

Ta'zir and Restorative Justice: Alternative Punishments from an Islamic Perspective

Riva Mutiara¹, Aprilia Yoshinta Putri², Muhammad Rivan Viawan³

Hukum Keluarga Islam, Fakultas Syariah, Universitas Islam Negeri Prof K. H. Saifuddin Zuhri Purwokerto

Email : 234110302104@mhs.uinsaizu.ac.id,

234110302078@mhs.uinsaizu.ac.id, 234110302099@mhs.uinsaizu.ac.id³

Abstract

This study examines ta'zir punishment as a form of punishment in Islamic law that is adaptive and upholds humanitarian values. The study was conducted using a qualitative, descriptive, and normative approach, through a literature review of primary sources such as the Qur'an, Hadith, and works of previous scholars, supported by contemporary academic literature. The findings show that ta'zir punishment is imposed on violations that are not expressly regulated in the holy text, with the determination of sanctions left to the judge's consideration through *ijtihad*, referring to justice, public interest, and social context. This concept emphasizes the importance of personalizing punishment, orientation towards the recovery of the perpetrator, and balance between action and sanctions, so it is in line with the restorative justice approach in the current criminal system. The conclusion of this study confirms that the principles of ta'zir can inspire modern criminal law reform, especially for cases that require non-punitive handling, as long as they adhere to the principles of legality and respect for human rights.

Keywords: Ta'zir, Islamic Criminal Law, Human Rights

Kajian ini mengulas pidana ta'zir sebagai salah satu bentuk pemidanaan dalam hukum Islam yang bersifat adaptif dan menjunjung tinggi nilai-nilai kemanusiaan. Penelitian dilakukan dengan pendekatan deskriptif kualitatif dan bersifat normatif, melalui telaah pustaka terhadap sumber utama seperti Al-Qur'an, Hadis, dan karya-karya ulama terdahulu, serta didukung oleh literatur akademik kontemporer. Temuan menunjukkan bahwa pidana ta'zir dikenakan terhadap pelanggaran yang tidak secara tegas diatur dalam teks suci, dengan penetapan sanksinya diserahkan kepada pertimbangan hakim melalui *ijtihad* yang mengacu pada keadilan, kemaslahatan umum, dan konteks sosial. Konsep ini menekankan pentingnya personalisasi hukuman, orientasi pada pemulihan pelaku, dan keseimbangan antara tindakan dan sanksi, sehingga sejalan dengan pendekatan keadilan restoratif dalam sistem pidana masa kini. Kesimpulan dari penelitian ini menegaskan bahwa prinsip-prinsip ta'zir dapat menjadi inspirasi dalam reformasi hukum pidana modern, terutama untuk kasus-kasus yang menuntut penanganan non-punitive, selama tetap berpegang pada asas legalitas dan penghormatan terhadap hak asasi manusia.

Kata Kunci: Ta'zir, Hukum Pidana Islam, Hak Asasi Manusia

Introduction

In everyday life, people often encounter conflicts with others, which can sometimes lead them to commit acts that violate criminal law. The inherent nature of humans, various forms of crimes, and their legal sanctions have already been depicted in the Qur'an and Hadith. However, due to humans' complex and ever-changing nature, the forms of crime and the characteristics of the perpetrators also evolve. Therefore, not all criminal acts and punishments are explicitly stated in sacred texts. These types of violations are categorized as offenses that are subject to ta'zir punishment.

Maintaining public welfare and upholding justice are essential components in Islamic law. Ta'zir punishment is one of the legal sanctions within this system, distinguished from hudud and qisas by its unique characteristics. In Islamic law, ta'zir refers to the sentence imposed by a judge for violations that are not directly regulated in the Qur'an and Hadith. Thus, the determination of ta'zir punishment is highly dependent on the ijtihad (juridical discretion) and wisdom of the authoritative body, considering principles of justice, public utility, and the prevailing social conditions.

The primary goal of ta'zir is not merely retribution but restoring order and preventing future harm. In comparison to hudud (punishments explicitly prescribed by the Qur'an for certain crimes) and qisas (punishments for personal injury or death), which have fixed parameters, ta'zir offers flexibility. The judge considers the gravity of the offense, the social impact, and the personal circumstances of both the perpetrator and the victim. The punishment, therefore, seeks to align with the maqāṣid al-sharī'ah (objectives of Islamic law), which aim to protect religion, life, intellect, lineage, and property.

