

The Discretionary Power of The Judge in The Determination of *Ta'Zir* Punishment

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ABSTRACT

Ta'zir crime consists of all kinds of transgression where no specific and fixed punishment is prescribed. The judge is, in this case, authorised to inflict a punishment on the offender as he deems fit under the particular circumstances of the case. Since ta'zir punishment is subject to the discretion of the judge, the question arises as to whether this discretionary power is absolute or limited. Hence, this paper discusses the power of the judge in the determination of ta'zir punishment and the extent of which the judge has in exercising his discretion. The issues on whether or not the previous judgment is binding and whether the enactment of ta'zir laws in advance would deny the power of the judge to use his discretion in determining punishments, are relevant to the topic and will also be discussed.

ABSTRAK

Jenayah ta'zir melibatkan semua jenis kesalahan yang mana hukumannya tidak ditetapkan oleh teks (nass) syariah. Dalam perkara ini, hakim diberi kuasa untuk menentukan hukuman yang difikirkan paling sesuai ke atas pesalah berdasar kepada keadaan kes tersebut. Oleh kerana hukuman ta'zir tertakluk kepada budi bicara hakim, satu persoalan timbul mengenai isu sama ada kuasa yang dimiliki oleh hakim ini adalah terhad atau tidak. Jadi, kertas kerja ini cuba mengupas persoalan kuasa yang dimiliki oleh hakim dalam menentukan hukuman ta'zir dan sejauh manakah hakim bebas menggunakan budi bicaranya. Isu mengenai duluan mengikat dan isu sama ada pemaktuban undang-undang ta'zir di dalam statut boleh menafikan kuasa hakim menggunakan budi bicaranya, juga akan dibincangkan.

INTRODUCTION

Crimes and punishments in Islamic criminal law are divided into two categories, fixed and discretionary. The first category includes *hadd* and *qisas* punishments, which are prescribed by God and thus unchangeable. The second one consists of all kinds of transgression where no specific punishment is prescribed but for which there may be *ta'zir*.

The *Shari'a* gives the ruler or the judge considerable discretion in the infliction of *ta'zir* punishments, which range in gravity from a warning to death. He has the authority to determine the punishment which he considers to be the most suitable to be inflicted on the offender, taking into account any mitigating or aggravating factors. However, it is to be remembered that though

the *Shari'a* gives the judge freedom to use his discretion, it must not contradict the general principles of the *Shari'a*.

The method of implementing *ta'zir* laws in practical terms is an important issue which needs to be elucidated since it is left to the discretion of the ruler to legislate these laws while at the same time the scope of *ta'zir* crimes and punishments is very wide. Therefore, in this paper, I propose to deal with the general rules governing the implementation of *ta'zir* punishments including the extent of the discretionary power of the judge, the effect of previous judgments on the judge's decision and the enactment of *ta'zir* laws. The above matters cannot be comprehended unless the concept of *ta'zir*, its definition and classification are explained first.

DEFINITION OF TA'ZIR

The word *ta'zir* is derived from the verb “*azzara*” which means to prevent or to restrain.¹ It also means to respect² and to support.³ In Islamic criminal law, *ta'zir* (plural: *ta'azir* or *ta'zirat*) signifies the unprescribed punishment delivered against the commission of a *ma'siya* (religious disobedience) which is subject neither to *hudud*⁴ nor *kaffara* (atonement),⁵ and which is intended to prevent the culprit from committing further offences and to purify him. All the four schools of Islamic law unanimously agree with the definition of

¹ Ibn Mandhur, *Lisan al-'Arab*, Dar Sadir, Beirut, 1955, Vol. XX, pg. 561.

² Al-Razi, *Mukhtar alSihah*, Dar al-Kitab al-'Arabi, Beirut, 1967, 1st ed., pg. 36.

³ Ibn Qudama, *al-Mughni wa al-Sharh al-Kabir*, Dar al-Kutub al-'Ilmiyya, Beirut, (n.d.), Vol. X, pg. 347.

⁴ *Hadd* (plural: *hudud*) and *qisas* for which punishments are prescribed by God and thus unchangeable. *Hudud* are the legally prescribed punishments for seven major crimes as the right of God (*haqq Allah*), these being unlawful intercourse (*zina*), false accusation of *zina* (*qadhif*), drinking intoxicants (*shurb al-khamr*), theft (*sariqa*), robbery (*hiraba*), apostasy (*ridda*) and rebellion (*baghy*), while *qisas* is for crimes involving the taking of life or the causing of bodily harm which are punishable by retaliation or blood money (*diya*), both being fixed in the *Shari'a* texts. Unlike *hudud*, *qisas* is imposed as the right of individuals (*haqq al'ibad*) and, accordingly, the victim or his relatives have the right to forgive or reduce the penalty of the accused person. For further details on *hadd* and *qisas*, see: 'Abd al-Qadir 'Awda, *al-Tashri' al-Jina'i al-Islami*, Dar al-Turath, (n.d.), Vol. I & II; Muhammad Abu Zahra, *al-Jarima wa al-'Uquba Fi al-Fiqh al-Islami*, Dar al-Fikr al-'Arabi, Cairo, (n.d.); Wahba al-Zuhayli, *al-Fiqh al-Islami wa Adillatuh*, Dar al-Fikr, Dimashq, 1985, Vol. VI, 2nd Ed.; Ahmad Fathi Bahansi, *al-'Uquba Fi al-Fiqh al-Islami*, Dar al-Shuruq, Cairo, 1989, 6th Ed.

