

The ninth lecture

Section Five: The difference between punishment and ta'zir

The most important differences between hadd and ta'zir can be summarized as follows:

- ✓ Ta'zir is a punishment that is not estimated by Sharia, as it is vested in the discretionary power of the guardian, as no legal text in the Qur'an or Sunnah determines its amount or type, while the limit is a prescribed penalty by Sharia, it is determined under texts determined by its gender and amount accurately binding on the guardian and the judge alike.

- ✓ The judge has broad powers in the field of ta'zir contrary to the limit in both the two parts of criminalization and punishment, where the judge is authorized in the field of ta'zir the authority to determine the act that requires ta'zir and undertakes the criminalization and the authority to determine its punitive punishment, even if it is within a certain scope, and the judge also has the authority of analogy in the field of ta'zir if crimes and penalties are stipulated under the Islamic Penal Code, and if he does not have the authority to measure, he may determine the Quba as determined by contemporary legislative policy within the framework of the exercise of his discretionary power in the field of punishment based on the protected interest, where he enjoys this power that authorizes him to assess the appropriate punishment in the light of the available texts and according to the circumstances of the accused and the crime committed without departing from the text that determines the minimum and maximum limits within which he may move and act between them without exceeding or exaggerating, and can also decide For mitigating or aggravating circumstances according to the facts committed, and he also has the authority to suspend execution in the field of ta'zir, and therefore his powers are multiple in the field of ta'zir, but in the crimes of hudud, the various of these powers and powers are lost by the judge, but they are completely absent, as the act carried out by the crime is clearly defined, and the punishment in this case is determined by sex, type and amount in a way that the judge cannot dispose of or diligence, there is no room for the application of his discretion in such a case, if it is proven The accused commits the hadd act and is eligible for assignment and there is no suspicion preventing the hadd punishment that the judge had

to pronounce without replacing it with another penalty, and he may not aggravate or reduce its amount, nor may he suspend its execution, as is the case in the field of ta'zir.

- ✓ The guardian has the authority to pardon the punitive punishment and does not have the right to do so if it comes to the punishment of hadd punishment.

- ✓ The victim does not have pardon for the Ta'zir crime, as the punishment for it is determined for the public interest and the right of God Almighty is clear and clear, while the offender has the authority to pardon the limits in which the right of God Almighty and the right of the slave meet, as previously explained, although the jurists differed between the need to express a desire to pardon before claiming and claiming before the judiciary or not.

- ✓ The right of God Almighty is related to the punitive punishment clearly and clearly, as the guardian does not appreciate it unless the interest of society requires it through its prejudice to the public interest, the right of God Almighty is predominant in it, while in border crimes, the right of God Almighty, although it is always related to the limit, it may be based next to the right of the slave or it may be a pure right of God Almighty decided to protect the public interest, and therefore border crimes may meet the two rights together and may be unique It has the right of God Almighty, unlike the crimes of ta'zir.

- ✓ The jurists unanimously agreed on the permissibility of the fall of ta'zir crimes by statute of limitations by analogy with the permissibility of pardoning them if the guardian sees the achievement of an interest in that or to ward off damage and spoiler, while border crimes there are those who saw the inadmissibility of falling by statute of limitations and there are those who allowed their fall by statute of limitations except for the limit of slander.

The third topic: Elements of crime in Islamic legislation

The crime in Islamic criminal legislation is based on three pillars, the failure of one of which leads to its failure and thus the absence of a criminal character for the committed act. These

pillars are summarized in the legal pillar, the material pillar, and the moral pillar, as will be explained in turn.

The first requirement: the legal pillar

The legal element of a crime means the illegal character of the act, and he commits an act that violates the commands and prohibitions of Sharia. Some have considered the text containing the command or prohibition to be the legal pillar itself, although others disagreed with this opinion, considering that this text is the source of the legal pillar and not the legal pillar itself. As the source of the illegal character of the act, how can the Creator be a part of the creature, according to the same opposing opinion? The illegal character of an act does not depend solely on its being subject to the criminalization text that orders or prohibits, but rather, while being subject to the criminalization text, it must not be subject at the same time to any of the reasons for permissibility. This is because its submission to the latter takes it out of the criminalization circle and returns it to the permissibility again, and removes the illegal character from it. It is legitimate despite the application of the text of the command or prohibition to it from the beginning, which leads us to research the elements of the legal pillar until the latter is fully established.

