeal with Explanation of the decision: In Khost province, the Shia population is small, so the court has not received any relevant cases so far, and has not applied Article 131 of the Constitution.

Studying the application of Articles 130 of constitution law in Public security Court of appeal With Explanation of the decision: A public security prosecutor for the Appellate Court of Khost province attested that the court receives cases related to public security. Everything relevant to these cases is addressed in public security laws. Accordingly, this court does not prosecute cases not mentioned in these laws, and has never needed

to issue decisions based on Article 131 of the Constitution.

Studying the application of Articles 131 of constitution law in Public security Court of appeal With Explanation of the decision: The majority of people in Khost are Sunni, so that is why the court has not come across cases where decisions need to be issued based on Article 131 of the Constitution.

Studying the application of Articles 130 of constitution law in City prosecution with Explanation of the decision: There are no current cases that have not been prosecuted according to the enacted laws of the jurisdiction. Accordingly, the court has not come across cases related to the relevant Constitutional provisions.

Studying the application of Articles 131 of constitution law in City prosecution with Explanation of the decision: The relevant article of the Constitution has never been used in Khost because most of the residents here are Sunni.

## **IV. RESULT**

At the end of the research, we come to the following Results:

Many Afghan people do not know about the discretionary crimes and punishments from Ta'zir, and the number of criminals to be punished by discretionary punished is going up day after day. Because many wars have passed in our country, through wars the illiteracy and poverty have increased. Due to lack of standard research, illiteracy, and lack of public awareness, Afghans have difficulty understanding and defining discretionary punishments and the delegated authority related to them.

According to religious scholars, discretionary punishments are legitimate and indeterminate punishments which should be determined in accordance with Sharia by taking the following issues into consideration: the gravity and type of the crime, the character and status of the criminal, the expediency of the punishment for the interests of the community and the rehabilitation of the accused, and to reform the society. A judge has been given the authority and power to determine this punishment for each specific case.

In Hudud and Qisas cases, the discretionary punishments are applied when the conditions set by Sharia and laws are not fulfilled for the administration of these two punishments. According to the majority of scholars, discretionary punishments are mandatory, but Imam Shafeei (R) believes these punishments are not mandatory. The legitimacy of discretionary punishments has been proven by Ayats of the Holy Quran, the Nabawi Ahadith, the deeds and statements of the Companions of the Prophet, consensus (ijma), and intellect. To administer a discretionary punishment, the only requirement is intellect or a sound mind. Mentally competent person can be punished for committing a crime with a discretionary punishment because

<sup>72</sup>Daad Mohammad Nazeer (1393) . Special Criminal Law of Islam, Translator: Abdulahamed Wardak, Kabul , Resaalat Publications, p 396.

discretionary punishments are aimed at reforming society, so that the people can lead secure lives.

The crimes with discretionary punishments are proven by all the means through which violations of public rights are proven. Through this research, it is clear that discretionary punishments are categorized into the discretionary punishments of imprisonment, sending into exile, lashing, and dispossession of property, public shaming, and execution. All of these punishments have also been incorporated into legal texts and the Penal Code. The opinions of courts<sup>73</sup> on addressing criminal cases based on Article 131 of the Constitution show that for many years after the Constitution came into force, perpetrators of crimes without specific punishments mentioned in the law were punished with discretionary punishments based on Article 131 of the Constitution. Examples included running away, and carrying an unlicensed gun. But, through an approval issued by the High Council of the Supreme Court, issuing verdicts in criminal cases based on Article 131 of the Constitution was ordered to be stopped. Finally, with the enforcement of the Penal Code, punishments have now become regulated and are officially registered. According to the principle of the legality of crime and punishment, a court can never prosecute a case and administer a punishment using the provisions of Article 131 of the Constitution. So far, this has not happened.

## V. DISPUTE DISCUSSION

The majority of the scholars support the mandatory application of discretionary punishments for crimes for which Had does not apply, or where laws do not determine specific punishments, and there are no legal text or Kaffarah (compensation) for them. However, Imam Shafeei (R) does deem discretionary punishments mandatory. However, the opinions of the majority are strong, because there are many Ayats, Nabawi Ahadith, and statements of the companions of the Prophet (S) to prove the legitimacy of discretionary punishments. Also, based on the expediency of the punishment for society and social requirements, discretionary punishments need to be administered for crimes for which there are no predefined and predetermined punishments.

Some believe that judges could, as they please, charge a person for any actions. In Islamic Sharia, this is not permitted, and not only discretionary punishments, but all prohibited acts have been stipulated in the text. Therefore, a judge cannot deem an action as a crime as he or she pleases. If a person is charged for an action, the judge must investigate to figure out if the action is a crime according to the law and Sharia, because no one has the right and authority to issue a verdict about the

criminality of an action other than what is mentioned in the text of the law or Sharia.

## VI. CONCLUSION

Today, many people and criminals do not know enough about discretionary punishments and the associated crimes. Crimes with determined and specific punishments provide a better deterrent effect. This may cause the commission of more and more crimes with discretionary punishments. The reasons for this gap in knowledge are assumed to be lack of public awareness, illiteracy, and lack of interest. The solution is to eradicate illiteracy in the community, develop public information campaigns, and write and publish research and articles about the topic.

The legitimacy of discretionary punishments has been proven by Ayats of the Holy Quran, Nabawi Ahadith, the deeds and statements of the Companions of the prophet, consensus (ijma) and intellect or sound mind. In the legal provision of discretionary punishment, taking the disagreements between the scholars into account, the opinions of the Majority have been deemed to be stronger. To prevent crimes in the society, every wise person who has committed a crime without a specified penalty must be punished with a discretionary punishment. On the one hand, Ayats of the Holy Quran, Nabawi Ahadith, and the deeds and statements of the Companions of the Prophet prove the legitimacy of these kinds of punishments. On the other hand, the expediency of these punishments for society and social requirements also support the application of discretionary punishment for crimes without predefined and predetermined punishments.

There are many types of discretionary punishments ranging from warning to execution, taking into account public order and the expediency of the punishments for society. Also, the judge does not have the right to attribute any action to anyone as a crime without the act being criminalized by law, because all prohibited actions are mentioned in the text of laws, and the judge can only determine penalties for crimes mentioned in laws.

## RECOMMENDATIONS

If prosecutors study all the crimes enacted in various laws, it is more likely that discretionary punishments will be correctly administered in society; Because on the one hand some people of in Afghan society are illiterate, they do not completely understand the concept of Ta'zir punishment, on the other hand in Afghan society some Prosecutors are do not completely understand the concept of Ta'zir punishment, determining the punishments, and the delegated authority to specify the punishments in the view of Islamic jurisprudence law and also the jurisprudence law is more sensitive than the positive laws. Public

<sup>73</sup> The case study was conducted in khost province, so the opinions of courts in khost, not all courts in Afghanistan.

awareness programs are needed about crimes with discretionary punishments, which should be conducted by religious scholars, teachers and professors in schools, universities and speakers in public gatherings. The Ministry of Culture and Information could order the media to prepare and broadcast programs regarding crimes with discretionary punishments. The Ministry of Haj and Religious Affairs could send sermons to Imams at mosques regarding the definition and information about discretionary punishments, because many Afghans respect the teaching of Mullahs and Preachers.

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