⁵ *Kaffara* (atonement) is actually a kind of religious observance (*'ibada*) as it is normally concerned with releasing a slave, fasting, or feeding the poor. However, if this order results from the commission of *ma'siya*, it is called *kaffara*. Thus, *kaffara* is an act, which is prescribed by the *Shari'ah* to clear the sins of those who commit certain offences. The offences, which are punished by atonement, are in fact, clearly mentioned in the Qur'an and *Sunna*. For further details, see: 'Awda, *al-Tashri' al-Jina'i al-Islami*, Vol. I, pg. 131; Al-Khin, Mustafa, *al-Fiqh al-Manhaji*, Dar al-'Ulum al-Insaniyya, Dimashq, 1989, Vol. III, pg. 113.

ta'zīr as above.⁶ The term *ta'zīr* can be applied both to offences and to punishments.

It should be noted that the word *ta'zīr* in its legal meaning is not used in the Qur'an and the *Sunna*. Nevertheless, the punishment of *ta'zīr* is alluded to in both texts since they do refer to some types of offences without specifying the punishments to be imposed, which means that the judge is left to determine the suitable punishment to be inflicted on the offender. For example, the Qur'an states:

If two men of you are guilty of lewdness, punish them both.⁷

The phrase "punish them both" is an order to punish those who practise sodomy⁸ without specifying the fixed punishment to be inflicted on them, which implies that it is left to the judge's discretion to determine its punishment. Another example is the following Qur'anic text:

The recompense for an injury is an injury equal thereto (in degree).⁹

The above text concerns the treatment of any misdeed without giving a detailed punishment to be imposed.¹⁰ Thus, it is left to the discretion of the judge in the determination of the most suitable punishment to be inflicted on the offender.

There is a *hadith* of the Prophet reported by Abu Burda that the Prophet said:

Nobody can be flogged more than ten lashes except in the case of a *hadd*.¹¹

⁶ Al-Zayla'ī, *Tabyin al-Haqa'iq*, Matba'a al-Amiriya, Bulaq, Egypt, 1313H, Vol. III, 1st Ed., pg.207; al-Kasani, *Bada'i' al-Sana'i'*, Matba'a al-Jamaliya, Cairo, 1910, Vol.VII, 1st Ed., pg.63; al-Hattab, *Mawahib al-Jalil*, Matba'a al-Sa'ada, Cairo, 1329H, Vol. IV, pg.319; al-Shirazi, *al-Muhadhdhab*, Dar al-Fikr Cairo, (n.d.), Vol. II pg.288; al-Ramli, *Nihayat al-Muhtaj*, Dar al-Fikr, Beirut, 1984, Vol. VIII, pg.18; al-Mawardi, *al-Ahkam al-Sultaniyya wa al-Wilayat al-Diniyya*, Maktaba wa Matba'a Mustafa al-Babi al-Halabi wa Awladuh, Egypt, 1973, 3rd Ed., pg.236; al-Bahuti, *Kashshaf al-Qima'*, Dar al-Fikr, Beirut, 1982, Vol. VI, pg.121; Ibn Qudama, *al-Mughni wa al-Sharh al-Kabir*, Vol. X, pg.347.

⁷ Qur'an, 4:16.

⁸ Ibn Kathir, *Tafsir al-Qur'an al-'Azim*, Dar al-Kutub al-'Ilmiyya, Beirut, 1986, Vol. I, pg. 462.

⁹ Qur'an, 42:40.

¹⁰ Al-Tabari, *Jami' al-Bayan 'an Ta'wil Ay al-Qur'an*, Matba'a Mustafa al-Babi al-Halabi wa Awladuh, Egypt, 1968, Vol. XXV, 3rd Ed., pg. 37.

¹¹ Abu Dawud, *Sunan*, Hadith No. 4491, Matba'a al-Sa'ada, Cairo, 1950, Vol. IV, pg. 167.

From the above *hadith* text, it can be understood that punishment which is not included under *hadd* punishments is the punishment of *ta'zir*. In addition, the *Sunna* of the Prophet has ample practical examples concerning *ta'zir* punishments.

THE CLASSIFICATION OF TA'ZIR

Ta'zir crimes can be classified into three basic categories, as follows:

1. *Ta'zir* for religious disobedience (*ma'siya*)
2. *Ta'zir* for the public interest (*maslaha 'amma*)
3. *Ta'zir* for delinquencies (*mukhalafat*)

1. *Ta'zir* for Religious Disobedience (*Ma'siya*)

It is unanimously agreed by the jurists that *ta'zir* punishment must be delivered for the commission of any *ma'siya* which is not included under a *hadd* punishment or an act of atonement whether it infringes the right of God or individuals.¹²

Ma'siya means the commission of prohibited acts (*fi'l al-muharram*) and the omission of obligatory acts (*tark al-wajib*) which are mentioned in the Qur'an and the *Sunna* of the Prophet.¹³ Thus, any violation of a legal order or prohibition is called *ma'siya* and is punishable according to Islamic criminal law. In other words, *ma'siya* covers all acts that are considered as sins in Islam. However, it should be remembered that some sins are not punished if they relate to internal sin (i.e. sins committed in the mind). Methods of proof in the execution of *ta'zir* punishments are very significant.¹⁴ The obligatory commandments and prohibitions are recognised by studying Islamic Jurisprudence (*usul al-fiqh*).¹⁵ In fact, the principles of Islamic Jurisprudence pro- pound clear-cut distinctions between these classes of acts.

¹² Al-Kasani, *Bada'i' al-Sana'i'*, Vol. VII, pg.63; al-Qarafi, *al-Furuq*, 'Alam al-Kutub, Beirut, (n.d.), Vol. IV, pg.180; al-Shirazi, *al-Muhadhdhab*, Vol. II, pg.288, al-Ramli, *Nihayat al-Muhtaj*, Vol. VIII, pg.19, Ibn Qudama, *al-Mughni wa al-Sharh al-Kabir*, Vol. X, pg. 347.

¹³ 'Awda, *al-Tashri' al-Jina'i al-Islami*, Vol. I, pg. 128.

¹⁴ See for example: Bahansi, *Nazariyyat al-Ithbat fi al-Fiqh al-Jina'i al-Islami*, Dar al-Shuruq, Cairo, 1988, 5th Ed.; Wahba al-Zuhayli, *al-Fiqh al-Islami wa Adillatuh*, Vol. VI, pg. 209.

¹⁵ See for example: al-Amidi, *al-Ihkam fi Usul al-Ahkam*, Dar al-Ma'arif, Cairo, 1914, Vol. I, pg.160-174; 'Abd al-Wahhab Khallaf, *'Ilm Usul al-Fiqh*, Dar al-Qalam, Kuwait, 1978, pg. 79-89; al-Shatibi, *al-Muwafaqat fi Usul al-Shari'a*, Maktaba al-Tijariyya al-Kubra, Egypt, (n.d.), Vol. III, pg. 119-259; Ibn Hūazm, *al-Ihkam fi Usul al-Ahkam*, Matba'a al-'Asima, Cairo, (n.d.), Vol. I, pg. 42-43.

2. *Ta'zir* for Public Interest (*Maslaha*)

Initially, *ta'zir* punishments were only for the commission of religious disobedience. However, in some exceptional cases the *ta'zir* punishment has been legalised in the *Shari'a* for an act, which is initially legal but then becomes illegal due to public interest.¹⁶

The jurists attest the legality of this type of *ta'zir* by invoking the *Sunna* of the Prophet who arrested a man accused of stealing a camel. When it was proved that the man was not a thief, he was released.¹⁷ Thus, it can be concluded that the accused's arrest is a type of *ta'zir* for the public interest. Another example of *ta'zir* punishment for the public interest is to banish an effeminate person, according to the *Sunna* of the Prophet.¹⁸ The public interest here is to prevent the public from looking at him, as he looks like a female, and to deter other people from imitating him. Nevertheless, in fact, effeminate conduct is a kind of *ma'siya* since it is unlawful for a man to imitate a woman. 'Umar ibn al-Khattab banished Nasr ibn al-Hujjaj to Basra only due to his good looks is also a sort of *ta'zir* for public interest. A punishment, which is inflicted on a child who has not yet reached puberty, is also based on the public interest.¹⁹

What is being practised in many countries nowadays, such as fining one who fails to fasten his seat belt while driving a car, or who does not wear a helmet while riding a motorbike, is a sort of *ta'zir* punishment for the public interest. In fact, this type of punishment is the most popular as it is implemented frequently.

3. *Ta'zir* for Delinquencies (*Mukhalafat*)

What is meant by *mukhalafat* is the commission of disapproved of acts (*makruh*) and the omission of recommended acts (*mandub*). Some jurists define *mandub* acts as those, which we are required to do, while *makruh* acts are those, which we are required to abstain from. The difference between *mandub* acts and obligatory acts (*wajib*) is that the omission of the latter will

¹⁶ Ibn 'Abidin, *Hashiya*, al-Astana, Cairo, 1294H, Vol. VI, pg. 113; al-Qarafi, *al-Furuq*, pg.180, Vol. IV; al-Ramli, *Nihayat al-Muhtaj*, Vol. VIII, pg.21; Hajawi, *al-Iqna'*, al-Maktaba al-Misriyya, Cairo, 1319H, Vol. IV, pg. 269.

¹⁷ Al-Tirmidhi, *Sunan*, Matba'a Mustafa al-Babi al-Halabi wa Awladuh, Cairo, 1975, Vol. IV, 2nd Ed., pg. 28; al-Kasani, *Bada'i' al-Sana'i'*, Vol. VII, pg.64; Ibn al-Humam, *Sharh Fath al-Qadir*, Dar al-Kutub al-'Ilmiyya, Beirut, 1995, Vol. V, 1st Ed., pg. 335; al-Ramli, *Nihayat al-Muhtaj*, Vol. VIII, pg. 21; Hajawi, *al-Iqna'*, Vol. IV, pg. 269.

