SIYASAH WA QANUNIYAH: JURNAL ILMIAH MA'HAD ALY RAUDHATUL MA'ARIF
ISSN : 2987-8748/e-ISSN : 2987-7415
Volume 3: Number 1, June 2025
https://jurnal.mahadalyraudhatulmaarif.ac.id/index.php/Siyasah_wa_Qanuniyah
Doi: https://doi.org/10.61842/swq/v3i1.42

Submitted :	*Accepted: 21-06-2025*	*Published: 25-06-2025*

FUQAHA' PERSPECTIVE ON GOVERNMENT AUTHORITY IN FORMULATING *TA'ZĪR* PENALTY

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Abstrak: *Penelitian ini ingin mengkaji pemikiran para fukaha' tentang perumusan ta'zīr oleh pemerintah. Selama ini ta'zīr dipahami sebagai bentuk hukuman yang tidak terbatas, penetapannya tidak mengacu kepada suatu peraturan yang baku. Apabila terjadi suatu tindak pidana ta'zīr , maka saat itu pemerintah berijtihad menetapkan hukuman yang patut bagi perbuatan tersebut. Kondisi seperti ini tidaklah relevan dengan kontek penegakan hukum di zaman sekarang. Penelitian ini menggunakan dua pendekatan sebagai dasar analisis: 1) sosio-historik, yaitu memahami perumusan hukum pidana ta'zīr yang dilakukan oleh fuqaha' dari periode silam sampai dengan periode sekarang. 2) content analysis, yaitu analisa terhadap teks-teks fiqh dan ilmu hukum positif. Langkah ini bertujuan mendapatkan dasar atau sarana yang telah tersedia dari khazanah keilmuan untuk bisa memahami tentang perumusan hukum pidana ta'zīr oleh pemerintah. Hasil penelitian bahwa ta'zīr merupakan suatu hukum pidana menyangkut perbuatan pidana dan hukuman yang harus melalui proses perumusan terlebih dahulu sebelum diterapkan. Pidana ta'zīr yang dibuat harus memenuhi kriteria suatu peraturan yang layak untuk diterapkan.*

Kata Kunci: Fuqaha'; Pemerintah; Ta'zir

Abstract: This research aims to examine the thoughts of the jurists regarding the formulation of *ta'zīr* by the government. So far, *ta'zīr* has been understood as a form of unlimited punishment; its determination does not refer to a standard rule. If a crime of *ta'zīr* occurs, the government undertakes ijtihad to determine the appropriate sentence for the act. Conditions like this are not relevant to the context of law enforcement today. This research uses two approaches as a basis for analysis: 1) socio-historical, namely understanding the formulation of *ta'zīr* criminal law carried out by fuqaha' from the past to the present period. 2) Content analysis, namely, analysis of fiqh texts and positive legal science. This step aims to obtain the basis or tools available from the scientific treasures to

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understand the formulation of the *ta'zīr* criminal law by the government. The research results show that *ta'zīr* is a criminal law concerning criminal acts and punishments which must go through a formulation process before being implemented. The *ta'zīr* penalty that is made must meet the criteria of a regulation that is suitable to be implemented.

Keywords: Fuqaha'; Government; Ta'zir

INTRODUCTION

The criminal acts committed by humans are not limited to *hudūd* and *qisās/diyat*, but apart from these, there are countless other forms of crime with various modes. Every day, the number and type of criminal acts increase over time. So the scholars made a new legal formulation called *ta'zīr* , a criminal offence outside the *hudūd* and *qisās/diyat* category.[1] The jurists of each school generally explain that the formulation of *ta'zīr* is the duty of the government. As a party with full authority, the government can determine the types of acts that fall within the jurisdiction *of ta'zīr* and the punishment, ranging from the simplest to the most complicated.

However, in the matter of *ta'zīr* , there are still problems that must be clarified. So far, *ta'zīr* has been mentioned as a punishment for criminal acts outside *hudūd* and *qisās*, without detailing the acts one by one and the form of punishment. In fact, this criminal act should first be determined by the government and outlined in the form of regulations so that it becomes a reference for every judge in their judgment. In addition, the community also knows what acts are classified as the crime of *ta'zīr* so that they do not do it. Implicitly, *ta'zīr* , *hudūd* and *qisās/diyat* have the same goal, which is to try to get people to avoid all these acts because there are punishments to be received. However, in terms of clarity in the form of criminal acts, punishment and determination, all three have differences. *Hudūd* and *qisās/diyat* have been clearly formed based on the explanation of the nas, but *ta'zīr* is entirely delegated to the government to establish them. Therefore, the government must formulate the punishment of *ta'zīr* clearly as well as *hudūd* and *qisās/diyat*. The principle of law requires that it be clear, simple, and easy to review, arranged in an orderly, logical, and harmonious manner, and have a certain and definite nature. [2]

From the above background, it can be understood that the formulation of the criminal act *of ta'zīr* by the government still has problems that must be studied. The formulation of the criminal *ta'zīr* needs to be examined in its true form to see the extent of the government's duty in

[1] Munadi, "QISĀS DAN HUDŪD SERTA RELEVANSINYA DENGAN HAK ASASI MANUSIA," *Tahqiqa* 1, no. 7 (2020): p. 20.

