

Special Deterrence in the "Ta'zir" Crimes (Misdemeanors and Infractions), and its Impact on the Offender Rehabilitation between Shariah and Law in Egypt, Jordan and Bahrain

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Abstract

Penalties in Islam were created to preserve people's lives, freedoms, honor, dignity, property and mental health, and to provide a basis for coexistence and stability within the community. The main objective of the Islamic faith is to preserve life. Islam strictly prohibits the deprivation of the right to life of any human being, aside from in situations that are clearly and explicitly specified in Shariah (Islamic law).

Ta'zir punishments are up to the discretion of judges and rulers, something that in practice leads to a disparity in judgments with some judges handing out stringent punishments. Regarding this, there is an ongoing debate among Shariah scholars whether the authorities should introduce guidelines to create consistency in how much punishment judges should hand out for crimes that fall under the Ta'zir category.

Key words: Ta'zir, Special Deterrence, Shariah

1.1 Introduction

The legislature authorized some penalties to the Muslim ruler insight, without exceeding certain limits, and these penalties are in two types:

The first type is related to the common crimes in the community, which are the violation of the whole rights of God, or the whole of human rights, or the violation of the social moral values, in other words: they are the direct and basic crimes violating the five overall necessities of Islam; to be achieved and protected; namely: religion, life, mind, birth and capital.

The legislator had specified direct and clear penalties that do not leave them to the jurisprudence of the rulers.

The second type is related to the subsidiary crimes which are connected to the basic crimes identified by the legislator, but merely be a prelude or an appendage of their tails, or some sort of irritation towards them, so if the basic crimes are necessary to achieve the interests of the overall necessities of Islam that we have mentioned, the rest of the other crimes are necessary to achieve needs and improvements. For that the legislator gave the ruler the responsibility to draw the appropriate punishment for each deviation or of these subsidiary offenses, taking into account some certain conditions and restrictions.

1.2 Research Methodology

this research will discuss the purpose of the punishment in relation to the rehabilitation of the victim in Shariah and Law, using the descriptive analysis in accessing all the texts and events in the jurisprudence books "fiqh books" and law books with a logical analysis to demonstrate the purpose of the prescribed punishment, arguing all the evidence in the texts when needed. Hereby this research will be in three sections; the first section is related to the purpose (purposes) of punishment in general, the second section is related to the deterrence of the penalties of Alta'zir crimes, while the third section will discuss the conclusions.

1.3 Purposes of Punishment in Sharia and Law

Tenets of religion scientists had said that "things are considered by their purposes", and with the related benefits to the individual or the nation as a whole (Al-Mawardi, 1953).

Accordingly, the science of Al-Shariah purposes is one of the divisions of the jurisprudence science, Al-Shariah purposes in language means: the destination, while in terminology is the goals and secrets that put by the legislator, therefore the purposes of punishment in the Islamic laws are as follows:

1.3.1 Deterrence and Restraining

Deterrence and Restraining are for preventing the offender from re-committing the crime, and preventing others from committing the crime too, as Al-Mawardi in his book (The Sultan rules) had said that "punishments are deterrents in Islam, in which we can fight our lusts (Al-Mawardi, 1953), and also Ibn Taymiyyah in his "fatwa's" had said: " legitimate sanctions are embarked on the mercy of God towards His slaves to deter the commission of crimes" (Ibn Taymiyyah – Al Moktarrat).

1.3.2 Achieving Justice

In reducing the feelings of anger and resentment caused by the crime in the community, and satisfy the general

feeling and healing rage of the victim.

1.3.3 Reforming the Offender

The consensus was held that the discretionary (Ta'zir) crimes purpose is the reforming of the offender and to rectify his action, even more to let join the community again, for that the purpose of all punishments as defined by the Criminal Code is not that far from what is graduated by the Islamic law, and are as follows:

- Special Deterrence: defined as the reforming of the criminal by eliminating the dangerous criminal side of his personality, using the latest methods of treatment, which will work on eradicating the desires of evil in him (Al-Hussnay, 1999), and then preventing the offender from returning to commit the crime or persist in criminality, therefore deterrence is intended to create a feeling of pain because of the crime committed and the harm done to the society.
- General deterrence: in preventing the rest of the community members committing the same act.
- Justice, as mentioned earlier.

The penalties of "Al-Qassas" punishments for instance in murder or adultery crimes were preventing the offender from committing such crimes, and preventing the corruption of the nation, and this of course will protect the community, then the reforming of the offender will create the needed discipline which is better known for deterrence in the science of criminal law, and which appears more clearly in the ta'zir crimes (Abdl-Qader, 2007).

1.4 Impacts of Alta'zir Penalties on the Special Deterrence

The purpose of the special deterrence is to prevent the offender from committing another crime, with different methods of prohibition from case to case, depending on the severity of the crime, and depending on the offender's degree of susceptibility for reforming and rehabilitation, as long as some offenders can be reformed and rehabilitated easily by warning or preaching, while some others must be isolated from community, thus the philosophy of reward and punishment must be cleared to the public, as it increases people's faith and belief and commitment.