The first section: Elements of the legal pillar

The legal element of crime in Islamic legislation is based on two elements:

- **The act violates the rule of command or prohibition**
- **The act is not subject to the rule of permissibility**

This will be explained later:

- **Violation of the act of the rule of command or prohibition:** The requirement of the act to violate the rule of command or prohibition means that the act violates a legal rule that includes an order or prohibition, otherwise it remains on its origin of permissibility, in application of the principle of "the origin of permissible things and acts", and the principle of "no rule for the actions of the wise before the text is received", which leads to limiting the sources of criminalization and punishment to the legal rules represented in the texts of the Qur'an and Sunnah and other sources of ijtihad that the judge resorts to to extract legal rulings and determine crimes Ta'zir and the penalties prescribed for it, which is known as the principle of legality of crimes and penalties, which was observed and preserved by Islamic law when determining various rulings and costs, and this

principle requires that a person can only be held accountable for acts for which an explicit text is stated in the Qur'an or Sunnah.

Islamic law preceded man-made legislation in determining the principle of legitimacy and emphasizing the need to respect and observe it much, as this principle was not known at the level of positive legislation until the end of the eighteenth century AD, while Islamic law approved it a thousand years before that in the crimes of hudud, retribution and blood money, and even in an advanced formulation in ta'zir crimes, which reflects the progress of the criminal policy adopted by Islamic law and far superior to man-made legislation, as it was keen to protect rights and freedoms. Individualism is superior to European laws and other legislation that has been quoted and to which such principles have been attributed in a great fallacy.

• **The principle of legality of crimes and penalties:** The Qur'anic verses that were mentioned regarding the report of the inventory of sources of criminalization and punishment under the rules of Sharia are many and multiple, as they were conclusively indicated, as they show infinitely accurately the act or acts carried out by the crime in preparation for determining the punishment determined by each of them, and among the verses that confirm the observance of Sharia to the principle of legitimacy is the Almighty's saying: "We were not tormented until we sent a messenger", and the words of Glory be to Him: "And your Lord did not destroy the villages until he sent in her mother a messenger to recite our verses to them", and his saying, "Lest people have an argument against God after the messengers", and his saying: "Tell those who disbelieve to end up forgiving them what has already been done", which is useful for determining the principle of "no crime or punishment except based on a text or law" accurately and clearly in Islamic law, where the scholars of the origins based on these texts clarified the rule that decides that: "It shall not be legally mandated except by a possible act, capable of the taxpayer, known to him with knowledge that complies with it," and the rule that states: "The actions of the wise shall not make sense before the text is received."

• **Sources of criminalization and punishment in Islamic law:** The rules of criminalization and punishment in Islamic law are part of the rules of Sharia in general, and then had the same sources of Islamic law, and are divided into main sources, namely the Qur'an, Sunnah, consensus and measurement, and backup sources, which are approbation, companionship, interest sent and custom, and legislated by us and the doctrine of the companion, and the support of these sources is the hadith of the Messenger of God, may God bless him and grant him peace, to Muadh bin Jabal when he was the judge of Yemen, and he said to him: "What do you spend?" Muadh said, "By the Book of Allah," he said, "If you do not find?" He said: "I will spend the

Sunnah of the Messenger of Allah", he said: "If you do not find?" The Messenger of Allah (peace and blessings of Allah be upon him) said: "Praise be to Allah, who reconciled the Messenger of Allah to what pleases Allah and His Messenger", and enters into the meaning of "ijtihad opinion" analogy and what is attached to it from other sources, especially approbation, companionship, interest sent and custom.

The principle of legality is not based on the mere existence of a text prior to the commission of the criminal act by act or omission, but that act or omission must fall within the scope of the authority of the text, that is, the latter is valid for application to the act temporally, spatially and personally, which are the limits that control the scope of application of the text, the act or omission is not considered illegal according to that text unless it falls within the temporal, spatial and personal limits of its application, but if it comes out on one of them by committing it at a time that does not The text is in force, or in a place where it is not applied, or if the perpetrator is not subject to his judgment, the act is not described as illegal, as will be explained below by clarifying the scope of application of the Sharia criminal text in terms of time, place and persons respectively: