

The eighth lecture

Section Three: Controls of discretionary punishment

Neither the judge nor the guardian has absolute authority in the field of discretionary punishment, but rather it is restricted so as not to deviate from the requirements of this authority granted to them in a manner inconsistent with the purposes of Islamic Sharia. Some of the restrictions on the discretionary authority relate to the criminalization aspect, while others relate to the punishment aspect when determining what qualifies as a discretionary punishment, as will be explained later.

- **The officer related to the act subject of ta'zir:** No act is suitable to be subject to ta'zir, but the act that requires ta'zir and which is carried out by the ta'zir crime requires that it meet two conditions: the first / to be a sin, and the second / to be valid for proof before the judiciary.

• **Stipulating that the act be a sin:** Sin means disobeying the commands and prohibitions of God Almighty, where the source of these commands and prohibitions is in the legitimate text contained in the Qur'an or Sunnah, as it may be extracted from the spirit of Sharia and its general principles, taking the form of a positive act if it is a breach of prohibition such as forgery, bribery and breach of trust, or the form of a negative act such as abstention resulting from a breach of an order, for example, non-payment of debt, or non-payment of zakat due Shariah, where this sin ultimately constitutes aggression against A special right of the slave or a pure right of God Almighty, by affecting a private interest such as non-performance of religion, and may also constitute an aggression against the right of God Almighty, such as abandoning prayer, and may also combine the assault on the two rights together, such as bribery, for example.

Whether the act that constitutes a sin takes the form of a positive or negative act, it may be of the same sex that requires hadd or retribution, but there is something that prevented their implementation, such as if one or more of the conditions for its application fail, such as the existence of a suspicion that prevents the application of the hadd punishment, or the stolen money does not reach the quorum or does not exist in a similar harz, or the blood guardian pardons the offender in murder, or the victim pardons the offender in crimes without the soul Whether in return or without consideration, the act that requires ta'zir may be different and different from the acts that require hadd or retribution, such as forgery or bribery, for example.

Accordingly, the act for which the ta'zir punishment is imposed is required to constitute a "sin" by which it is attacked against a legally protected interest, otherwise the act is permissible, individuals can do it without being the subject of any blame, accountability or punishment from the guardian.

In all the cases mentioned above, the sin committed by an act that constitutes a ta'zir crime may be committed by an ordinary member of society, such as breach of trust, abandonment of prayer or zakat, theft of money without the quorum or without the score or insult, and may also be committed by a public official, such as bribing the ruler or the guardian, or the injustice of the judge in his judiciary, or the arrest of a person by the public authority without right, since the principle of absolute equality adopted by the Sharia Islamism requires that all these and others like them be subject to Sharia rulings on an equal footing.

• **The requirement that the act be suitable for judicial proof:** It is required that the act carried out by the discretionary crime be capable of being a subject of judicial proof, that is, capable of establishing evidence of its commission and verifying the materiality of the crime before the judiciary along with all the circumstances and circumstances surrounding it, provided that it is This is done by following legitimate methods that respect human rights and preserve his dignity and the sanctity of his private life. These are all principles that Islamic law came to emphasize and protect, and to ensure that all human beings enjoy them equally. Therefore, it excludes any evidence obtained by violating the aforementioned rights, which is achieved by respecting Two important things are, respectively:

- ✓ Exclude spying on the private lives of individuals as a way to detect crimes, because espionage is forbidden in the Almighty's saying: "Do not spy and do not be alienated by each other."
- ✓ Adopting definitive and decisive evidence for conviction and excluding anything less than that, such as mere suspicions, evidence, or suspicions, and the suspicions that arise from them, because the Messenger of God, may God bless him and grant him peace, forbade that when he said: "Beware of suspicion, for suspicion is the most false of speech, and do not spy, and do not backbite one another." And be servants of God, brothers."
- The officer related to the punitive punishment: There are a variety of punitive penalties that the guardian may decide as a penalty for punitive crimes, as he has a wide range of choice, as he can select and choose for each crime the appropriate punishment in terms of its gravity, gravity, gravity of its damages and the extent to which it affects the

security and safety of society, and these punitive penalties include death, imprisonment, flogging, exile and fine, from which the judge or guardian chooses what he deems appropriate to the circumstances of the crime and the accused, taking into account considerations of justice and deterrence, both public and private.

On this basis, the judge and the guardian are guided in his determination of the appropriate penalties chosen by a set of controls that he must observe, the most important of which are:

- Considering ta'zir crimes less serious than hudud crimes, it logically follows that punitive penalties must be less serious than hudud penalties, and therefore the penalty of ta'zir flogging may not exceed the minimum amount of flogging limit, which is eighty lashes in the punishment of drinking and forty lashes as the punishment of drinking in some opinions.
- That the ta'zir penalty is less than the punishment of hadd if the ta'zir crime is an act that is of the type of act for which the hadd is determined, but it is less serious than it or does not meet the conditions of hadd punishment, which is stated in the hadith of the Messenger of Allah (peace and blessings of Allaah be upon him): "Whoever reaches a limit without a limit is one of the aggressors", and in application of that, it is not permissible to impose the punishment of hadd for an act that does not meet the conditions for imposing this penalty, if the guardian is punished Or the judge for an act of indecency without adultery, such as kissing or hugging, his punishment must be without the penalty of adultery, and if he is punished for slander other than adultery, such as insult or insult, his punishment must be without the penalty of slander by adultery, and if he is punished for theft that does not meet the conditions of hadd or punished for fraud or breach of trust, this punishment may not be cutting, and therefore the punishment for ta'zir in such cases must be less than the punishment for hadd punishment.

Section Four: Areas of discretion

The areas of ta'zir are multiple, which can be summarized as follows:

- ✓ Committing a sin for which no hadd punishment, retribution or blood money has been established, and which affects an interest protected by Sharia or that would corrupt the land and cause damage.
- ✓ Committing a crime of hudud crimes, and proving the insufficiency of the limit to face the gravity of the crime or the sin of the offender, so that ta'zir is added to it, until the latter achieves with the limit the deterrent penalty for the crime, such as adding alienation to the limit in adultery, and adding the suspension of the hand to cut it off in

theft, and here the punitive punishment takes the rule of complementary punishment in positive law to confront the criminal danger.

- ✓ Committing a crime that requires retribution and then pardoning the victim or his family, whether for blood money or without consideration, may be sentenced to a ta'zir penalty until it achieves alone or with blood money the deterrent penalty for the crime subject of retribution, and covers the right of God Almighty in this crime, which remains in place even with pardon, so the punitive penalty is imposed to achieve this.
- ✓ Committing a crime that requires the payment of blood money, so the victim obtains it or pardons it, so the punitive penalty may be imposed until the penalty deterrent to the crime is achieved, in addition to blood money or alone.
- ✓ Not committing a sin, but the existence of a "dangerous situation" that portends the possibility of committing a crime in the near future, as ta'zir in such a case plays the role of precautionary measure or preventive measure currently recognized in contemporary criminal policy, for example, the exile of the effeminate or those who fear women's infatuation with him, and Omar bin Al-Khattab, may God be pleased with him, eliminated Nasr bin Hajjaj.