¹⁸ Al-Bukhari, *Sahih*, Maktaba al-Nahda al-Haditha, Mecca, 1984, Vol. VIII, pg. 142; al-Khatib, *Mughni al-Muhtaj*, Dar al-Fikr, Cairo, (n.d.), Vol. IV, pg. 192.

¹⁹ Ibn 'Abidin, *Hashiya*, Vol. VI, pg. 113; al-Qarafi, *al-Furuq*, Vol. IV, pg. 180; al-Khatib, *Mughni al-Muhtaj*, Vol. IV, pg. 192.

be rebuked but not the former. Similarly, the difference between *makruh* acts and prohibited acts (*haram*) is that the commission of the latter will be rebuked but not the former. They, however, do not consider those who omit *mandub* acts and commit *makruh* acts as disobedient ('*as*) but rather as "not submissive" (*mukhalif*).²⁰

Another group of jurists hold that *mandub* acts are not included under *wajib* acts and *makruh* acts are not included under *haram* acts. In other words, the former is merely recommended whilst the latter is merely abominated. Thus, according to them, the omission of a *mandub* act and the commission of a *makruh* act is not considered an act of disobedience (*ma'siya*).²¹

Therefore, it can be concluded from both opinions that a person who omits a *mandub* act and commits a *makruh* act is not considered as committing religious disobedience (*ma'siya*). If so, can a person who commits *mukhalafat* such as spitting or smoking in certain area be punished with *ta'zir* punishment?

The jurists do not agree on this matter following their differences regarding the definition of *mandub* and *makruh* as discussed above. The first group of jurists hold that delinquencies may be punished. They base their opinion on the tradition that 'Umar punished a man who had laid down a goat in order to slaughter it and then sharpened his knife in front of the goat. Since this act is considered as *makruh* act, some jurists hold that delinquencies may be punished.²²

The second group of jurists hold that there is no punishment for delinquencies. According to them, the condition of *taklif* (i.e. being subject to the dictates of the *Shari'a*) must apply before any *ta'zir* punishment can be carried out. Thus, it is clear that in the case of delinquencies, there is no *taklif* and therefore no punishment will be inflicted on those who commit *makruh* acts or omit *mandub* acts.²³

From the above, it can be concluded that the scope of *ta'zir* offences is very wide. Unlike *hudud* and *kaffara*, the offences of *ta'zir* are unlimited and include those considered as *ma'siya* and non-*ma'siya* which are punishable on the basis of *maslaha*. Even delinquencies may be punishable with *ta'zir* punishments.

²⁰ Al-Ghazzali, *al-Mustasfa*, Ma ba'a al-Amiriyya, Cairo, 1904, Vol. I, pg. 85; al-Amidi, *al-Ihkam fi Usul al-Ahkam*, Vol. I, pg. 160; al-Hattab, *Mawahib al-Jalil*, Vol. VI, pg. 320.

²¹ Ibn Hazm, *al-Ihkam fi Usul al-Ahkam*, Vol. I, pg. 43; Hajawi, *al-Iqna'*, Vol. IV, pg. 270.

²² Al-Ghazzali, *al-Mustasfa*, Vol. I, pg. 85; al-Amidi, *al-Ihkam fi Usul al-Ahkam*, Vol. I, pg. 160; al-Hattab, *Mawahib al-Jalil*, Vol. VI, pg. 320, Ibn Farhun, *Tabsirat al-Hukkam*, Dar al-Kutub al-'Ilmiyya, Beirut, 1995, Vol. II, 1st Ed., pg. 259; Ibn Hajar, *Tuhfat al-Muhtaj*, Dar Ihya' al-Turath al-'Arabi, (n.d.), Vol. VIII, pg. 18.

²³ Ibn Hazm, *al-Ihkam fi Usul al-Ahkam*, Vol. I, pg.43; al-Kasani, *Bada'i' al-Sana'i'*, Vol. VII, pg. 63, Hajawi, *al-Iqna'*, Vol. IV, pg. 270.

THE DISCRETION OF THE JUDGE

The jurists all agree that the determination of the punishment of *ta'zir* is left to the discretion of the judge. Therefore, a judge has full power to pass a suitable punishment on an offender besides taking into account the condition of the offence and the offender.²⁴ The question, however, arises as to whether the discretion of the judge in the determination of *ta'zir* punishment is absolute or limited.

According to the Hanafis, the discretion of the judge is not fully absolute. It is accepted that the right to determine a punishment in the case of *ta'zir* is left to the discretion of the judge and therefore, he is free to choose any type of *ta'zir* punishment which is suitable to the condition of the offence and the offender. If, however, he opts for inflicting the punishment of whipping on an offender, then the judge's discretion is limited with regard to the number of lashes that can be allowed. The maximum number of lashes allowed in *ta'zir* cases is either thirty-nine as fixed by Abu Hanifa and al-Shaybani, or seventy-five as fixed by Abu Yusuf.²⁵ Thus, when a judge inflicts the punishment of whipping, he may determine the number of lashes which he believes is enough to achieve the aim of *ta'zir* punishment, but it must not exceed the maximum number of lashes mentioned above. However, if a judge thinks that whipping an offender with the maximum number of lashes is insufficient to serve as deterrent, a judge still cannot exceed the maximum limit, but he may choose another suitable punishment in addition to whipping.²⁶

The Shafi'is agree with the Hanafis concerning this matter. They accept that it is left to the discretion of the judge to determine a suitable punishment to be imposed on a *ta'zir* offender taking into account mitigating and aggravating factors. However, this power is not absolute since if a judge opts to choose the punishment of whipping, he must not exceed the maximum number of lashes as fixed by the Shafi'i jurists.²⁷ In addition, if a judge

²⁴ Ibn 'Abidin, *Hashiya*, Vol. VI, pg. 106; Ibn al-Humam, *Sharh Fath al-Qadir*, Vol. V, pg. 330; Ibn Farhun, *Tabsirat al-Hukkam*, Vol. II, pg. 221; al-Ramli, *Nihayat al-Muhtaj*, Vol. VIII, pg. 22; Ibn Qudama, *al-Mughni wa al-Sharh al-Kabir*, Vol. X, pg. 347.

²⁵ This controversy results from their differences in interpreting the *hadith* of the Prophet which says:

"One who exceeds the limits of the *hadd* punishment in a non *hadd* crime is among the transgressors". For further details see: Al-Kasani, *Bada'i' al-Sana'i'*, Vol. VII, pg. 64; Ibn al-Humam, *Sharh Fath al-Qadir*, Vol. V, pg. 334-336.

²⁶ Ibn 'Abidin, *Hashiya*, Vol. VI, pg. 104; Ibn al-Humam, *Sharh Fath al-Qadir*, Vol. V, pg. 335.

²⁷ The Shafi'is, in this context, have three different opinions; the first agrees with Abu Hanifa, the second agrees with Abu Yusuf, and the third states that the maximum limit might surpass seventy-five but should not exceed one hundred, on condition that each *ta'zir* crime is to be assessed by an analogical comparison (*qiyas*) with a *hadd* crime similar to it, for example the punishment for preparatory acts of adultery should be less than that for adultery though it may exceed the punishment for *qadhif*. See: Al-Ramli, *Nihayat al-Muhtaj*, Vol. VIII, pg. 22, al-Shirazi, *al-Muhadhdhab*, Vol. II, pg. 288; al-Mawardi, *al-Ahkam al-Sultaniyya*, pg. 236.

chooses to banish an offender, the duration of banishment should not exceed one year since banishment as a *hadd* punishment prescribed in the case of *zina* of an unmarried culprit is one year. A similar opinion is held by the Hanbalis.²⁸

The Malikis, on the other hand, have a different view concerning this matter. According to them, the discretion of the judge in the determination of *ta'zir* punishment is absolute and total. Therefore, a judge is given full power to determine a suitable punishment to be imposed on an offender, even if it exceeds one hundred lashes in whipping or more than one year banishment. However, a judge cannot go beyond the necessary punishment, i.e. if a judge thinks that a light punishment such as a reprimand is sufficient to deter an offender, a judge cannot choose another punishment which is stronger than that.²⁹

From the above, it can be concluded that according to the majority of the jurists, the discretionary power that the ruler has is not absolute if he chooses the punishment of flogging or banishment; the Malikis, however, hold that this power is absolute. This disagreement results from their conflicts on whether *ta'zir* punishments, particularly flogging and banishment, may exceed *hudud* punishments or not. Even the Malikis, who claim that the discretion of the judge is absolute³⁰, hold that there is still a limit that a judge cannot go beyond. It is to be noted that the judges in exercising their discretionary power pertaining to *ta'zir* punishment should follow the guidelines prescribed by the government on the basis of *al-siyasah al-shar'iyah*. This is necessary to ensure justice and uniformity in the implementation of punishments.

THE EFFECT OF PREVIOUS JUDGMENTS ON THE JUDGE'S DECISION

The jurists do not discuss the effect of previous judgments on the judge's decision directly. However, it can be implied that this matter is included when they discuss the role of the ruler in the implementation of *ta'zir* punishment. According to the Malikis, Hanafis and Hanbalis, *ta'zir* punishment must be implemented by the ruler in *ta'zir* cases, which have already been mentioned

²⁸ Al-Ramli, *Nihayat al-Muhtaj*, Vol. VIII, pg. 23; al-Khatib, *Mughni al-Muhtaj*, Vol. IV, pg. 192; Ibn Qudama, *al-Mughni wa al-Sharh al-Kabir*, Vol. X, pg. 347.

²⁹ Ibn Farhun, *Tabsirat al-Hukkam*, Vol. II, pg. 222.

³⁰ According to the Maliki school, the right to determine the maximum number of lashes in the case of *ta'zir* is left to the discretion of the ruler because it depends upon the public interest and the seriousness of the crime, and the criminal's condition. Therefore, the number of lashes allowed in the case of *ta'zir* may exceed that of the *hadd* punishment as long as the ruler thinks the circumstances require it. See: Ibn Farhun, *Tabsirat al-Hukkam*, Vol. II, pg. 221; Ibn Qudama, *al-Mughni*, Vol. VIII, pg. 325.

in the *Shari'a* texts.³¹ They confirm that if a *ta'zir* crime has already been mentioned in a text, for example, having sexual intercourse with one's wife's slave, or with a shared slave, the punishment is binding. There is no pardon in a case where the crime is punishable with a *hadd* punishment, which is reduced to a *ta'zir* punishment due to certain causes. If a *ta'zir* crime is not mentioned in a text, the punishment is imposed on the basis of *maslaha*.³² This means that previous judgments do affect the decision of the judge but in certain cases only.

When the subject of precedent is involved, it is essential to look through the historical facts concerning this matter. When the Islamic state rose in Medina, the primary source of Islamic law referred to in making judgments was the Qur'an. The Prophet firstly referred to the Qur'an and what God revealed to him (*wahy*) in making his judgment. He also used his own wisdom in making judgment (*ijtihad*) and quite often, he asked his Companions' opinions (*mushawara*) on certain issues when there was no revelation from God. Then after the demise of the Prophet, his *Sunna* became the second source of Islamic law.³³

It is reported that Abu Bakr, whenever there was an incident which needed to be settled, would refer to the Qur'an first; if he got the answer in it he would make his judgment based on the Qur'an, but if not, he would base it on the *Sunna* of the Prophet concerning that matter which he knew himself. If he did not know any *Sunna* concerning that case, he would ask the Muslims if any of them knew whether there was a tradition of the Prophet concerning the matter, and would base his judgment on this *Sunna*. However, if there were no single *Sunna* concerning the matter, he would gather the leaders and the distinguished people among the Muslims and ask their opinions on the matter. If they achieved a consensus on that, he would make his judgment following this consensus of opinion (*ijma'*). Similarly, 'Umar followed the same way as Abu Bakr did in making his judgment. If he did not get the answer in the Qur'an and *Sunna* he would first refer to the judgments of Abu Bakr on similar cases and base his judgment on that precedent. Again, if there were no previous judgment, he would base his judgment on the consensus of opinion concerning that matter.³⁴ Thus, it can be concluded that previous judgments do have an effect in the determination of punishment. The judge should first refer to any previous judgments before making his own decision

³¹ Ibn al-Humam, *Sharh Fath al-Qadir*, Vol. V, pg. 330; al-Kasani, *Bada'i' al-Sana'i'*, Vol. VII, pg. 64; al-Qarafi, *al-Furuq*, Vol. IV, pg. 179; al-Bahuti, *Kashaf al-Qina'*, Vol. VI, pg. 124; Ibn Qudama, *al-Mughni wa al-Sharh al-Kabir*, Vol. X, pg. 349.

³² *Ibid.*

³³ Mahmud ibn Muhammad, *Tarikh al-Qada' fi al-Islam*, Matba'a al-Halabi, Cairo, (n.d.), pg. 19.

³⁴ *Ibid.*, pg. 20.

on *ta'zir* matters. However, previous judgments are not binding and may be adapted according to time and place.

It is worth mentioning that the judiciary power was originally held by the caliph himself who also held an executive power. Therefore, it is his right to be directly involved in making judgment himself or to delegate this power to his representative i.e. a judge.³⁵

THE ENACTMENT OF *TA'ZIR* LAWS

As discussed earlier, unlike *hudud* and *qisas* crimes, not all *ta'zir* crimes are mentioned in the *Shari'a* texts. Only some are mentioned while the greater part of *ta'zir* crimes are left to be considered by the ruler. Hence, it is the ruler's duty to prohibit the commission of a certain act, or make it compulsory, with the intention of protecting the whole community and keeping it in order and well-organized. The legislative power that the ruler has concerning *ta'zir* matters should always comply with the *Shari'a* texts and its principles as well as the accepted views of the jurists. The reference should also be made to the principles in *al-siyasah al-shar'iyah* (Islamic legal policies).

Regarding the way of punishing *ta'zir* crimes, the *Shari'a* has laid down a list of types of punishments, which vary between the lightest punishment and the severest one. Once again, it is left to the discretion of the ruler or the judge to choose a punishment from this range which is the most suitable for the condition of the offence and the offender, as done by the judges in the early days of Islam such as Abu Musa al-Ash'ari, Shurayh, Ibn Abi Layla, Ibn Shabrama, 'Uthman al-Batti, Abu Yusuf, Muhammad al-Shaybani and Zufar ibn al-Huzayl.³⁶

If this is a general rule that the *Shari'a* has set down concerning the matter of *ta'zir*, where a ruler has a jurisdiction in the legislation of *ta'zir* crimes and punishments from the very beginning, there is, thus, no restriction for the ruler to lay down certain guidelines either in the forms of rules or enactments or in other words, to enact the law of *ta'zir* in advance and pre-determine a certain punishment for a certain crime and fix its degree within its maximum and minimum limit. Then, it is left to the judge to apply this law besides giving him freedom in choosing the punishment and making judgment within the two limits.³⁷ The enactment of *ta'zir* crimes and punishments is even rational when compared to the crimes whose punishment has already been prescribed, such as *hudud* and *qisas*, since the number of crimes of this type are very small while the offences that are punishable with *ta'zir* punish-

³⁵ Ibid., pg. 24.

³⁶ Abu Zahra, *al-'Uquba*, pg. 69.

³⁷ Ibid., pg. 110.

ments are abundant. The enactment of *ta'zir* laws is, therefore, essential to warn people in advance, making them accountable for their deeds and avoids any chance of excuse on the grounds of ignorance of the law, which may make application of the principle a difficult task. The enactment of *ta'zir* laws is also necessary to protect the society from the possibility of misuse of power by the judge. Furthermore, it will standardise judgments among the many judges, discourage questions of unfairness from arising, and even make the judge's work easier and less complicated.

The facts note that 'Umar ibn 'Abd al-'Aziz had made an effort to enact the law specifically on *ta'zir* i.e. by taking the formal legal opinions of the Medinese (*fatawa ahl al-Madina*) of the Companions and the *tabi'in* (their successors) as the law which should be followed by all the judges of his time. However, he died before he completed this effort. Similarly, Abu Ja'far al-Mansur, the second caliph of the Abbasid period, had attempted to take the formal legal opinions of the Companions and the *tabi'in* as the law for the Muslims. He asked Imam Malik to compile the *Sunan* (the *fatawa* of Companions and *tabi'in* of Medina's period) in one book to make them as laws. Though Malik had completed the compilation, he forbade the ruler and the rulers after Abu Ja'far as well from taking it as the law of the country since the other region of the Islamic territory has already compiled the *Sunan* of the Companions and *tabi'in*, which they followed.³⁸

The silence of the *Shari'a* texts in not mentioning the demand for the discretion of the judge alone in the determination of *ta'zir* punishments indicates that the prescriptions involving *ta'zir* crimes and punishments do not contradict the rules of the *Shari'a*. What we find in the books of *fiqh* (*kitab*), in which the jurists mention that *ta'zir* punishments should be left to the discretion of the leader (*imam*), or the ruler (*hakim*) or the judge (*qadi*), in fact denotes the same meaning, i.e. a person who holds both the legislative and judiciary powers. We do not think that it denotes a person who is directly involved in the judgment of a certain case. If that were the case, the jurists would have used the word *qadi* constantly when they discussed on *ta'zir* matters.

It is worth mentioning here that any *ta'zir* law, which is enacted with the recognition of the ruler, is considered as *ta'zir*, as long as it conforms to the *Shari'a* texts and does not slip away from the general principles of the *Shari'a*. It is also to be noted that the ruler who has the authority in the legislation of *ta'zir* crimes and punishments is the same ruler who implements the Islamic law comprehensively besides fulfilling all the requirements and qualifications stipulated for a just ruler (*hakim 'adil*) of the Islamic state.³⁹

³⁸ Ibid., pg. 70.

³⁹ Ibid.

When *ta'zir* is enacted in advance, it seems that there is no point in discussing the power that the judge has in the determination of *ta'zir* punishment. In fact, when this matter is studied thoroughly, it can be noticed that the judge still has the power of determining the exact penalty to be imposed on the offender since *ta'zir* laws are established as a guideline to simplify the judge's task and to safeguard the public interest. It is still the judge's task to determine the most suitable punishment to be imposed on an offender taking into account the mitigating and aggravating factors.

The establishment of *ta'zir* laws does not mean that the law is unchanged forever. *Ta'zir* punishments are not prescribed as *hudud* and *qisas*. Therefore, they are subject to change whenever necessary. It is well-known that Umar ibn al-Khattab, in his early days as a caliph, fixed that the number of lashes allowed in whipping an offender who was guilty for drinking intoxicants at forty lashes but later on he fixed it at eighty lashes since the people were not deterred by the former punishment and the crime of drinking intoxicants became widespread during his time. It is indeed important to revise the *ta'zir* laws from time to time as is, in fact, done in many countries nowadays. This revision would ensure that the *ta'zir* laws continue to be applicable and relevant for the time and place.

GENERAL OBSERVATION ON THE IMPLEMENTATION OF TA'ZIR PUNISHMENT IN MALAYSIAN SYARIAH COURT

In Malaysia, almost all offences provided for in the State Enactments⁴⁰ are of *ta'zir* in nature.⁴¹ The scope of *ta'zir* offences which are provided for in the

⁴⁰ The Federal Constitution of Malaysia provides that, other than in the Federal Territories, the constitution, organization and procedure of Syariah Courts are state matters over which the state has the exclusive legislative and executive authority, see: the Federal Constitution Sch 9, List II, Item 1.

⁴¹ Except *zina* (illegal sexual intercourse), *qadhif* (false accusation of *zina*) and drinking intoxicants which are of *hudud* type but the punishments provided for these offences are *ta'zir*. For details, see: Syariah Criminal Offences Act 1997 (Federal Territories) (Act 559); Syariah Criminal Offences Enactment 1997 (Johore) (No 4 of 1997); Syariah Criminal Code Enactment 1988 (Kedah) (No 9 of 1988); Syariah Criminal Code Enactment 1985 (Kelantan) (No 2 of 1985); Syariah Criminal Offences Enactment 1991 (Malacca) (No 6 of 1991); Syariah Criminal Enactment 1992 (Negeri Sembilan) (No 4 of 1992); Administration of the Religion of Islam and the Malay Custom Enactment 1982 (Pahang) (No 8 of 1982); Criminal Offences in the Syarak Enactment 1996 (Penang) (No 3 of 1996); Crimes (Syariah) Enactment 1992 (Perak) (No 3 of 1992); Syariah Criminal Offences Enactment 1993 (Perlis) (No 4 of 1993); Syariah Criminal Offences Enactment 1995 (Sabah) (No 3 of 1995); Syariah Criminal Offences Ordinance 2001 (Sarawak) (Chapter 46); Syariah Criminal Offences Enactment 1995 (Selangor) (No 9 of 1995); Syariah Criminal Offences (Takzir) Enactment 2001 (Terengganu) (No 7 of 2001).

Enactments are limited to family and personal law matters only.⁴² Generally, the offences can be divided into six categories, namely, matrimonial offences, offences relating to decency, offences relating to the consumption of intoxicants, offences concerning the spiritual aspect of Muslim communal life, offences relating to conversion of religion and miscellaneous offences apart from those categories mentioned. It is agreed that none of the offences provided for in the State Enactments contradicts the *Shari'a*. However, the analysis on the prescribed punishment appears to be inconsistent with the *Shari'a* as it is limited to imprisonment, fining and whipping only⁴³ despite the fact that the punishments of *ta'zir* in Islamic law may vary from a warning to death.⁴⁴ Consequently, the discretion of the judge in inflicting punishment on a *ta'zir* offender is confined to imprisonment or a fine or whipping as the main punishments. However, in certain offences, particularly those relating to *aqidah* (religious beliefs) and *akhlak* (decency) the judge is empowered to commit convicted person to an approved rehabilitation center or an approved home for a certain period.⁴⁵

CONCLUSION

The scope of *ta'zir*, as we have seen, is very wide compared to the limited nature of *hudud* and *qisas*. *Ta'zir* crimes and punishments are left unspecified in the *Shari'a* texts so as to make them appropriate to the changing requirements of a society as it develops. This indicates the flexibility of Islamic criminal law, which can be adapted according to different times and places and remains compatible with the demands of the modern world. Since *ta'zir* punishment is subject to the discretion of the judge, the question arises as to whether this power is absolute or limited. The majority of the jurists hold that the discretionary power, which the judge has, is not fully absolute in the sense that if a judge chooses the punishment of flogging or banishment, it must not

⁴² See: the Federal Constitution Sch 9, List II, Item I.

⁴³ See: Syariah Courts (Criminal Jurisdiction) Act 1965 (Amendment) 1984 (Act A612) s. 2.

⁴⁴ According to 'Awda, in cases of *ta'zir*, the *Shari'a* provides a variety of punishments starting with the death penalty, whipping, imprisonment, fine, banishment, threat, public disclosure, reprimand, admonition or any other type of punishment which suits for the situation of the offender and the offence. See: 'Awda, *al-Tashri' al-Jina'i al-Islami*, Vol. II, pp. 687-708.

⁴⁵ See for example: Syariah Criminal Offences Act 1997 (Federal Territories) (Act 559) s. 55, 56; Syariah Criminal Offences Enactment 1997 (Johore) (No 4 of 1997) s. 55, 56; Syariah Criminal Offences Enactment 1991 (Malacca) (No 6 of 1991) s 66; Criminal Offences in the Syarak Enactment 1996 (Penang) (No 3 of 1996) s 55, 56; Syariah Criminal Offences Enactment 1995 (Sabah) (No 3 of 1995) s. 63; Syariah Criminal Offences Ordinance 2001 (Sarawak) (Chapter 46) s. 52, 53; Syariah Criminal Offences Enactment 1995 (Selangor) (No 9 of 1995) s. 54; Syariah Criminal Offences (Tak'zir) Enactment 2001 (Terengganu) (No 7 of 2001) s. 67, 68.

exceed that provided for *hudud*. Even the Malikis, who hold that the discretion of the judge is absolute, hold that there is still a limit that a judge cannot go beyond. The judge in exercising his discretionary power should follow the guidelines prescribed by the government on the basis of *al-siyasah al-shar'iyah*. This is necessary to ensure justice and uniformity in the implementation of punishments. Previous judgments should also be referred to by the judge since this was practised by the Companions before making their judgments. However, previous judgments are not binding and may be adapted according to time and place. The enactment of *ta'zir* laws does not contradict the discretionary power of the judge since the judge still has the power of determining the exact penalty to be imposed on the offender. Establishing *ta'zir* laws would serve as a guideline to simplify the judge's task and to safeguard the public interest.

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