[2] Bambang Poernomo, *Asas-Asas Hukum Pidana* (Jakarta: Ghalia Indonesia, 2021).

dealing with this criminal act. So this study tries to answer this problem by examining the concept of the formulation of *ta'zīr* according to *fuqaha'*.

METHODS

This research is normative qualitative.[3] namely research that wants to express the legal thoughts of the fuqaha' regarding the formulation of *ta'zīr* . This research uses a literature research method, namely searching library data in various books and books that discuss *ta'zīr* issues. Two approaches are used in this study, namely 1) socio-historical, which aims to understand the formulation of the criminal act of *ta'zīr* carried out by scholars from the past to the present. This approach aims to see the similarities and differences of the explanations put forward by each scholar. 2) *Content analysis* of fiqh texts and positive legal science. This step aims to obtain the basis or means that have been available from scientific treasures to be able to understand the formulation of *the crime of ta'zīr* by the government. Among the treasures that need to be considered are the explanation of fiqh jinayah in Islamic law and the theory of the formulation of criminal acts in positive legal science.[4]

RESULTS AND DISCUSSION

Definition of *Ta'zīr*

Etymologically, the word *ta'zīr* is a mashdar from the verb 'azzara, which means to teach or hit someone with a strong blow.[5] In the dictionary of fiqh terms, *ta'zīr* means to reject *(ar-raddu)*.[6] Meanwhile, according to the Encyclopedia of Islamic Law, *ta'zīr* means to reproach, reprimand, prevent, prohibit, punish, and beat.[7] According to 'Abdul 'Aziz Amir in Ahmad Wardi Muslich, *ta'zīr* in language is to reject and prevent *(ar-raddu wa al-man'u)*.[8] According to 'Atiyah Mustafa Musyarafah, *ta'zīr* is to denounce and educate.[9] According to Abī Ishak al-Shayrazī, *ta'zīr* is a teaching *(ta'dib)* and an insult *(ihānah)*.[10] Meanwhile, according to Haliman, *ta'zīr* is a form

[3] Cik Hasan Bisri, "Model Penelitian Fiqh, Paradiqma Penelitian Fiqh dan Fiqh Penelitian" (Jakarta: Prenada Media, 2000), p. 87.

[4] Bambang Sunggono, "Metodelogi Penelitian Hukum" (Jakarta: Raja Grafindo Persada, 2019), p. 34.

[5] Luis Ma'luf, "Al Munjid fi al Lughat wa al 'Alam" (Beirut: Darul Masyriq, n.d.), p. 503.

[6] M. Abdul Mujied, "Kamus Istilah Fikih" (Jakarta: Pustaka Firdaus, 2003), p. 454.

[7] Abdul Azis Dahlan, "Ensiklopedi Hukum Islam" (Jakarta: Ichtiar Baru Van Hoeve, 2000),p. 75.

[8] Ahmad Wardi Muslich, "Pengantar dan Asas Hukum Pidana Islam" (Jakarta: Sinar Grafika, 2003), p. 102.

[9] 'Atiyah Mustafa Musyarrafah, "Al-Qadha fi al-Islam" (Beirut: Syirkah al Syarq al Awsat, n.d.), p. 149.

[10] Ishak al Syairazī, "al-Muhazzab fi Fiqhi Mazhab al-Imam Asy-Syafi'" (Beirut: Darul Fikr, 2000), p. 404.

of mashdar from *fi'il madhi 'azzara,* which means to refuse.[11]

As for terminology, scholars give different definitions of *ta'zīr* . According to Khatib Syarbaini;

تَعْزِيْرُ هُوَ تَأْدِيْبُ عَلَى ذَنْبِ لَا حَدَّ فِيْهِ وَلاَ كَفَارَةَ

Meaning: *Teaching (punishment) against sins (mistakes) that do not have a punishment of limitation and kifārat.*[12]

According to 'Abdul Qadir 'Awdah;

التَعْزِيْر : تَأْدِيْبُ عَلَى ذُنُوْبِ لَمْ تُشَرَّعْ فِيْهَا الْحُدُوْدُ

Meaning: *Teaching (punishment) for sins (mistakes) that are not determined by the Shari'ah for him hudūd.*[13]

'Abdul 'Azis Amir, as quoted by Syahrizal in his book *The Dimension of Legal Thought in the Implementation of Islamic Sharia in Aceh*, *ta'zīr* is *"Punishment that is not determined in magnitude (level). It is the right of Allah SWT, or the right of man, and it is a violation (criminal act) that has no limits and kaffarah."*[14]

Fathi Duraini, as quoted by Abdul Azis Dahlan in the Encyclopedia of Islamic Law, stated that:

> *"Ta'zîr is a punishment that is handed over to the ruler to determine its form and degree in accordance with the benefits that require the achievement of the purpose of sharia' in establishing the law for all forms of vices (criminal acts) either by abandoning orders or violating prohibitions, all of which do not fall into the category of had, kifārat and qisās/diyat. These violations are related to the rights of Allah SWT in the form of disturbances to the general public, security situations, applicable laws or norms, or violations related to the rights of individuals in the community".*[15]

According to Haliman, *ta'zīr* is *"A lesson (ta'dib) against an offence that has no punishment. This teaching can be done in various ways such as beating, insulting, reprimanding and so on, depending on the judge's view on this matter."*[16] Another definition of *ta'zīr* as stated by Rahmat Hakim is *"A form of punishment whose level of punishment is not stated by the sharia' and becomes*

[11] Haliman, "Hukum Pidana Syariat Islam Menurut Ajaran Ahlussunnah" (Jakarta: Bulan Bintang, 2000), p. 130.

[12] Syarbainī al Khatib, "Mughni Muhtaj Ila al-Ma'rifat al Ma'ani al-Alfadh al Minhaj" (Kairo: Mustafa al Babi al Halabi wa Awladuh, n.d.), p. 191.

[13] Abdul Qadir 'Awdah, "Al-Tasyri' al Jinai' al Islami Muqaranah bi al Qanun al Wad'i" (Beirut: Mu'assasah Al Risalah, n.d.), p. 685.

[14] Syahrizal, "Dimensi Pemikiran Hukum dalam Implementasi Syariat Islam di Aceh" (Banda Aceh: Dinas Syariat Islam, 2007), p. 143.

[15] Abdul Azis Dahlan, "Ensiklopedi Hukum Islam."

[16] Haliman, "Hukum Pidana Syariat Islam Menurut Ajaran Ahlussunnah."

the power of waliyyul amri (ruler) or judge".[17]

Of the various definitions of *ta'zīr* Above, it can be seen that the definition given by scholars is generally different, but the difference only revolves around the editorial level, while the substance is the same. So *ta'zīr , it can be understood as a punishment outside the had, qisās/diyat and kifārat,* which is not determined in the form and extent in the Shari'a. Meanwhile, the authority to determine it is handed over to the government.

The scope of the crime of *ta'zīr* is very broad, namely criminal acts that are not punished with *hudūd*, *qisās/diyat* and kifārat, both criminal acts concerning the rights of Allah SWT and individual rights.[18] The definition of Allah's right as stated by Mahmūd Syaltūt is:

مَا تَعَلَّقَ بِهِ النَفْعُ الْعَامُ لِلْجَمَاعَةِ الْبَشَرِيَةِ ، وَلَمْ يَخْتَصُّ بِوَاحِدٍ مِنَ النَّاسِ

Meaning: *A right whose benefits return to society and are not specific to a person or humans.*[19]

Meanwhile, what is meant by individual rights is a right whose benefits return to an individual from society, not society in general. This is as stated by Mahmūd Syaltūt, namely:

مَا تَعَلَّقَ بِهِ نَفْعٌ خَاصٌّ لِوَاحِدٍ مُعَيَّنٍ مِنَ النَّاسِ

Meaning: *A right whose benefits return to a certain person.*[20]

Ta'zīr is a punishment that is a lesson for the perpetrator of a criminal act so that he will no longer repeat the act. *Ta'zīr* can also be mentioned as a preventive effort to overcome criminal acts in society. Acts that fall into the criminal act *of ta'zīr* include the rights of Allah and human rights. The punishment for the crime of *ta'zīr* is also unlimited, because the Shari'ah does not regulate it in detail. The determination *of ta'zīr* is completely left to the government through the consideration of maslahat.[21]

The government can designate any act as a *criminal act of ta'zīr* as long as the act meets the criteria for the crime of *ta'zīr* —likewise, the form and rate of punishment for these acts. The government can also grant pardons to perpetrators if it is considered worthy of being given. So the government's decision in the criminal *ta'zīr* is related to the situation and conditions of the perpetrator, victim and others. The judge's decision in

[17] Rahmat Hakim, *Islamic Criminal Law (Fiqh Jinayah),* Cet. I, (Bandung: Pustaka Setia, 2000), p. 141.

[18] Al Suyuthi, "Asybah wan Nadhair" (Beirut: Darul Fikr, n.d.), p. 745.

[19] Mahmud Syaltut, "Al-Islam 'Aqidah wa Syariah" (Kairo: Dar Al-Qalam, n.d.), p. 296.

[20] Mahmud Syaltut.

[21] Ahmad Wardi Muslich, "Pengantar dan Asas Hukum Pidana Islam."

deciding *the ta'zīr* case is conditional.[22]

The Importance of *Ta'zīr*

In principle, *ta'zīr* differs from *hudūd* and *qisās/diyat* in terms of the review of evidence. *Qisās/diyat* and *hudūd*, as we know, are two forms of punishment that have clear evidence, because the Qurān and Hadīs have explained these two crimes in relative detail. In contrast to *ta'zīr* , there is no specific evidence that concretely mentions it.[23] However, there are several general postulates that can be used as the basis for determining and implementing the crime of *ta'zīr* .

Ibn Hajar Askalani in the chapter *of ta'zīr* establishes two Hadiths as the basis of the law of *ta'zīr* , the first Hadith narrated from Abī Burdah Ansarī which reads:

عَنْ أَبِي بُرْدَةْ الأَنْصَارِى رَضِيَ اللهُ عَنْهُ اَنّهُ سَمِعَ رَسُوْلَ اللهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ يَقُوْلُ: لاَيُجْلَدُ فَوْقَ عَشَرَةِ أَسْوَاطٍ إِلاَّ فِى حَدٍّ مِنْ حُدُوْدِ اللهِ تَعَالَى. (مُتَّفَقٌ عَلَيْهِ)

Meaning: *From Abi Burdah Ansari ra, he once heard the Prophet PBUH say: "Do not punish more than ten lashes, except only in the execution of the punishment that has received the blessing of Allah SWT" (Muttafakun 'alaihi).*[24]

The above hadith implicitly shows that in addition to the punishment of the limit, there are also other punishments that are recognised by the Sharia. The hadith legalises the punishment of whipping in addition to hudud with a number not exceeding ten lashes. Even if it is not mentioned in *ta'zīr* directly, it can be understood that there are other punishments outside the limit. On this basis, the scholars then determined it as *ta'zīr* .

The second hadith is narrated from Aisha (ra) which reads:

وَعَنْ عَائِشَةَ رَضِيَ اللهُ عَنْهَا أَنَّ النَّبِىَ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ قَالَ : أَقِيْلُوْا ذَوِى الْهَيْئَاتِ عَثَرَاتِهِمْ إِلاَّ الْحُدُوْدَ (رَوَاهُ أَحْمَدْ وَأَبُوْ دَاوُدَ وَالنَّسَائِ وَالْبَيْهَقِى)

Meaning: *It is narrated from Aisha that the Prophet PBUH said: Lighten/forgive the mistakes of those who have good morals, except in hudud (HR. Ahmad, Abu Daud, Nasaī and Baihaqī)* [25]

The above hadith states that it is permissible to forgive or lighten the punishment for wrongs committed by people of good character, as long as

[22] Abdul Qadir 'Awdah, "Al-Tasyri' al Jinai' al Islami Muqaranah bi al Qanun al Wad'i."

[23] Muhammad Salim Al-'Awa, "Fi Usul al Nizham al-Jina'i al-Islamī" (Mesir: Darul Ma'arif, n.d.), p. 244.

[24] Muhammad bin Ismail Al Kahlani, "Subulussalam" (Bandung: Dipenogoro, n.d.), p. 37.

[25] Muhammad bin Ismail Al Kahlani.

the act is not a criminal act of *hudūd*. This hadith became the juridical basis for the government in imposing *ta'zīr* . Ibn Hajar mentioned that the commands in the Hadith were directed to the government because it had broad authority in public affairs. Ibn Hajar, in concluding the authority of the government in dealing with the crime of *ta'zīr* , uses ta'līliyah *reasoning*, which is a reasoning that seeks to find 'illat for a law.

The interpretation of the word *dhawīl haiāt* has resulted in differences of opinion among scholars. According to Imam Shafi'ī, *dhawīl haiāt* is a person who does not know wrongdoing, so he has already done it. Meanwhile, according to Imam Al-Mawardi, *dhawīl haiāt* is divided into two, namely children and people who want to repent if they sin.[26] Therefore, the ability to forgive mistakes other than *hudūd* crimes for people of good character indicates that, in addition to *hudūd*, there are other punishments that are loose in nature and open to forgiveness.

Umar bin Khatāb when he served as caliph once shaved Nasr bin Hajjaj's head to avoid slander. Because of her good looks, many women are captivated. Umar also burned the stalls and villages that sold khamar in them, burned the stalls belonging to Sa'ad bin Waqqas in Kufa because they were closed and only entered by certain people.[27]

Ali bin Abi Talib even clearly stated that *ta'zīr* is one of the punishments for criminal acts that have no limit or kifarat on them. 'Abdul Malik bin Amīr narrated that a companion asked Ali about what someone said to another person, "*you are wicked, you are ugly*". So Ali replied that such a statement is something that is not good and the person who says it should be punished with *ta'zīr* , not had.[28]Ali's statement clearly states that *ta'zīr* is a punishment for a crime or mistake.

Elements of the Crime of *Ta'zīr*

The elements or pillars of a criminal act are something that must exist in the act so that it can be classified as a criminal act. The elements of criminal acts consist of two parts, namely the general elements that apply to each criminal act and the special elements that only apply to each specific criminal act. [29]

Criminal acts in Islamic law are called jarīmah. The meaning of jarīmah according to 'Abdul Qadir 'Awdah is:

مَحْظُوْرَاتٌ شَرْعِيَةٌ زَجَرَ اللهُ عَنْهَا بِحَدٍّ أَوْ تَعْزِيْرٍ

Meaning: *All the prohibitions of the Shari'ah that are punished by Allah with a*

[26] Muhammad bin Ismail Al Kahlani.

[27] Muhammad Baltâji, "Metodelogi Ijtihad Umar bin Khathab" (Jakarta: Khalifa, n.d.), p. 289.

[28] Ishak al Syairazī, "al-Muhazzab fi Fiqhi Mazhab al-Imam Asy-Syafi'."

[29] Ahmad Wardi Muslich, "Pengantar dan Asas Hukum Pidana Islam."

limit or ta'zīr .[30]

In positive law in Indonesia, jarīmah is called a criminal act or criminal offence. According to Moelyatno, criminal acts/criminal offences are acts that are prohibited by criminal law and are threatened with criminal penalties for those who violate the prohibition.[31]

'Abdul Qadir 'Awdah stated that jarimah/criminal acts consist of three elements, namely the formal element (*ruknu al-syar'i*), the material element *(ruknu al-madi*) and the moral element (*ruknu al-adabi*).[32]

1. Formal Elements (*Ruknu al-Syar'i*)

The formal element or *ruknu asy-syar'i* is a sharia provision or regulation that states that an act is prohibited and there is a punishment for those who do it. These provisions must first exist before the act is carried out. On the other hand, if the prohibition comes later, then the person who commits the act cannot be punished.

According to Haliman, an act is prohibited if there is an element against the law (syara'). So, before the existence of the Sharia, an act had no consequences or punishments. This is as understood from the rules of fiqh, which reads:

لَا حُكْمَ لِأَفْعَالِ ٱلْعُقَلَاءِ قَبْلَ وُرُوْدِ النَّصِ.

Meaning: *There is no law (provision) for the deeds of the intelligent (mukallaf) before the coming.*[33]

Also based on other fiqh rules, namely:

الَاصْلُ فِيْ الاَشْيَاءِ الْإِبَاحَةُ

Meaning: *Basically, all things are mubah (permissible)*[34]

So an act of law is basically mubah (permissible) before the advent of the evidence that prohibits the act. The example of eating pork was initially mubah until the adjective that forbade eating it came down.

In the positive law of the formal element *(ruknu asy-syar'i), it is called the principle of legality; this principle was only known at the end of the eighteenth century AD after the French Revolution*. Before the principle of legality emerged, judges were free to determine the form of criminal act and also the punishment. This condition is vulnerable to injustice and arbitrariness. Because of this reality, legal scholars in Europe limited the authority of

[30] Abdul Qadir 'Awdah, "Al-Tasyri' al Jinai' al Islami Muqaranah bi al Qanun al Wad'i."
[31] Moeyatno, "No TitleAsas-Asas Hukum Pidana" (Jakarta: Rineka Cipta, 2008), p. 2.
[32] Abdul Qadir 'Awdah, "Al-Tasyri' al Jinai' al Islami Muqaranah bi al Qanun al Wad'i."
[33] Abdul Qadir 'Awdah.
[34] Al Suyuthi, "Asybah wan Nadhair."

judges by making written laws, as a reference for judges in deciding the law.[35]

In Latin, the principle of legality is called *"nullum delictum, nulla poena sine praevia lege poenali" (no crime, no punishment without a prior criminal law*).[36] So in positive law, every criminal act has been first determined in the form of laws and regulations. Acts that are not regulated in the regulations are not criminal offences and should not be punished.

The principle of legality of *the crime of ta'zīr* is different from *hudūd* and *qisās/diyat*, because the nash does not explain in detail the form and punishment of *ta'zīr* . The difference is that *hudūd* and *qisās/diyat* have been explained in relative detail by Nash. The determination of the crime of *ta'zīr* and punishment is completely left to the government. Nash only explained in general the criminal act of *ta'zīr* with the term immorality.

The application of the principle of legality to the crime *of ta'zīr* is loose, the government has broad authority to regulate and determine the types of criminal acts and also the punishment as long as they do not cross the boundaries of the shari'a lines, such as legalizing what is haram or prohibiting what is halal. The government still adheres to the general provisions of sharia, common sense and the public interest.

'Abdul Qadir 'Awdah divided *ta'zīr* into three parts, namely; *ta'zīr* because of vice, *ta'zīr* to realize the public benefit and *ta'zīr* for doing acts that are transgressive *(mukhalafah)*. The act *of ta'zīr* as agreed by the scholars is any criminal act other than had and kifārat, both criminal acts concern the rights of Allah and the rights of individuals.

As for what is meant by vices as stated by 'Abdul Qadir 'Awdah is:

إِتْيَانُ مَا حَرَّمَتْهُ الْشَرِيْعَةُ مِنَ الْمحَرَّمَاتِ، وَتَرْكِ مَا اَوْجَبَتْهُ مِنَ الْوَاجِبَاتِ

Meaning: *Doing something that is prohibited by sharia, or leaving something that is obligatory by sharia*'.[37]

Ibn Qayyim, as quoted by Ahmad Wardi Muslich, divided the crime of *ta'zīr* into three types, namely:

1. Acts that are subject to the punishment of limitation are then given additional punishment in the form of *ta'zīr* , as in the crime of drinking liquor, which is punished with forty lashes, may be added to eighty lashes as *ta'zīr* .
2. Acts that are punishable by kifārat, such as having sex with one's wife during the day of Ramadan. In this matter, the fuqaha' differ on whether or not the person should *be wearing ta'zīr* . However, based on a strong opinion, the punishment of *ta'zīr* is imposed.

[35] A. Hanafi, "Asas-Asas Hukum Pidana Islam" (Jakarta: Bulan Bintang, 2003), p. 71.
[36] Bambang Poernomo, *Asas-Asas Hukum Pidana*.
[37] Abdul Qadir 'Awdah, "Al-Tasyri' al Jinai' al Islami Muqaranah bi al Qanun al Wad'i."

3. Acts that are not subject to limits and kifārat, such as kissing women who are not his wife, attempted theft, eating carcasses and others.[38]

Ibn Taymiyyah stated the criteria for the crime of *ta'zīr* , namely:

اَلْمَعَاصِى الَّتِيْ لَيْسَ فِيْهَا حَدٌّ مُقَدَّرٌ وَلَا كَفَارَةٌ, كَالذَّي يُقَبِّلُ الصَّبِى وَالْمَرْأَةَ الْأَجْنَبِيَّةَ أَوْ يُبَاشِرُ بِلاَ جِمَاعٍ, أَوْ يَأْكُلُ مَالاَ يَحِلُّ كَالدَّمِ وَالْمَيْتَةِ... فَهَؤُلاَءِ يُعَاقَبُوْنَ تَعْزِيْرًا وَتَنْكِيْلاً وَتَأْدِيْبًا بِقَدْرِ مَايَرَاهُ الْوَالِى

Meaning: *An offence that is not punishable by a predetermined limit and is not subject to kifārat, such as kissing children and women who are not wives, or flirting with them without immorality, or eating something forbidden, such as blood and carcasses.... So all that they do is subject to the punishment of ta'zīr , retribution and teaching in accordance with the government's decision.*[39]

From this, it can be understood that the principle of legality for the crime *of ta'zīr* is different from *hudūd* and *qisās/diyat*. In the criminal act *of ta'zīr* , the application of the principle of legality is loose because the shari'i does not stipulate this criminal act in detail. This results in the type of criminal act *of ta'zīr , and* the punishment is quite broad. The government can determine the category *of ta'zīr* as long as there are benefits and the stipulation does not go beyond the Sharia corridor.

2. Material Elements (*Ruknu al-madi)*

What is meant by *ruknu al-madi* (material element) is the existence of behaviour that constitutes a criminal act, be it in the form of acts in prohibited cases or not doing in cases that are ordered. Ahmad Wardi Muslich said that material elements are actions or words that cause losses to other parties, both individuals and society. Muhammad Abu Zahrah regarding the material elements of the criminal act *of ta'zīr* , namely:

اَلْاِرْتِكَابُ بِالْفِعْلِ أَوِ القَوْلِ لِلْأَمْرِ اَلَّذِى وَرَدَ بِهِ النَّهْيُ وَقُرِّرَتْ لَهُ عُقُوْبَةٌ يَطْبَقُهَا اَلْقَضَاءُ

Meaning: *Doing acts or words that are prohibited and have been punished by the court.*

It can be understood that what is meant by material elements is the existence of behavior that constitutes a criminal act so that a person can be punished, such as in the case of theft, then what is the material element is the action of a person taking or moving the property of another person without rights.

In the context of legal science, *ruknul al madi* is called the objective

[38] Ahmad Wardi Muslich, "Pengantar dan Asas Hukum Pidana Islam."

[39] Ibnu Taimiyah, "As-Siyasah as-Syar'iyah" (Kairo: Maktabah Anshar as-Sunnah al-Muhammadiyah, n.d.), p. 122.

element, namely the behaviour of a person that is against the law. Moeljatno stated that the objective element is the birth condition that accompanies the perpetrator's act, while he does not have the right to commit the act, such as deliberately damaging and moving other people's goods without rights and so on.

So the material element *(ruknu al madi)* in a criminal act is the existence of an unlawful nature in the actions committed by a person. In the criminal act *of ta'zīr*, the material element is the act of committing a violation, disturbing public order, or committing a habit that is strange in the eyes of the public without a clear reason.

3. Moral Element (*ruknu al-adabi*)

The moral element (*ruknu al-adabi* is also called *al mas'uliyyah al jinayah* (criminal responsibility). This element is focused on the state of the perpetrator of a criminal act who is a person who is able to account for his actions. The perpetrator of a criminal act must understand the law of an act and the consequences of the act.[40]

According to A. Hanafi, criminal liability is the imposition of a person on the consequences of an act done or not doing an act that should have been done. The action was carried out of his own volition, and he knew the consequences of his actions.[41]

In Islamic law, criminal liability consists of three elements, namely, *first*, there is a prohibited act, *second*, the perpetrator knows the legal consequences of his act and *third*, the act is done intentionally or of his own volition. If these three things have been met, then criminal liability can be enforced.

A person who does not commit a criminal act or does not meet the elements of criminal liability, such as a child or a crazy person, cannot be held criminally liable to them, because basically the responsibility for it does not lie with them.

Purpose and Function of *Ta'zīr*

Abdurrahman Al-Jazīrī said that the purpose of *ta'zīr* is to provide lessons to the perpetrators of criminal acts so that they will no longer repeat their actions. The type of punishment given is determined by the judge based on his fair consideration, and can really make the perpetrator convert not to repeat his actions. [42]

The Judge's mercy stated that among the purposes of *ta'zīr* is to be in addition to the principal punishment of *hudūd* and *qisās/diyat* if the court

[40] Rahmat Hakim, "Hukum Pidana Islam" (Jakarta: Bumi Aksara, 2004), p. 23.

[41] A. Hanafi, "Asas-Asas Hukum Pidana Islam."

[42] Abdurrahman al Jazīrī, "Kitab al Fiqh 'ala al Mazhab al Arba'ah" (Beirut: Darul Fikr, n.d.), p. 260.

deems it necessary to impose an additional punishment. The punishment *of ta'zīr* can also be imposed for the perpetrators of the crime of *hudūd* and *qisās/diyat* that contain elements of syubhat or there is insufficient evidence that a person has committed the crime.

From this, it can be understood that *ta'zīr* is a punishment to deal with criminal acts in society other than *hudūd* and *qisās/diyat*. *Ta'zīr* is also an additional punishment for the crimes of *hudūd* and *qisās/diyat*. *Ta'zīr* is an alternative punishment for the crime of *hudūd* and *qisās/diyat* where there is syubhat or insufficient evidence. The form of *ta'zīr punishment is* more flexible, ranging from the lightest to the most severe according to the perpetrator's actions and conditions.

Hanafiyah, Malikiyah and Hambaliyah scholars are of the view that a person after being considered should be punished, so the government is obliged to punish him if it is believed that it can deter and regret his actions. On the other hand, a person does not need to be punished if he is believed to have repented and will not repeat his deeds.[43]

Ta'zīr also aims to maintain public order to discipline people whose behaviour disturbs public order, as Umar bin Khatab burned the building belonging to Sa'ad bin Abi Waqqas in Kufa because it was considered suspicious, then shaved the head of Nasr bin Hajjaj, because his good looks had made the women of Medina at that time uneasy and tried in all kinds of ways to obtain it. These two examples are forms of *ta'zīr* punishment to create public order.[44]

Ta'zīr can also be applied to people who often do *makruh* (hated) or abandon what *is mandub* (circumcision). Basically, the acts of circumcision and makruh are not sinful, because *the taklif* (burden) on the two laws is not strong. However, Abdul Qadir 'Awdah is of the opinion that it is permissible *for ta'zīr* for a person who has repeatedly performed makruh or abandoned the act of circumcision.[45]

Government Authority in the Formulation of *Ta'zīr*

Jalaluddin Al-Mahalli stated that the government and other parties who are authorised in the matter of *ta'zīr* need ijtihad to determine the types of acts that are classified as the criminal act of *ta'zīr* , the form of punishment and the criteria for the perpetrator that can be imposed on *ta'zīr*.[46]

According to Muhammad Abu Zahrah, the government can set a

[43] Abdurrahman al Jazīrī.

[44] Al Yasa' Abubakar & Marahalim, "Hukum Pidana Islam di NAD" (Banda Aceh: Dinas Syariat Islam, 2007), p. 37.

[45] Al Yasa' Abubakar & Marahalim.

[46] Jalaluddin Al Mahalli, "Qalyubi wa 'Amirah" (Jakarta: Darul Ihya Kutub Arabiyyah, n.d.), p. 300.

punishment that is desired by the public interest, for example, an act that is not initially forbidden, but because there are certain characteristics of the act, such as harming others, interfering with the interests, benefits and security of the community. So the act can be punished with *ta'zīr* .[47]

'Abdul Qadir 'Awdah stated that there are three authorities that leaders have in handling criminal acts, namely:

1. The right to prohibit, oblige, and punish. The government has the right to determine the prohibited acts and the acts that must be carried out. Then the government also has the right to punish someone who commits a violation. All government provisions must not go beyond the limits allowed by sharia'.
2. The right to specialise the judiciary, meaning that the government has the right to create a special court to handle a certain criminal act and also determine the judge and his punishment
3. The right to forgive. The government has the right to pardon a person who has committed a criminal act, but this is only for the crime *of ta'zīr* , while it is not permissible for *qisās/diyat* and *hudūd*.[48]

From the various opinions of these scholars, it can be understood that the government has the authority to handle criminal matters, including *ta'zīr* . The government is asked to have ijtihad to formulate *ta'zīr* both regarding acts, perpetrators and punishments, then also apply it.

The government, in determining the crime of *ta'zīr* , remains bound by the values and norms of shari'a. In relation to the government's power over *ta'zīr* , there are two opinions of fiqh experts that have developed. The *first* opinion that the government, in this case, the judge, can punish anyone, in any case and with any type and form of punishment, this opinion is expressed by Mahmūd Syaltūt.

The *second opinion* was put forward by Muhammad Salim Al-'Awa, who said that the freedom of the judge in *ta'zīr* is not unlimited, but freedom that is bound (limited). According to him, Syaltūt's opinion above is not only unstable, but also wrong. Scholars of madhhab fiqh have agreed that judges should not impose punishments on their own volition, but must have ijtihad to seek appropriate punishment according to the perpetrator.[49]

From the above explanation, it can be understood that the government has broad authority in dealing with *ta'zīr* , but this authority is not absolute, but is bound by the values and norms of the Shari'ah. The government, in deciding the type or form of criminal act as well as the form and level of punishment of *ta'zīr* , must first do ijtihad and consider what is

[47] Muhammad Abu Zahrah, "Al-Jarimah wa al-'Uqubah fi al-Fiqh al-Islamī" (Beirut: Darul Fikr, n.d.), p. 82.

[48] Abdul Qadir 'Awdah, "Al-Tasyri' al Jinai' al Islami Muqaranah bi al Qanun al Wad'i."

[49] Muhammad Salim Al-'Awa, "Fi Usul al Nizham al-Jina'i al-Islamī."

the appropriate form to be applied to the convict.

The government, with its power, is asked to formulate *ta'zīr* clearly, that is, determine what criminal acts fall into the category of *ta'zīr* and also their punishments, then standardise it in a separate codification of laws. The government's task in dealing with *ta'zīr* is to make a complete *formulation of ta'zīr* , both regarding criminal acts and criminal matters, such as *hudūd* and *qisās/diyat*.

CONCLUSION

Ta'zīr , according to fuqaha', is a criminal act and punishment that is unlimited in nature and does not form a formula. The government is given freedom in determining the acts of *ta'zīr* , and the punishment ranges from the most severe to the lightest. It is a criminal act that needs to be formulated in a clear formulation, both regarding criminal acts and punishments. This is to facilitate its implementation, both for law enforcement and the community as legal targets.

The formulation of *ta'zīr* must meet the requirements and criteria of a rule or law. The requirements and criteria that must be possessed are clarity of the right purpose, institution or forming organ, suitability between the type and material of content, implementation, usefulness, as well as clarity of formulation and openness. The goal is that the legal formulation of *ta'zīr* can really function properly.

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