The main rule of Alta'zir penalties that they are only against any sin, or for the public interest or the public order, thus the aftercare of the convicted or the perpetrator is an important mean of reforming under the contemporary legislation and the international conventions, which aims to provide a protection from crime, and working on the causes treatment, beside reforming the behavior of the perpetrators (Sroor, 2001).

1.4.1 Ta'zir in Language and Terminology: Legally and Religiously

1.4.1.1 Ta'zir in Language

Ta'zir in the language means:

- Exaltation and victory, as mentioned in the holy Quran "Wta'ziroh WtokeroH", (Surat El Fateh: verse 9).
- Discipline, prevention and response.

1.4.1.2 Ta'zir in Terminology

- Sheikh Zakaria al-Ansari had declared that Ta'zir is on a sin that has no clear expiation for it.
- Imam Ibn Qodammah had defined it as discipline before punishment.

This study had adopted the definition saying that Ta'zir is a legitimate punishment for a sin or a felony that does not have any expiation.

1.4.2 Types of Ta'zir Penalties

The authority of the judge in Alta'zir penalties is wide, but it is not arbitrary, because the Shariah punishments in Alta'zir crimes start with the simplest penalties like preaching and end with the strongest penalties such as imprisonment until death or the death penalty. Al-Shariah leaves to the judge the ability to choose from among these groups the appropriate punishment for the crime, and leaves him with the ability to estimate the punishment between maximum and minimum.

Alta'zir penalties came with different faces, this research we will discuss these penalties and their impact on the reforming process of the individual, including the so-called special deterrence in the criminal law, these penalties can be divided into the follow:

1.4.2.1 Physical Ta'zir Penalties including:

- Death Penalty: It is known that the real purpose of Alta'zir penalties is the discipline, for that it shouldn't be fatal to the offender, as God says: "Do not kill self which Allah has forbidden except by right" (Surat Al An'am verse: 151). For this, the Fuqaha differed in conceding the Death Penalty as one of the Ta'zir Penalties into two views: the Shaafi'is and most of the Maalikis do not count the death Penalty as one of the Ta'zir Penalties, while the Hanafi and the Hanbali do so.
- The Punishment of Whipping: The punishment of whipping is the favorable in the dangerous ta'zir crimes, and this preference is due to some reasons including:

1- Because it is the most deterrent penalty for criminals who become dangerous and their criminality became an attitude, as well as it is characterized by the possibility of rewarding every criminal with the extent punishment that fits his crime and fits his character.

2- In ta'zir, this is the prime type of punishment used. This is because whipping is very effective in achieving the objective of punishing itself. It deters the criminal from committing crime, does not cause difficulty to the government and does not take the right of the criminal's family away from them. Most importantly, the criminal will not be exposed to bad morality, health hazard and laziness which are faced by those being jailed.

1.4.2.2 Ta'zir Penalties that Restrict Freedom including:

- Imprisonment: The situations which prescribe imprisonment are eight as Imam Al Quraafi of the Maalikis had said:

1- Imprisonment to save for the Qassas: the imprisonment of the offender for the absences of the victim to be sentenced.

2 - Imprisonment upon financial reasons.

3- Imprisonment for the omission to pay the rights.

4- Imprisonment to choose for the right obligation.

5- Imprisonment to deter from committing sins.

6- Imprisonment due to the refrain of acting.

7- Imprisonment due to refrain of the indiscernible statement approval.

8- Imprisonment to perform the commands of God, and finally Imam Al Quraafi had said: "Except these eight, must be no solitary" (Al Quraafi, 632 AH).

In imprisonment, and as required form all other penalties; they often lead to the reform of the offender, and imprisonment in man-made laws is the first sentence that punished in almost all crimes. In the Islamic law imprisonment is a secondary punishment, subjected only to minor offenses, leaving the judge with the options to punish or not, and as the statistical studies have indicated that the prison had failed in qualifying the reactions of the convicts, with an increase in the crimes rates and with high percentage of returning to prison. In 1999, Jordan and Egypt showed that the rate of return to criminal attitude was 25% and 57% of prisoners had an attitude towards returning to criminality after their release (Ganem, 1999).

- Exiling: as a kind of the reforming process, which aims at changing the surrounding environment in which the offender is living. There is no disagreement among fuqaha that the exile punishment is prescribed in the Islamic law, as mentioned in the Qur'an "The punishment for those who wage war against God and His Prophet, and perpetrate disorders in the land, is to kill or hang them, or have a hand on one side and a foot on the other cut off, or banish them from the land. Such is their disgrace in the world, and in the Hereafter their doom shall be dreadful" (Surat Al Ma'eda verse: 33).

the legality of the exile punishment as one of the Ta'zir penalties is proved by Caliph Omar Ibn al-Khattab (may Allah pleased him) when he used the punishment of exile many times, by exiling the drinker to "Khyber", while it is known that the punishment of drinker is whipping, but he used the was exile punishment instead.

1.4.2.3 Financial Ta'zir Penalties

The Ta'zir penalties vary from one place to another and from one time to another, and that Islamic law authorized the ruler or the judges to assess some penalties by taking money from the offender. Imam Abu Yusuf, some the Maalikis and Imam Al Shafi'i agreed with that, but Imam Abu Hanifa and Imam Ibn al-Hassan disagreed, and this disagreement is justified by forbidding the iniquitous rulers from taking people's wealth unlawfully under the guise of Financial Ta'zir Penalties.

1.4.3 Psychological Ta'zir Penalties

That does not have any physical impact such as beating, but it is limited to the psychological sense of pain to awaken his conscience (Al Khalidi, 2005).

And these penalties are met either by speech, direct or indirect, which draws on the ears of the offender or by leaving a talk with him, or any other similar act that can affect the psyche of the offender to reform his actions, thereby the fulfillment of these penalties depends on the selection of the appropriate phrases for each punishment, and these psychological penalties include the followings:

1.4.3.1 Penalty of Preaching

The evidence of considering the preaching penalty as one of the ta'zir penalties is mentioned in the Qur'an: "As for those, from whom ye fear rebellion, admonish them" (Surat Al Nesa'a verse: 34), and the preaching benefits are limited in reminding the offender of his felony as if he was unaware of it.

Therefore, the preaching as a ta'zir penalty in Islam, authorize the judge to preach the offender if he sees that preaching is enough to reform the offender.

1.4.3.2 Penalty of Rebuking

The ta'zir rebuking penalty could be by using words or by angry facial expressions from the judge upon the type

and the size of the crime, for that the rebuking penalty in Islam is one of the ta'zir Penalties, and the judge may only punish the offender with if he considers it enough to reform the offender.

1.4.3.3 Penalty by Threatening

The ta'zir penalty by threatening could be verbal, as long as the offender feels it's a real one, which will be an effective punishment that the judge believes it can reform the offender, thereby, the judge impose the punishment and then stop the implementation of it; be threatening the offender with much more penalties in the future if he didn't deterred.

Qur'an has used the threat style for some crimes as in Surat Al-Baqarah verse: 279: "And if you do not, then be informed of a war [against you] from Allah and His Messenger. But if you repent, you may have your principal - [thus] you do no wrong, nor are you wronged" (Surat Al-Baqarah verse: 279).

Penalty by threatening is considered as a precautionary measure in order to eliminate criminal risk inherited in the character of the offender, and it achieves only the special deterrence.

1.4.3.4 Penalty by Informing and bringing to the Judicial Council

Some ta'zir crimes are simple and non-violent, but at the same time the offender must not be left unpunished, such cases justice will be achieved by informing the offender of committing such a crime.

In these penalties we must take into account the type of the crime and the social status of the offender, but if the crime is repeated then we can go further with the other ta'zir penalties.

1.4.3.5 Relieving from Job

Relieving a person from his job and his salary, only if he is a governmental employee, is a double punishment: financially by cutting his salary, and emotionally by the social hurt caused, of course this kind of punishment must be written on papers and he should have a copy of it or to be read for him.

1.4.3.6 Penalty by Defamation

Defamation in language: Are the protruding and the disclosures of the act, the legal meaning: are the announcements of the crime and the highlighting of the criminal act among people, and there is no doubt that this type of ta'zir penalties will expose the criminal to society in a way of reforming him.

1.4.3.6 Abandonment Penalty

Abandonment penalty is the province of the offender and then the refraining processes from contacting or treating with him in any kind of in any way. The evidence of considering the abandonment penalty as one of the ta'zir penalties is mentioned in the Qur'an: "As for those, from whom ye fear rebellion, admonish them and banish them to beds apart" (Surat Al Nesa'a verse: 34).

Special deterrence as a goal for penalty has a role in the punishments policies in the laws of Arab countries, which emphasized the function of the rehabilitation processes of the offender, as it aims to reform the offender, and to influence the composition of moral system, and then turning the offender into a new straight positive character, including creating a feeling of responsibility in front of himself, his family, and the society, especially if this reform was accompanied by providing him with a craft to become a productive member in his environment.

1.5 Conclusions

The principle of punishment exists in all stages of the human existence, whether that was approved by the heavenly religion or philosophy or man-made laws, everyone unanimously agreed on the necessity and the inevitability of the principle of punishment, the evidence of the necessity and the inevitability of the ta'zir penalties is mentioned in the Qur'an: "And there is for you in legal retribution [saving of] life, O you [people] of understanding, that you may become righteous" (Surat Al Nesa'a verse: 187).

Shariah defines punishment as (the penalty decision in the interest of the groups), thus keeping the balance that the punishment plays between the offense and the penalty, and that's what did not heed by the man-made laws.

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