Practically, ta'zir punishments are varied and can range from admonition, written warnings, or social work, to fines, restrictions of certain rights, or even detention or exile. This variability ensures that the punishment is appropriate, contextually relevant, and does not exceed the scope of hudud punishments. In modern contexts, judicial discretion in ta'zir could lead to penalties such as mandatory ethical training for

those spreading false information, rehabilitation programs for domestic violence offenders, progressive fines, or restorative mediation for victims of economic crime. The goal is not just retribution but the restoration of social order, the rehabilitation of the offender, and the restitution of the victim's harm, three interconnected aspects that reinforce each other.

Since its determination relies on discretion, ta'zir demands strict ethical and procedural guidelines. At least four key principles should be followed: first, justice and proportionality the punishment must be in proportion to the offense and the harm it caused; second, utility the penalty should bring about deterrence and tangible social benefits; third, prevention and education ta'zir should aim to prevent the reoccurrence of the crime through moral teaching and behavioral correction; fourth, procedural certainty the judgment should follow a legitimate process that respects the rights of the defendant and the victim, and it should be open to review to prevent arbitrariness. With these principles, the flexibility of ta'zir is not an opening for arbitrary decisions, but rather a legal tool that is both agile and accountable.

In conclusion, ta'zir bridges the divine norms that provide eternal guidance and the practical needs of a changing society. It ensures that Islamic law remains dynamic: firm when necessary, flexible when wise, and oriented toward public welfare and justice.

Methods

This study employs a descriptive qualitative research method and a normative approach within legal studies. The research was conducted through a literature review, which involved examining and analyzing various sources related to Islamic law, fiqh books, scholarly articles, and other academic materials relevant to the theme of ta'zir punishment. The normative approach is used to analyze the foundation of the enforcement of sharia law concerning ta'zir punishment as outlined in the Qur'an, the views of scholars, and Hadith. In this study, the Qur'an is used as the primary source, serving as one of the primary data sources, along with Hadith and the works of classical scholars such as Sayyid Sabiq, Wahbah al-Zuhaili, and Abdul Qadir Audah. Meanwhile, secondary data is obtained from scholarly articles, contemporary books, and previous studies that provide foundational insights. The data collection

technique employed is documentary research, which involves gathering and reviewing relevant written documents and sources. After collection, the data is analyzed to understand the concept, legal foundation, and significance of ta'zir punishment in Islamic criminal law and its relationship with principles of justice and human values within modern law.

Result and Discussion

Ta'zir Punishment in Islamic Law and the Arguments Underlying the Existence of Ta'zir Punishment

Ta'zir etymologically means al-man'u, which can be interpreted as a preventive action. Azzara comes from the root word ta'zir, which means to reject and avoid (man'u wa radda). This term can also be understood as educating (addaba) or respecting and honoring (Syarbaini, A., 2023).

Ta'zir is mentioned in both the Qur'an and Hadith, referring to a form of legal action for violations not explicitly regulated in these two sources. The determination of ta'zir sanctions becomes the authority of the competent authorities, considering the principles of justice, public welfare, and prevailing social norms. The ta'zir system offers flexibility in determining appropriate forms of punishment, based on the offender's fault level, rehabilitation goal, and efforts to maintain public order. Punishment in ta'zir can include the death penalty, flogging, Imprisonment, exile, revocation of rights, social ostracism, insults, threats, tasyhīr (publicizing disgrace), and fines.

Etymologically, the term ta'zir carries the meaning of rejecting and stopping. In linguistic terms, ta'zir means al-man'u, which refers to forbidding or stopping something. Moreover, ta'zir can also be understood as al-naṣrah, meaning assistance, because someone who helps prevents harm or threats from those seeking harm. Over time, the broader understanding of ta'zir is al-ta'dīb, which means fostering or education. Thus, the purpose of ta'zir sanctions is intended as a means to guide and educate the offender to reform and not repeat their actions.

In Islamic law, ta'zir is a punishment imposed by the government (imam) for criminal acts or sins that are not explicitly mentioned in religious teachings, or for offenses where the prescribed punishment is not applicable. Examples include cases of theft that do not meet the criteria for hand amputation. These

criminal acts do not meet the conditions for qisas, lesbian behavior, or accusations against someone without valid evidence (Syarbaini, 2023).

The legal basis for the punishment of individuals committing jarimah ta'zir is grounded in the principle at-ta'zir yadurru ma'a al-mashlahah, meaning that when determining ta'zir punishment, the consideration of public benefit is the primary basis, while maintaining the principle of social justice. The Qur'an serves as a reference for the existence of ta'zir offenses, according to Syarbaini al-Khatib, in Surah Al-Fath, verse 9:

لَتُؤْمِنُوا بِاللَّهِ وَرَسُولِهِ وَتُعَزِّرُوهُ وَتُوَقِّرُوهُ وَتُسَبِّحُوهُ بُكْرَةً وَأَصِيلًا

So that you may believe in Allah and His Messenger, strengthen His religion, exalt Him, and glorify Him in the morning and evening. (Q.S. Al-Fath [48]:9).

Based on A. Hasan's translation, as referenced by Haliman, the word watu'azziroohu is interpreted as "and so that you may strengthen (your religion)." Syarbini al-Khatib explains that one way to achieve this goal is to prevent the actions of Allah's enemies. Meanwhile, in Jarimah Ta'zir, there is a hadith that serves as the basis for its existence, namely:

1. From Bahz ibn Hakim, his father, and his grandfather, that the Prophet (peace be upon him) imprisoned a man suspected of committing a crime. (Narrated by Abu Dawud, Tirmidhi, Nasa'i, and Baihaqi, and authenticated by Hakim).
2. From Abu Burdah Al-Ansari (may Allah be pleased with him), that he heard the Messenger of Allah (peace be upon him) say: "No one should be flogged with more than ten lashes except in the punishment prescribed by Allah, the Exalted." (Muttafaq Alaih).
3. From Aisha (may Allah be pleased with her), that the Messenger of Allah (peace be upon him) said: "Relieve those with good conduct from their mistakes, except for the prescribed punishments (hudud)." (Narrated by Ahmad, Abu Dawud, Nasa'i, and Baihaqi).

Broadly speaking, these three hadiths confirm the existence of ta'zir sanctions from an Islamic perspective. The explanation is as follows:

The first Hadith depicts a situation where an individual is suspected of committing a criminal act, and the Prophet (PBUH) orders his detention to facilitate the investigation process. Without such detention, the suspect might escape, destroy evidence, or continue to commit the crime.

- 1) The second Hadith discusses the limitation of ta'zir punishments, stating that they should not exceed ten lashes to distinguish them from the hudud punishments. This limitation clearly categorizes the types of offenses: hudud and ta'zir, each with distinct criteria.
- 2) The third Hadith elaborates on the flexibility of ta'zir punishment, emphasizing that it should align with the offender's status and other relevant considerations.

Ta'zir refers to offenses that incur a punishment different from hudud, qisas, or diyat. It is characterized by its flexibility, with punishments varying based on the discretion of the judge or ruler. There is no fixed limit to the sentence for ta'zir, and judges have the authority to determine the appropriate penalty, ranging from mild to severe. Therefore, the judge is entrusted with the responsibility to impose the most fitting punishment, always prioritizing public welfare while ensuring the protection of individuals from harm, without compromising the Sharia values.

Different schools of thought (madhahib) have distinct views regarding the implementation of ta'zir punishments:

1. The Maliki and Hanbali schools hold that ta'zir punishments must be executed like hudud penalties, serving as a warning to uphold Allah's rights. Consequently, rulers or leaders must enforce them.
2. According to the Shafi'i school, executing ta'zir punishments is not obligatory. A ruler or leader can decide not to impose it, particularly when the offense does not directly affect fundamental human rights.
3. The Hanafi school states that enforcing ta'zir is mandatory when it concerns the rights of individuals. In this case, the judge cannot grant forgiveness because the owner can only waive such rights. However, regarding Allah's rights, the judge can decide. If the judge believes that imposing the punishment would bring benefit, they must enforce it. However, if the judge is convinced that no benefit will result, they can refrain from issuing the penalty and offering leniency to the offender. Ibn al-Hammam stresses that it is the imam's duty to enforce ta'zir penalties related to Allah's rights, which cannot be neglected unless the penalty does not bring benefit.

The primary goal of ta'zir is to correct or educate. Hence, while the number of lashes may be reduced, the punishment should not be eliminated.

Enforcing ta'zir for violations of sharia is not limited to the ruler or judge alone. Other authorities can also carry it out, such as parents disciplining their children, husbands correcting their wives, and teachers guiding their students. However, those imposing such punishments must always consider the offender's safety, unless the ruler or judicial authority directly handles the case. Directing or warning cannot be performed by anyone other than the imam, entrusted with such responsibilities. This aligns with the Hadith narrated by Abu Huraira, in which the Prophet (PBUH) said, "The imam is a guardian. Behind his leadership, the people fight their enemies. If he leads with righteousness and fairness, he deserves a reward. But if he is unjust, he will bear the sins of his leadership" (Sahih Muslim, Kitab Al-Imarah).

Ta'zir punishments can take various forms, from light to severe penalties. The judge has the authority to select the appropriate sentence, considering the offense's nature and the offender's background. Types of ta'zir punishments include:

Death Penalty

In cases of intentional murder, the death penalty is imposed as qisas, and it also applies to serious offenses such as armed robbery (hirabah), adultery by a married person (muhsan), apostasy (riddah), and rebellion. However, opinions differ regarding the application of the death penalty for ta'zir offenses. The Hanafi school permits the death penalty for ta'zir under certain circumstances, especially when the offense is repeated or when the crime warrants a severe punishment. Examples include ongoing theft or insults against the Prophet (PBUH) that are repeated by a dhimmi who has converted to Islam.

The Maliki school also allows the death penalty for serious offenses like espionage and large-scale destruction. Some Hanbali scholars, including Imam Ibn Uqail, share similar views. In contrast, certain Shafi'i scholars permit the death penalty for cases involving the propagation of teachings that contradict the Qur'an and Sunnah.

Regarding the means of execution, while the use of a sword is commonly preferred, some scholars also consider the use of other methods, like the electric chair. Most scholars, however, favor the sword due to its perceived efficiency and ability to cause swift death without prolonged suffering (Muslich, 2005, p. 260).

Lashing (Dera)

Lashing is typically carried out using a moderate-sized whip or stick. Imam Ibn Taimiyyah emphasized that the instrument used should not be too severe. However, scholars have differing views about the intensity of the lashes for ta'zir. The Hanafi school believes that lashes in ta'zir should be harsher than those imposed for hudud, aiming to have a more substantial deterrent effect, especially since the number of lashes in ta'zir is usually fewer. Conversely, scholars from other schools treat the manner of execution in ta'zir similarly to that in hudud.

It is advised that lashes should not target the face, head, or vital organs, but instead focus on the back. Imam Abu Yusuf warned that lashes should not be directed to the chest or abdomen, as this could cause serious injury. This shows that the intent of lashing is not to cause permanent injury or harm the offender's life, but to instill fear and educate, not to torture.

Imprisonment

In Arabic, Imprisonment is referred to as *al-habsu*, meaning confinement or prevention. Imam Ibn al-Qayyim al-Jawziyah explained that *al-habsu* in sharia is not merely detaining someone in a confined space but is meant to prevent them from continuing unlawful behavior, whether at home, in a mosque, or elsewhere. Scholars disagree on the duration of Imprisonment, and there is no universally agreed-upon maximum period for detention in ta'zir cases.

Exile

Exile is another form of ta'zir punishment, often applied to individuals whose behavior negatively impacts society, such as mukhannats (effeminate men) during the time of the Prophet (PBUH), who were expelled from Medina. This punishment can also apply to those who falsify the Qur'an. Exile serves to remove the individual from the community to prevent further harm. Scholars differ on the duration of exile, with some schools setting a one year limit, while others, like Imam Abu Hanifah, allow for more extended periods. Exile is considered a ta'zir punishment, not a hudud punishment, which grants flexibility in its implementation.

Fines

Some scholars, such as Imam Abu Hanifah and Muhammad, oppose using fines as a ta'zir punishment, while others, like Imam Shafi'i, Abu Yusuf, Imam Ahmad, and Imam Malik, permit it. Those who allow fines have differing opinions on their application, with some believing that fines were permissible only during the early Islamic period but are no longer applicable due to potential abuse of power by authorities. However, most scholars reject this view, citing instances from the time of the Prophet (PBUH) and the rightly guided caliphs, where fines were imposed for offenses, such as the destruction of alcohol and the increased fines for stolen fruit.

In conclusion, Islamic law permits fines as ta'zir punishment, though scholars disagree on the specifics, including the minimum and maximum amounts. Fines are typically imposed for offenses related to wealth or economic value, although some scholars argue that theft-related crimes should result in Imprisonment instead.

The Concept of Ta'zir as a Form of Punishment that Upholds Human Values

In Islamic criminal law, ta'zir is a sanction or penalty that carries an educational value imposed by an authority, such as a judge or head of state, on a human rights violator. This punishment is not explicitly detailed in the Qur'an and Hadith (Hanifuddin, 2020). Unlike hudud, which has clearly defined penalties (hadd), ta'zir allows the judge to decide the level and type of punishment based on the circumstances of the offender, the victim, and society (Audah, 1992).

Ta'zir has several fundamental principles that reflect humanitarian values. First is the principle of the individuality of the sanction, where the punishment is tailored to the offender's personal circumstances, including age, social background, education level, and the reason for the action (al-Zuhayli, 2005). Second, the rehabilitative goal, which emphasizes moral and behavioral improvement of the offender rather than mere retribution. Third, proportionality between the crime and the punishment, to prevent injustice or excessive cruelty (Muslehuddin, 2005). Fourth, ta'zir also considers the aspect of prevention for both the offender and society at large, as well as the restoration of social relations that the crime may have disrupted.

In practice, ta'zir can take the form of warnings, advice, financial penalties, social activities, temporary exclusion, or light physical punishment that does not threaten life (Sabiq, 2005). This flexibility allows law enforcement to determine the most appropriate and humane sanction based on the context of the case. The concept of ta'zir also respects the principles of repentance and forgiveness, where an offender who shows remorse and a willingness to change may receive a reduced punishment. This reflects Islam's positive perspective on the human capacity for transformation and self-improvement (Munajat, 2009).

The Relevance of Ta'zir Punishment in the Context of Contemporary Criminal Law

In contemporary criminal law, ta'zir is relevant because it addresses the challenges of the modern justice system, which has shifted from a retributive approach to a more holistic and humane direction (Garland, 2001). Ta'zir, as a flexible punishment in Islamic legal tradition, provides a theoretical and practical framework that aligns with current developments in criminology and victimology (Zehr, 2005). The concept of ta'zir shows significant compatibility with contemporary criminal law theory, especially in terms of individualized punishment. The principle of individualization in ta'zir aligns with the idea of individualization of punishment in modern judicial systems, emphasizing the importance of considering the offender's personal factors, social conditions, and the goals of punishment.

Additionally, the rehabilitative orientation of ta'zir is consistent with restorative justice theory, which focuses on restoring social relationships and reintegrating the offender into society. This approach differs from traditional punitive models that focus more on retribution and instead emphasize rehabilitation and preventing future crime. The flexibility in ta'zir allows the legal system to respond to emerging forms of crime, such as cybercrime, corporate crime, and environmental crime. The principle of ta'zir, which is not bound by rigid punishments, provides room for innovative sanctions that are more effective.

The concept of ta'zir is also relevant to developing alternative dispute resolution (ADR) in contemporary courts, such as penal mediation, diversion, and plea bargaining, which share philosophical similarities with the ta'zir

approach that prioritizes constructive conflict resolution. The practical relevance of ta'zir is evident in innovations in contemporary sentencing systems. Programs such as community service, electronic monitoring, and drug courts reflect the spirit of ta'zir, emphasizing the effectiveness and proportionality of punishment. The therapeutic jurisprudence approach in the criminal justice systems of the U.S. and several other countries also shows similarities with the principles of ta'zir.

In Indonesia, the implementation of ta'zir can be seen in the development of the juvenile justice system, which emphasizes diversion and restorative justice, as well as the application of alternative sanctions such as community service and rehabilitation outside correctional facilities. This demonstrates that the values of ta'zir can be applied in contemporary criminal law practice without adopting the entire Islamic legal system. However, the application of ta'zir principles in modern criminal law faces challenges, such as the need for a clear regulatory framework to prevent arbitrariness, the development of law enforcement capacity, and harmonization with key concepts in modern criminal law, such as the principle of *nullum crimen sine lege*. The prospects for developing ta'zir require a comparative approach that combines traditional wisdom with international human rights standards.

Conclusion

In the Islamic legal system, ta'zir represents a flexible form of punishment focused on humanitarian values, as fixed penalties like hudud or qisas do not bind it. It is applied to violations not explicitly stated in the Qur'an or Hadith, with its determination left to the discretion of the judge or relevant authority, considering justice, societal welfare, and social context. The implementation of ta'zir reflects respect for humanity by considering the offender's characteristics, aiming for rehabilitation, and maintaining a balance between the offense and the punishment. This approach aligns with modern criminal law, which shifts from pure retribution to more restorative and corrective methods. Beyond its role in Islamic law enforcement, ta'zir is relevant in contemporary criminal law, especially in handling juvenile offenses, emerging crimes, and social reintegration programs. Additionally, it aligns with alternative dispute resolution mechanisms like penal mediation and diversion. Therefore, the

principles of ta'zir can guide current penal system reforms while respecting legal and human rights principles.

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